

JOINT PLANNING LAW CONFERENCE

MATERIAL CONSIDERATIONS
IN TOWN AND COUNTRY PLANNING DECISIONS

MATERIAL CONSIDERATIONS IN PLANNING: THE LAW

by

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Material considerations in planning

The Law

Introduction	p. 1
The general scope of the expression	p. 4
Public and private interests	p. 6
Plans and Policies	p. 7
Timing	p. 8
Prior uses and planning permission	p. 10
Financial considerations	p. 10
Alternative sites	p. 12
Conservation	p. 13
Special and exceptional considerations	p. 16
Planning Gain	p. 17
Reasons	p. 19
Costs	p. 19
Witnesses	p. 20
The significance of a Material Consideration	p. 21
The Court's Role	p. 22
The Future	p. 23
Summary	p. 25
References	p. 29

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Sir Frank Layfield, Q.C.

Introduction

It is now well over 40 years since the term "material considerations" was introduced to planning law. The words "Material Considerations" are still undefined and are likely to remain so. The judgments on which any review must be based are scattered randomly over the field of land planning. Despite these limitations, I shall attempt, so far as practicable, to show:

- (i) what the expression "material considerations" means in law and what is its broad scope;
- (ii) how the term has been interpreted and applied in those subject areas in which guidance has been provided by the Courts;
- (iii) in broad summary how our understanding appears to be today;

- (iv) in what ways the use of the term may develop in the near future.

The natural starting point is the year 1947.

The Bill for the Town and Country Act, 1947 described the purpose of the Act as one

"to make provision for planning the development and use of land, for the grant of planning permission to develop land and other powers of control over the use of land".

The Planning Acts of 1962, 1971 and those of 1990 do not disturb the 1947 Preamble, merely describing themselves as Acts of Consolidation.

The Bill of 1947 introduced development control and provided the basis on which the control was to be exercised. That provision is now found in Section 70 of the Town and Country Planning Act, 1990. Section 70(2) stipulates that where an application is made to the local planning authority for planning permission

"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".

There is a closely similar requirement to have regard to the development plan and any other material considerations when a local planning authority considers whether it should serve a revocation, modification or discontinuance order or an enforcement notice (1).

The expression "material consideration" was not defined in the 1947 Act nor were either of the words used, nor has any additional means of construing the expression been given in the succeeding Acts of 1962, 1971 or 1990.

Megaw J. gave a general indication of the meaning of "consideration" when he described it as "something one takes into account as a factor in arriving at a decision" (2). A factor to be capable of being a material consideration in law must plainly be one which is a planning consideration.

The general scope of the expression 'material consideration'

A useful initial description of what can comprise a planning consideration was provided by Cooke J., who said that

"In principle, it seems to me that any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances" (3).

The Judge added that

"It seems to me that all considerations relating to the use and development of land are considerations which may, in a proper case, be regarded as planning considerations" (4).

Since that judgement, of 1970, the scope of what can comprise a material consideration in any given case has become much clearer. But even now, twenty years on, the ambit of the concept remains necessarily imprecise. Furthermore it is evident that always much will depend on

the nature of the application under consideration, the surrounding circumstances, and the relevant plans, and that the consideration must fairly and reasonably relate to the application (5).

In what follows I shall endeavour to draw from the numerous cases a general set of propositions that, together, demonstrate, as closely as can be, those factors that in law can be material considerations. Thereafter I shall offer a summary of the general ambit of the expression as seen at present.

Cooke J's assumption that all considerations relating to the use and development of land are apt to be regarded as planning considerations naturally imports all those fundamental factors commonly involved in land planning. These include the siting of buildings proposed, their number, area, height, mass, design, external appearance and the space about them, means of access, landscaping, impact on the neighbourhood, and many other considerations such as the provision of services to the site. In each locality there will be many provisions of the development plan relating to traffic, communications, housing and many other common aspects of land planning which relate to the use of land and that are factors identified as relevant in the Development

Plan, regard to which is necessary, and so can be material considerations if related to the particular application under examination (6).

These considerations are, of course, often factors that concern both public and private interests.

Public and Private Interests

In Stringer's case, Cooke J., considered that it would be impossible for the Minister and local planning authorities to carry out their planning duties in the public interest if they were precluded from considering the effects of a proposed development on a particular use of land by a particular occupier in the neighbourhood.

"The public interest may require that the interests of individual occupiers should be considered. The protection of individual interests is one aspect, and an important one, of the public interest as a whole. The distinction between public and private interests appears to me to be a false distinction in this context" (4).

Plans and Policies

The provisions of Development Plans can be, and frequently are, material considerations. But to be so in individual instances a policy in the plan must serve a planning purpose and that planning purpose be one that relates to the character of the land (26). The plans are to be taken as they stood at the time of the decision. Such plans include those in course of preparation (7).

However, statements of policy that can be material considerations are not limited to those contained in development plans. Sir David Cairns, in a Brighton case, said

"I can see no reason why either the local planning authority or the Secretary of State should have to look for considerations of policy only to the development plans. That would be to ignore the second branch of Section 29(1) of the 1971 Act" (17).

Not only may other plans generally provide material considerations but non-statutory plans may be material. Such provision may well contain guidance or provide standards to be applied in a local authority area for such

subjects as plot ratios, vehicle parking standards, building materials and similar limitations (8). Guidance Notes of national or regional application or that supplement a Development Plan may also be a material consideration.

Statements of policy in Departmental Circulars "are material considerations to which regard should be paid in considering an application or an appeal" (9). Similarly if there is to be a departure from policies provided in Circulars the reasons for so doing are material. If it can be shown that some other Ministerial decisions are closely comparable to the particular proposals in issue those decision letters can be material and, even perhaps with delegated decisions (10).

Timing

Aspects of time can be a material consideration in certain circumstances since plans treat time as an aspect of policy: development plans since their earliest days have contained programmes for development in their policies. It is noteworthy that the time element is an appropriate ingredient in some conditions imposed on the grant of permission, further to the provisions of S. 72(1)(b) of the

1990 Act. In such instances, the relevance and extent of the time period is likely to be material.

Perhaps the most frequent instance when a specified time or period would be a material consideration are those where a refusal is contemplated or given in reliance on the contention that a proposal is premature. The Minister's view of that contention was well expressed in 1949 when he noted that:

"Refusals of permission are often due to the fear of setting-up a precedent which is likely to embarrass the authority in dealing with other applications of the same kind in the same area. There is sometimes, but not always, real substance in this argument. The merits of particular cases vary widely, and here, apart from the question of precedent, there are good reasons for allowing the applicant to carry out development, the fact that the granting of permission might lead to other applications being made should not be accepted as a sufficient reason for refusal".

There are also instances in which the claim of prematurity is unsound because it rests on matters properly to be determined under other legislative powers than those

of land planning. Nevertheless, if the time element in development is a planning consideration, as I take it to be, an argument of prematurity is likely to be one which is material, even when the weight to be attached to it may be small.

Prior Uses or Planning Permissions

The planning history of an application site can be an important material consideration (11). The Value of Existing Use rights and the significance of an existing use can also be material. The existence of a relevant and valid planning permission would almost invariably be material (12). Even a time-expired permission may be material (13). If an earlier permission is such as to offer a "fall-back" position showing development that an applicant could realistically carry out without the grant of the permission currently being sought, it would be a material consideration (14).

Financial Considerations

Since 1976 it has been clear that financial considerations including particularly cost, could, in

certain circumstances, be material In the Sovmots case. Forbes J., in a well-known passage in his judgment, said

"I would conclude that it is impossible to say that cost can never be a relevant consideration either in a planning matter or in a compulsory purchase matter. It can be in both or either and it will depend in every case on the circumstances of the case" (15).

Whether, in any given case, a financial consideration will be material must depend, in the first place, on whether the financial matter is a planning consideration (16) & (17). Such a matter has been held to be a planning consideration where a refusal of planning permission would result in a building being left derelict and unoccupied. The Judge in the Sosmo Trust case pointed out that "what could be significant was not the lack of financial viability but the consequences of that financial viability or the lack of financial viability (19).

Recently, the Court of Appeal have addressed the question "whether, as a matter of common sense, there could be any reason why the financial viability of a desirable development and the means of achieving it, must necessarily

be immaterial considerations" Kerr L.J., concluded that there was not. He held that

"Financial constraints on the economic viability of a desirable planning development are unavoidable facts of life in an imperfect world. It would be unreal and contrary to common sense to insist that they must be excluded from the range of considerations as material in determining planning applications" (20).

He was careful to add that planning authorities must be particularly careful not to give way too readily to assertions of financial constraints as a ground for relaxing policies which have been formulated in the public interest (21). It may also be pertinent to recognise that the judgment was, in that instance, dealing with financial considerations arising from a single application relating to a single site and a single proposal.

Alternatives Sites

In a number of cases over the years it has been argued that there had been a failure to have regard to a material consideration because there had been a failure to consider sites comparable to that in issue (22). The combined

effect of those judgments was helpfully summarised in 1986 by Oliver L.J. Without seeking to provide an exhaustive or detailed analysis, he concluded that the characteristics that denoted the need for a comparison were

"First of all, the presence of a clear public convenience, or advantage, in the proposal under consideration; secondly, the existence of inevitable adverse effects or disadvantages to the public or some sections of the public in the proposal; thirdly, the existence of an alternative site for the same project which would not have those effects, or would not have them to the same extent; and, fourthly, a situation in which there could be only one permission granted for such development, or at least only a very limited number of permissions" (27).

Conservation

For convenience I here use the word 'conservation' to refer to all those forms of special control the purpose of which is to protect areas and buildings or their settings on grounds of amenity, scenic beauty, architectural or historical interest or value, or to avoid or diminish

danger, risk of danger or hazards to the quality of the Environment generally.

In many particular instances conservation powers, now found in the Planning (Listed Buildings and Conservation Areas) Act, 1990 and the Planning (Hazardous Substances) Act, 1990, are imposed on the local authorities and the Secretary of State. Notable examples are Section 16(2) of the former Act which require that they "shall have regard to the desirability of preserving "the listed buildings and their setting and features"; and Section 72(1) of that Act which requires the local planning authority to give "special attention to the desirability of preserving or enhancing the character and appearance of the area".

Those two requirements and many other similar duties imposed by the two Acts will themselves be material considerations in the relevant cases and so also will the statements of policy in the corresponding Departmental Circulars.

In a wider context, Environmental Assessments are now required or may be offered with respect to particular classes of application by the Regulations of 1988 (24) and Circular 15/88. The specific requirements of the Regulations, where

applicable, will be material considerations. And so also with the policy statements, set out in the Circular. The Environmental Statements required by, or provided in accordance with, the Regulations and the Circular and evoked by an application may well be taken as material since regard must be had to them and, perhaps, the then recent "Environmental Assessment" (24). The representations made to the local planning authority in regard to the anticipated environmental effects of the proposals may also be material considerations; including those related to individual effects the subject of criticism in regard, for example, to noise, vibration, smoke, dust, dirt, the creation or disposal of waste and similar forms of pollution.

The word "heritage" appears frequently nowadays. The word is often of abstract or vague meaning. In so far as the word connotes a specific policy or policies it could identify a material consideration. It is more likely in practice that it will be specific policies, such as those in Structure Plans, Local Plan and Departmental Circulars concerned with conservation that will be the relevant material considerations.

Special and Exceptional Considerations

For many years, as a matter of practice, Ministers have regarded instances of fairness and hardship and, in some circumstances the Courts have regarded such matters, as proper material considerations. For example, where "it was right, in a case where the other planning considerations did not compel a different view, to bear in mind that the proper application of planning policy required that it should be fairly administered" (25). And "it was proper for the Minister to take into account personal circumstances, as indicated in the development control policy notes, where matters might be very evenly balanced and to consider the effect that a decision might have upon the individual applicant" (25).

Those exceptions have been endorsed and somewhat widened by the judgment of Lord Scarman in the Great Portland Street case where he first notes that the test of what is a material consideration in a planning context, is whether it serves a planning purpose: and a planning purpose is one which relates to the character of the use of the land. However, he continued,

"Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. The human factor is always present, of course, indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule to be met in special cases... a specific case has to be made and the planning authority must give reasons for accepting it" (26).

Planning gain

As far as I am aware the Courts have not considered the question whether the presence, absence or extent of planning gain in a particular planning case could be a material consideration and if so subject to what limitations.

The Secretary of State made it clear in a 1975 decision letter that he "wishes to make it clear that in his view the conferring of financial benefits on the local planning authority (or the avoiding of financial disadvantage to

them) cannot be a material consideration in dealing with a planning application" (27).

More recently the Secretary of State noted that "It is a matter of law as well as of good administration that planning applications should be considered on their merits having regard to the provisions of the development plan and any other material consideration and that they should be refused only when this serves a clear planning purpose and the economic effects have been taken into account."

He there sets out certain tests by which he considered the imposition of planning gain should be judged for reasonableness. He concludes that if what is required passes the tests then it must be asked whether the extent of what is required or sought is fairly and reasonably related in case and kind to the proposed development (28).

In January 1988 the Secretary of State's Planning Policy Guidelines contained somewhat similar observations (29).

If the Minister's tests and final question are favourably met in any given instances it is difficult to see

how, in the light of the authorities, the gain which follows could be an immaterial consideration.

Reasons

Weaknesses in, or the absence of, reasons in a decision on a planning application, or a decision on appeal, can be a material consideration and the reasons themselves may be also. On a grant of conditional planning permission, full reasons are required to be given (30) and those reasons may be material (31).

Costs

A recent note in the July volume of the J.P.L. raised the question whether the risk of costs being awarded on appeal against a local planning authority's refusal of permission was a material consideration in exercising their statutory powers. The note reported that the Local Ombudsman had recently found that "the probability of costs being awarded against the authority" was a proper consideration for members to take into account.

It appears that in the decision in question, when rejecting the complaint made to the Local Ombudsman, he

found that the Committee had taken their decision after having regard to all the relevant issues set out in a comprehensive report from the authority's Director of Planning and Transportation. If that was so there does not appear to be any grounds on which it could be said that the possibility that costs would be awarded against the Committee members could be material.

A Planning Committee, when making a decision on an application for permission, is under a duty to have regard to the provisions of the development plan, so far as may be relevant, and to any other material consideration. If any other consideration is to be a material one it must be one which is a planning consideration. The risk of an award of costs against Committee members cannot, I consider, be a planning consideration. However if the Committee has carried out its duties in considering any given application it may or may not be successful at an appeal but it is highly unlikely that an award of costs would be made against its members.

Witnesses

It must be doubtful whether a witness can, as such, comprise a material consideration though the appearance of

some and the length of the proof from others, may sometimes suggest so. Since the evidence of the witness may establish a fact or facts and may bring about a significant interpretation of relevant policy or its application to the particular case under consideration, it appears, prima facie, that the relevant parts of the evidence oral, written or illustrative could in some instances be a material consideration.

The significance of a material consideration

Thus far I have attempted to show in general terms what aspects of a case can, in law, be material considerations. Thereafter the question whether a factor, which is capable of being a material consideration, will be taken as being such a consideration. The matters which will govern the answer to the question are broadly speaking, that the factor is shown to be

- (i) relevant to the facts, policies or submissions under consideration;
- (ii) a factor that in the circumstances of the case has, or can have, a significant bearing on the matters in issue in the determination to be made;

(iii) that the factor is a planning consideration.

The next question then must be, if the factor concerned is a material consideration, what weight should it have? Forbes J., in a well known judgment, emphasised that if an appeal decision is challenged in the Courts

"the Courts will only interfere if the Minister acts beyond his powers. It is clear that his powers include the determination of the weight to be given to any particular contention; he is entitled to attach what weight he pleases to the various arguments and contentions of the parties, the Courts will not entertain a submission that he gave undue weight to one argument or failed to give any weight at all to another. Again, in doing so he must, at any rate, if substantial issues are involved give clear reasons for his decision" (32).

The Court's role

If a decision is challenged on the claim that the decision maker failed to have regard to a matter which was a material consideration and which he was required to take into account the Judge will first have to determine, on the

evidence and submissions before him, whether the decision-maker was in error.

The materials before him will usually be the Inspector's Report, and the Secretary of State's decision letter. Where a decision has been delegated to his Inspector he will have only the decision letter. In both instances he will also have the submissions made to him in Court. If the Judge finds that the decision-maker was not in error then he goes no further. If, however, he does find an error he must then take the next step. The Court having found that

"a relevant matter has been ignored, the question it has to ask is whether the ignored matter was so important that it ought not to have been ignored. And I think the test of importance must be whether, in the Court's opinion, the decision might have been different if the matter had been considered" (33).

The Future

Material considerations in planning law are principally of importance because of their significance in appeals to the S of SE and in appeals from the S of SE decisions to the

High Court. The latter class may be the subject of appeals under Sections 288, 289, 290 of the 1990 Act or by way of Judicial Review. On any of those three routes of challenge in law the material considerations will figure largely. The number of such appeals has been rising in recent years. Short of a major economic recession in Britain, I believe that that growth will continue. Indeed, there are reasons for thinking that will increase.

First, the substantial extension of environmental protective legislation will lead to the introduction of new and complex arrangements and the introduction of a substantial range of detailed standards which will increase the number of disputes materially. In parallel the growing public interest in conservationist measures will have the like effect.

Secondly, we are entering a period when many new transport provisions are to be made, or old ones substantially altered, and such changes generate disputes in which feelings are high and the sums of money involved are very large.

Thirdly, the interaction of a changing industrial and commercial pattern and efforts to maintain and improve the environment will also lead to problems in the planning field.

Lastly, recent years have seen a greater willingness in the Courts to look more intently at the reasons for individual decisions brought before them. Their willingness to look more closely at the Secretary of State's reasons has increased interest in the extent to which matters raised on appeal are, or are not, material considerations.

Those developments seem to me to indicate that a more searching look at appeals is likely to be adopted and extended over new areas of litigation in regard to planning decisions.

To summarise in broad terms:

1. To be accepted as a material consideration, a statement of policy or practice, an argument or submission, an averral of facts or circumstances, must

(a) comprise or contain a factor that should be taken into account in reaching the decision sought, and,

(b) must be a planning consideration, that is one that is related to the character, use or development of land, and

- (c) the planning consideration must fairly and reasonably relate to the application and the application (or appeal) site and its surroundings.

2. The subjects and fields in which a consideration may, and frequently will, be material, include

- (i) those fundamental aspects relevant to development control that concern the planning history of the application site and its surroundings, the character of past, present and proposed use of the site of the buildings or both, and the effects that may be anticipated from the proposed development in regard to those classes of effects that are characteristically regarded as of planning significance;
- (ii) the statements of policies to be found in development plans and other relevant plans, including non-statutory plans whether approved or not; policies, standards or criteria set out in Departmental circulars, or in practice notes in the form of official guidance, such as Planning Policy Guidance Notes;

- (iii) Judgments of the Courts, Ministerial decisions and relevant local planning authority minutes, Reports and decisions;
- (iv) the interests of private owners and occupiers in regard to the application site and its surroundings as well as those of the public;
- (v) the financial consequences of development or of a refusal of permission where economic considerations are directly and necessarily of importance;
- (vi) comparisons of other sites with the application site in special instances;
- (vii) those statements of policies, duties and criteria concerned with special control over land set out in the Planning Acts and related Acts and in the Regulations made under them and the Departmental Circulars including those dealing with aesthetic and other protective aspects of land use and assessments of environmental consequences of development on particular sites;

(viii) in special cases, the personal circumstances of an owner or occupier of an application site or affected by a plan.

3. Whenever a consideration is established as a material consideration regard must be paid to it, but the weight to be given to the consideration in the process of forming a decision is a matter for the decision-maker; the local planning authority, Inspector, Minister or the Court, as the case may be.

4. If a planning decision is challenged in Court it is for the Court to determine whether a given consideration was a material one and, if it was material, whether regard was paid to it. If the Court finds a consideration was material and that regard was not paid to it, the Court still may have to consider whether the decision might have been different if the material consideration concerned had been taken into account.

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Rhys Williams v. SoS Wales [1985] JPL 29.
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26. Westminster C.C. v. Great Portland Estates [1985] 1 A.C. 661, 670.
27. 1975 JPL 424 at 426, (but see also Brighton BC v. SOSE 1980 39 P & CR 46.
28. DOE Circular 22/83 Planning Gain paras. 4-7.
29. DOE PPG1 paras. 12-14 Jan. 1988.
30. T & CP; GDO, 1988, Article 25(a)(i).

31. E.g. Brayhead (Ascot) Ltd v. Berkshire C.C. [1964] 2 Q.B. 303.
32. Seddon Properties v. SOSE (1981) 42 P. & CR 26 at 28.
33. R. v. SOSE ex parte Bolton BC 1990 per Hodgson, J. (unreported).

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