PLANNING

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NEW PROCEDURES FOR APPEALS AND CALL-INS

by: **Dr. Wendy Le-Las**

Change is afoot in the world of planning as the Government institutes new procedures for appeals and call-ins.
Dr. Wendy Le-Las explains...

As part of its effort to gear up the planning system for the new millennium, the Government instituted important changes to the procedures for appeals and call-ins for England[1] . The Rules do not apply to Wales: the Welsh Assembly will have to make their own amended legislation before the New Rules can apply.

Although the new Rules were introduced to take effect on 1st August 2000, they are only beginning to kick in now because they do not apply to appeals lodged before that date. As usual this shake up of the system is all in the good cause of facilitating development. The appellant and the local planning authority (LPA) are only allowed one refusal of a date for the inquiry, and all parties are exhorted to meet the deadlines imposed, or risk having their evidence disregarded.

Pre-Appeal Considerations

An amendment to Article 22 of the General Development Procedure Order 1995, requires LPAs to specify all policies and proposals in the development plan which are relevant to the decision. Clearly it has always been in the interest of local councils that this should be done because it means that LPAs are obliged to play a leading role if there is an appeal, rather than leaving the third parties to carry the can. Now good practice has been made a statutory requirement.

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Since Best Value[2] was introduced LPAs have been even more reluctant to refuse applications in case the appeal goes against them and there is the possibility of costs: in either event it is a black mark against them. Now, LPAs are now exhorted to keep negotiating with a developer, despite a refusal of planning permission, in the hope of avoiding an appeal. Local councils can use this new provision to their advantage. They can point out to LPAs that they can both refuse an application on good planning grounds yet keep negotiating e.g. on conditions or relocation. However,

"***....in the interests of natural justice, local planning authorities should consider offering objectors the opportunity to attend any such meetings with the applicant.***"

Circular 05/2000, para.16.

So don't be alarmed about the continuation of talks. Just make sure you are there to keep an eye on any revised application.

Unless there are extraordinary circumstances appeals have to be lodged within six months. The days of the virtual appeal are approaching: appeal forms can now be downloaded from the Planning Inspectorate's rather uninspiring website, www.planning-inspectorate.gov.uk. At the moment all forms and supporting documents have to be returned by post but change is at hand. Under the Electronic Communications Act 2000 the requirement to submit applications etc. in paper form may be removed by statutory instrument, but the legislation has yet to be put in place. Meanwhile local councils should take note that the Planning Inspectorate has decamped from Tollgate House over the Easter weekend because the lease has run out and the building cannot cope with the electronic age.
[Since 17th April their new address has been Temple Quay House, 2 The Square, Temple Quay, Bristol, BS1 6PN, new phone number will be 0117 372 6362.]

For any inquiry under s.78 of 1990 Town & Country Planning Act the appellant and the LPA have a statutory right to be heard before an Inspector. If indeed they want to exercise this right, they are asked to consider whether they would prefer a hearing or a full inquiry and the reasons for their choice. The Planning Inspectorate then makes the final decision based on the reasons put forward. For some years now the full wig and gown inquiry has remained about 8% of the total but the hearing, first introduced in 1981 has increased in popularity by leaps and bounds: by the mid nineties it accounted for 12% of hearings and now it has reached 19%. The hearing has the advantage of being able to argue the toss before an inspector but without the expense and delay of a formal inquiry.

The New Rules for Appeals

There is a family resemblance between the different sets of Rules for planning appeals. They apply to all appeals concerning listed buildings and conservation areas plus s.78 appeals, apart from Tree Preservation Orders, which were catered for separately in 1999. The local council, in which the proposal is situated, is entitled to received all the documents and take a full part in the appeal if it registers its view with the LPA at the development control stage. A key component of the procedure is the starting date because it is the date from which all the other steps in the procedure is calculated. The starting date is the date of the Secretary of State's written notice to the appellant and the LPA that he has received all the documentation to enable him to entertain the appeal.

Within two weeks of the starting date the LPA has to:

- Send to the Secretary of State a completed version of the Planning Inspectorate's questionnaire on details of the application and its refusal or non-determination: the views of statutory consultees, like local councils, letters from members of the public; the officer's report to committee; details of the policies on which it is based; and minutes of the planning committee meeting.
- Give written notice of the appeal to those statutory consultees, including local councils, and those who made representations to the original application. It is crucial that all those who ought to be notified by the LPA, are in fact contacted: the views of those who have heard about the appeal on the grapevine, and just write in on spec to the Secretary of State, will be discounted.

In more complex cases the original appeal documents may not be sufficient to do justice to the case. Thus within six weeks of the starting date:

- Further detailed evidence may be submitted within 6 weeks of the starting date by the LPA. Of particular interest to the Secretary of State will be their view on how and why the proposal puts at risk the objective of a given policy.
- The appellant too may augment his original appeal.
- Local councils and members of the public may also add to their original views. If, as is likely, there have been amendments to the proposal and you wish to comment, and/or new evidence has come to light since the refusal, then local councils must send in their views to the Secretary of /State within six weeks. Secretary of State passes then this evidence to the LPA and appellant.

Within 9 weeks of the starting date the LPA and the appellant should have commented on each other's views and those of statutory consultees and third parties. The Secretary of State may allow further time, but a strict timetable is fundamental to the working of the new system, and the Secretary of State has power to disregard late representations.

We will now explore what the new rules mean for these different denominations of appeals.

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Written Representations

On average hearings take half as long again as written representations and inquiries twice as long. Then there is the advantage that neither side can sue for costs over a case decided by written representations. Thus it is not surprising that 73% appeals are heard by this means. The new Rules for Written Representations are to be found in Statutory Instrument 2001 No.1628[3].

Under the Rules for Written Representations there is no statutory provision for a site visit, but Circular 05/2000 assures one that the inspector will make an unaccompanied site visit provided the site can be seen from the road or other land to which the public has access. If this is not possible the inspector has be accompanied by representatives of the LPA and appellant: they are there to point out the features of the site, not argue their case still further.

Hearings

As has been said, hearings have become progressively more popular in the last twenty years, but until now the procedure was based on a Code of Conduct. Now the Hearing has graduated to having its own Statutory Instrument, S.I.2000 No.1626. The rules apply to all appeals under s.78 TCP Act 1990, plus appeals concerning listed buildings and conservation areas. A hearing is suitable where the development is small-scale, there is little or no third party interest, complex legal, policy or technical questions do not arise, and there is no need for formal cross-examination to test the evidence. All this is not to say that a spokesperson for the parish council, or those with property in the vicinity should not attend and speak. The emphasis is on informality but that presupposes that everyone has done their homework first! For example, it is also helpful if the LPA and appellant can agree a joint statement on matters on which they are agreed. If the Secretary of State requires further information from either party that has to be supplied to him and any statutory consultee, like the local council, within 2 weeks. Should it become apparent, either during the run up to the hearing or during it, that the matter is too complex to be handled by this procedure then there is provision for switching it to a proper inquiry.

The Secretary of State has to give at least 4 weeks notice of the hearing, but it should be within 12 weeks of the starting date: notice of the hearing will be published in a local paper and concerned parties informed by post. Generally the accommodation for a hearing will be less formal than for an inquiry: a committee room in LPA premises, or the village hall, but not the local pub! There is even provision for continuing and concluding the hearing on site if all parties are agreed and no one would be disadvantaged e.g. the disabled.

The inspector will open the hearing at the appointed hour even if certain parties have failed to arrive, so be prompt. He will summarise his understanding of the case, based on the documentation and an unaccompanied site visit, and then outline what he considers to be the main points at issue. To keep the proceedings informal the appellant may be represented by an agent but not a lawyer: this is to prevent hearings from becoming lawyers' love-ins like inquiries. Whether the appellant or the LPA follows on from the inspector will depend on the subject. After the main parties have had their say, third parties are welcome to join in the discussion. The appellant has the right to make a closing statement.

Introducing new information at this stage is very much frowned upon: an adjournment to consider it may result in costs being awarded against the culprit. Although it can be seen that the procedure for a hearing is much like that for written representations, but with the addition of a seminar, a major difference is that costs can be applied for if the conduct of one of the parties puts the other at a disadvantage e.g. late

submission of documents. The last word on costs is still to be found in DOE Circular 8/93. Every local council in the land ought to read it because so often costs are used to blackmail LPAs into granting planning permission: even if an LPA loses on appeal there is no need to fear costs if they had good planning reasons for refusal and play by the rules over the submission of documents.

Inquiries Determined by Inspectors

Of the small percentage of appeals that proceed to an actual inquiry, the inspectorate decides the overwhelming majority. Having received all the documentation and been notified about those taking part, the Secretary of State then tells all those entitled to appear who will be presiding over the inquiry, but that is no guarantee: if they drop dead, go sick, or get parachuted into another inquiry, you may not be aware of it until the opening day.

Within 6 weeks of the starting date, the LPA, the appellant and possibly any other third party, have to produce a statement of case. If you have never produced such a document before it is a curious beast, written in the future tense. You have to set out your main arguments and provide a list of documents that you will be using to support your position - known as "relying on" in legalese. Any party may then be asked by the Secretary of State to produce more information. Copies of the documents are then sent to the other parties and the inspector. Within 9 weeks any party may comment of the statement of case of any other. The Inspector may, within 12 weeks, send the main parties and any statutory party a list of matters about which he particularly wishes to be informed i.e. the key issues as he sees them. This helps give shape to your case but it doesn't preclude your raising other issues that your council considers to be important.

There may or may not be a pre-inquiry meeting: in general it is expected that there will be if the inquiry is expected to last more than 8 days, but there may also be a meeting even if the inquiry is expected to be shorter. If there is one, do go along. It is always amusing, in anthropological terms, to see who is attending from which tribe. You will also pick up valuable information like when the proofs have to be in, and the number of copies required. If there have been any problems about obtaining information from the other side, you may well be able to persuade the inspector to sit on their tails. It is also the opportunity to request an evening meeting in your town or village, or even get the venue changed altogether. There are also provisions in the Rules for inspectors to debar disruptive elements, from the meeting or even from the inquiry, so behave yourselves!

The inspector may also draw up a timetable for the inquiry, especially if it is expected to last longer than 8 days. This could have repercussions with regard to the submission of proofs: the usual rule will be to submit them 4 weeks before the inquiry commences, but if the inquiry is expected to drag on for weeks, the inspector has discretion to stipulate a later date.

LPAs and appellants are expected to produce a statement of common ground and to send to the Secretary of State and any statutory party: local councils may have an input into this process. Proofs of evidence from any party are expected to focus on the issues under dispute. The policies and plans of central and local government need only be referred to by referencing the document: core documents will form part of the inquiry library in any case.

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Thus it is only detailed material to which other parties are unlikely to have access that need be supplied by you: then, if it is sufficiently lengthy to disrupt the flow of your argument, it needs to be put in a separately bound and numbered appendix. Proofs, that are more than 1500 words long, need to be provided with a summary, which is attached to the front. This is what you read out at the inquiry but, rest assured, you'll be cross-examined on all your evidence.

Everything needs to be converted into A4 size for portability: Plans and diagrams need to be folded down and inserted into the right sized plastic wallet. Photos have to be numbered and viewpoints from which they are taken shown on an O.S.Map. Bundles of correspondence can count as a single document provided each letter is numbered. If the inspector agrees for a video to be shown, edit it carefully to make sure it actually supports your case, and have a copy available for the inspector to take home.

Veterans of many appeals will notice a few changes with inquiries conducted under the new Rules. At the start of the inquiry the inspector shall identify what are, in his opinion, the main issues to be considered at the inquiry and any matters on which he requires further explanation, but this does not preclude those participating raising other issues. The other main change is that LPAs lead the batting order because it is now thought more logical that the inquiry should commence with the reasons for refusing the application. In fact this procedural alteration could be said to signify a small change in the balance of power between the appellant and society. In the 19th century appeals were instituted as a sop to landowners who were resisting restrictions on their right, as they saw it, to do what they liked with their own property. In the 21st century there is a growing consciousness that property rights have to be balanced against the wider interests of society. However, in terms of modernising our procedures, we still have so way to go: the third party right is only one example.

Inquiries Decided by the Secretary of State

There are two types of inquiries which are decided by the Secretary of State: complicated s.78 appeals and s.77 call-ins: these are issues of more than local importance, which have been taken out of the hands of the LPA, so that the Secretary of State makes a decision on the application. There are usually around ½ million

applications a year: in 2000 only 62 were called-in, which graphically illustrates the odds against preventing you LPA from taking the decision!

There is a strong family resemblance between the Inspector's Rules, set out above, and those for inquires to be decided by the Secretary of State (S.I.1624). However the latter contains within it the Rules governing major inquiries like Terminal 5 at Heathrow or a deep level repository for radioactive waste. Circular 05/2000 also contains a new Code of Conduct for Major Inquiries.

Whether or not it is deemed to be a big inquiry depends on whether Rule 5 is invoked: the calling of a pre-inquiry meeting by the Secretary of State triggers a series of special provisions. The Secretary of State issues a statement about matters about which he is particularly concerned and this is issued with the notice to hold the pre-inquiry meeting. The applicant or appellant then have 8 weeks to produce their statements of case. The first pre-inquiry meeting should be held within 16 weeks of the starting date, but there may be another one if necessary. The idea is for the inspector to identify the main issues and call for additional information. He is also obliged to draw up a timetable for the inquiry, which has to begin no later than 8 weeks from the last pre-inquiry meeting. Ideally no more than 22 weeks should elapse between the starting date and the commencement of the inquiry in Secretary of State cases, or 20 weeks where the inspector takes the decision. However the pressure is on to reduce timescales, so be prepared.

In the March 2001 edition of LCR Mrs Potts showed just what can be achieved if local councils really mount a professional case at an inquiry. Bracknell was a local plan inquiry, but the same applies to call-ins and appeals. If you council is involved in one, read the instructions in 05/2000 and get stuck in!

1 See DETR Circular 05/2000, Planning Appeals: Procedures (Including Inquiries into Called-in Planning Application)
2 LCR Jan.2000
3 All statutory instruments of recent years are now viewable on www.legislation.hmso.gov.uk/start.htm

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