

## Lord Carnwath at the National Infrastructure Planning Association Inaugural Dinner

### A starring role for the Planning Act?

17 October 2012

1. Infrastructure planning seems to have been a backdrop to much of my life. I was brought up in the 1950s and 1960s in a small village in Essex, not far from Stansted. I have vague early memories of my father going off to protest meetings about plans to turn Stansted airport from a military base, as it had been during the war, into London's third airport.
2. One of the leaders of the campaign was our neighbour Major Buxton. It was only much later that I discovered that his vain attempts in 1960 to challenge a planning permission granted by the Minister for a chalk pit on neighbouring land had attached his name to a very narrow interpretation of the expression "person aggrieved"<sup>1</sup>, which meant that he had no standing to bring the case. It is a curious expression. Major Buxton was undoubtedly "aggrieved" in common sense if not in law. I am happy that today in the Aberdeen Bypass case in the Supreme Court we have been able finally to confirm that the common sense approach applies in both England and Scotland.<sup>2</sup> I will come back to that case, which is important for other reasons.

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<sup>1</sup> *Buxton v MHLG* [1961] 1 QB 278

<sup>2</sup> *Walton v Scottish Ministers* [2012] UKSC 44

3. The attempts of Major Buxton and others to stop Stansted Airport were no more successful than his efforts to stop the chalk-pit. The civil airport at Stansted developed incrementally because it was the easiest place for it to happen. It was not until the Roskill Commission in the late 60s that anyone attempted to carry out a methodical study of the various options – as it turned out too methodical. Roskill’s brave attempt to put a monetary figure on everything, tangible or intangible, was strongly criticised by many, including one of his more prominent members, Professor Colin Buchanan. Roskill’s final recommendation of a site in Bedfordshire (Cublington) was largely ignored. Buchanan’s proposal for a site at Maplin Sands in the Thames Estuary had more support. But inertia and bureaucracy favoured Stansted, and as so often inertia and bureaucracy won. Maybe Buchanan’s idea will yet have a renaissance as “Boris Island”.
4. As it happened the Roskill Commission coincided with my starting to read for the Bar and it was my first taste of something like a planning inquiry. I attended some of the sessions, because a good friend, who was an aspiring Labour candidate for the area of one of the sites, took an active part in the hearings in support of the proposals in the interests of local jobs. I admired his doughty championship of an unpopular cause. It seemed a rather more interesting side of the law than the rather dry subjects I had been struggling with at university.
5. It was not long after this that I was lucky enough to find a place as a barrister in 2 Paper Buildings, as it then was (now Landmark chambers), at a time when planning business was booming. George

Dobry was my most regular leader, and I also worked with him on his report into the Planning System, which has not been bettered, and could be studied with advantage by policy-makers today. I was also lucky to work with Geoffrey Rippon when he came back from government in 1974, having not only negotiated our entry into the Common Market, but also been the first ever Secretary of State for the Environment. When he went back into practice as a planning silk, he was pleased to find that most of the then current circulars had been issued in his name. He had no inhibitions about telling inspectors what the circulars really meant. He also gave me a very useful piece of practical advice – which is that the higher up the system the decision is made, the less material will be in front of the decision-maker, and the less time he will have in which to make it.

6. That reductionist approach could also be applied to some of the most successful infrastructure projects. Sometimes, it seems, the bigger the project, the simpler the decision-making process. When I was instructed for the Department of Transport on one of the first inquiries into a section of the proposed M25 I asked to see what I assumed would have been the many detailed reports which lay behind the strategic decision to build the orbital route in that location. The rather apologetic officials showed me a single sentence in a White Paper: “there shall be an orbital road round London”, or words to that effect. But of course I needed no more. That being government policy, any attempts to question its merits at the inquiry were doomed to failure.
7. The Channel Tunnel was in some ways similar. Mrs Thatcher, after much hesitation, eventually decided in a historic agreement with

President Mitterand to give her support to the concept of cross-channel link. That provided the policy basis on which the necessary Orders could be sped through Parliament. Unfortunately she did not think it so important that there should be a high speed way of getting to the Tunnel. For that we had to wait much longer, and content ourselves with admiring how much better the French seem to do these things.

8. Other projects have endured many stops and starts due to changes in government policy. People remember the long Sizewell B inquiry under Sir Frank Layfield, because the nuclear plant was actually built. The much shorter and inquiry into the Hinckley B project, rigorously chaired by Michael Barnes QC, has been largely forgotten, because the government cancelled the project shortly afterwards in spite of his favourable recommendation.
9. The marathon Heathrow Fifth Terminal inquiry happily started after I had become a judge. But anecdotal accounts suggest that many of its problems were due to changes in government policy on critical issues during the course of the inquiry, as well as the long periods devoted to discussion of need, which could better have been settled as a matter of policy before they began. It is a pity that it has tended to give all inquiries a bad name.
10. Another high-profile victim of changing policies was Cross-rail which endured many starts and stops. It is galling to think that the project was being actively promoted before Parliamentary Committee when I was still at the Bar. As I recall, the committee got

so fed up with the changes in the government's approach to funding that they threw it out, thus setting it back for more than a decade.

11. The redevelopment of St Pancras as the terminal to the Channel Tunnel link was a triumph both of engineering and aesthetics. But it may be forgotten that the original idea was to have it at Kings Cross. While I was still at the Bar much time and money was spent pursuing that project with the active support of the Department of Transport, before the government announced one day out of the blue that the terminal was to be at St Pancras.
12. What you may ask has all this history to do with a modern, thrusting organisation like NIPA?
13. Jump forward to last Sunday. I dragged myself away from the normal Sunday television diet of Downton Abbey and Homeland to watch an intriguing programme called "Built in Britain", presented by Evan Davies. His theme was that the traditional view that, as a county, we cannot do major infrastructure projects without going disastrously over-time and over-budget, needs to be radically revised. He contrasted recent projects like HS1 and the Olympic Park which have been models of successful and efficient delivery. The unsung hero of all this, he said, was not some great engineer – a latter-day Brunel, perhaps. No, it was a piece of paper – the New Engineering Contract (Series 3) Design and Build, or to its friends NEC3. Apparently NEC3 has been the key to building successful teamwork between the many parties involved in such ventures.

14. I was amazed. I am not an expert in the NEC contract. I have no idea what is the magic ingredient which has transformed the industry. But the idea of a standard engineering contract going head to head with Damian Lewis in the Sunday television ratings-battle made me sit up a bit.
  
15. A Google search disclosed some NEC notes which told me:

“NEC is a modern day family of contracts that facilitates the implementation of sound project management principles and practices as well as defining legal relationships. Key to the successful use of NEC is users adopting the desired cultural transition. The main aspect of this transition is moving away from a reactive and hindsight-based decision-making and management approach to one that is foresight based, encouraging a creative environment with pro-active and collaborative relationships.”

That leaves me not much wiser. But what matters is that apparently it works.

16. When I thought about it, it seemed to have an important lesson for us as lawyers and professionals. We spend too much of our time trying to sort out the results of unresolved conflicts. But good law makes things easy. It cannot prevent conflict, but it can prevent conflict causing unnecessary disruption. It does so by providing effective mechanisms for balancing the conflicting interests which inevitably arise. It is the duty of us as lawyers to make sure that the mechanisms are fit for that purpose. An association such as NIPA has a big potential role.

17. Perhaps the Planning Act 2008 could do for planning procedures what NEC3 has done for implementation. My first encounter with the new Act was again in connection with the London airports, when I sat in the Administrative Court in a case about plans for a Third Heathrow Runway. My general impression of the Act was favourable. It seemed to have tackled in a principled way the fundamental problem of ensuring a firm policy base for any public consultation process into infrastructure projects of national significance. I was also impressed by the Climate Change legislation. The problem which I identified in that case, and which led to the need to review the proposal, was that the two pieces of legislation had not really caught up with each other. As you know, the effects of my decision were overtaken by the result of the election.
  
18. At one time it looked as if not just the third runway proposal, but the whole Planning Act, would be jettisoned by the new government. However, they had second thoughts, and the Act lives on in a modified form. It is a shame that the first major project seems to have got bogged down in Parliament under Special Parliamentary Procedure. But maybe that glitch in the legislation can be sorted out.<sup>3</sup>
  
19. Making the Act work as intended is in all our interests. It is no use thinking that one can plan major infrastructure projects without conflict between the pros and the antis – as the Aberdeen road case demonstrated only too well. For national infrastructure projects, the Act provides a mechanism for listening to and examining those competing interests against the background of a firm policy direction

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<sup>3</sup> The Rookery South Waste Recovery Plant – the IPC's approval was given in October 2011, but Parliamentary approval is not expected till at earliest December 2012.

set by central government. Key to that of course is effective and inclusive environmental assessment. But as I said in one case the EIA process is intended to be “an aid to efficient and inclusive decision-making..., not an obstacle-race”<sup>4</sup>.

20. Today’s Aberdeen bypass judgment reinforces that point. Generous rules of standing are appropriate when the protection of the environment is at stake. As Lord Hope said: “environmental law... proceeds on the basis that the quality of the environment is of legitimate concern to everyone”. But as he also observed, the decision to construct this urgently needed road had been made nearly seven years ago, and there was understandable frustration at the delays in the planning system. So the necessary counterpart to the widening of standing rules are responsive and speedy procedures, and the discretion of the court to balance the competing interests in deciding whether to grant a remedy. The mere fact that, in the context of environmental assessments, the rules are derived from European Directives does not change the nature of the court’s role.
  
21. One of the possible worries about the Planning Act procedure is the scope for judicial review at so many points in the process. For example, in one of the first cases a land-owner challenged the IPC’s decision to grant a licence for the operator to enter private land for inspection.<sup>5</sup> The application for judicial review failed, but it took its time. The application had been made in January 2011; after abortive negotiations, the licence was granted in April; the judicial review application was not resolved until November. One can see how such

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<sup>4</sup> *Jones v Mansfield DC* [2003] EWCA Civ 1408 para 58

<sup>5</sup> *R(Innovia Cellophane) v IPC* [2011] EWHC 2883 (Admin)

applications multiplied over the course of a major project could cause serious disruption to any timetable. The answer is not of course to exclude such challenges, but to ensure that the system for dealing with them is as expert, responsive, and speedy as is possible consistent with the objects of justice.

22. Here I may be forgiven for returning to an idea which I floated when I was Senior President of Tribunals and responsible for the development of the Upper Tribunal, as the second-tier of the new tribunals structure introduced following the Leggatt reforms. I make no criticism of the excellent work done by the judges of the Administrative Court in individual cases. But what that court cannot do is to develop a specialised jurisdiction, to develop consistent practices over time to deal with the substantive and procedural issues which arise in this type of case, or to manage challenges to a particular project on a continuing basis.

23. Perhaps the NIPA could lend its collective skills, experience and political clout to the development and promotion of a Land and Environment Chamber of the Upper Tribunal. New South Wales has had a Land and Environment Court for two decades. Under a succession of distinguished Presidents it has become a world-leader. The 2007 Tribunals Act allows us at least to make a start here. There is already a limited environmental jurisdiction in the First-tier, but this would not be suitable for judicial review. The Act allows for the transfer of judicial review powers from the Administrative Court to the Upper Tribunal. That is already happening in other fields, notably immigration. There seems no obvious reason why the same should not happen for judicial reviews arising out of the Planning

Act, and perhaps other planning or environmental cases. One of the strengths of the Act is that it enables a body of specialist judges to be built up, drawing when necessary on senior judges from the courts. It also enables non-lawyers (for example, perhaps, planning inspectors) to be brought in as assessors).

24. This is no more than one suggestion. My hope is that NIPA might provide a forum through which professionals can work with the inspectorate, the specialist judges, and the interested Departments, to develop a legal and procedural framework which is really fit for purpose. If they can do that, maybe next year there will be a Sunday evening television programme about the transformation of the approval procedures for major infrastructure projects. And maybe this time the unsung hero will be the Planning Act 2008.

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