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Welcome to Landmark Chambers' 'Planning Law Update for Local Authorities: Dealing with Appeals' webinar

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

Jacqueline Lean (Chair)

Andrew Parkinson

Topic:
Opposing Appeals by Hearings

Matthew Fraser

Topic:
LPAs resisting written representations appeals

Your speakers today are…

Landmark Chambers

Topic:
Costs: when to apply and how to avoid awards

Nick Grant

Topic:
Costs: when to apply and how to avoid awards

Joe Thomas

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LPAs resisting written representations appeals

Matthew Fraser

Topics to cover

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- What is the procedure for appeals proceeding by written representations?
- What is a “combined procedure”?
- Important procedural responsibilities on the LPA: notification and publication.
- Making your case to the Inspector.
- Dealing with changes in circumstances between LPA decision and appeal decision.

Procedure

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- Part 1 written representations procedure: householder, advertisement and minor commercial appeals – see Annexe C to the Procedural Guide on Planning Appeals: https://www.gov.uk/government/publications/planning-appeals-procedural-guide.

- Part 2 written representations procedure: Other appeals suitable for written representations – Annexe D to the Procedural Guide.

- See also: The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009

Combined procedure

- Introduced by the Business and Planning Act 2020 to provide greater flexibility in combining different appeal procedures.
- See Annexe K to the Procedural Guide.
- So issues in a hearing or inquiry can be hived off to be dealt with by way of written representations.
- Not normal for a written representations appeal to be combined with other procedures, although a combined procedure may arise if written representations found to be unsuitable mid-way through the process.

Procedural responsibilities

- Notifying “interested persons” – see reg. 6 of the 2009 Regulations. See model notification letter at para. D.3.2 of Procedural Guide.

- Making appeal documents available online or at Council’s offices.

Making your case

- The completed appeal questionnaire and supporting documents

- The Statement of Case:
    1. Introduction;
    2. Describing the site and relevant context;
    3. Planning history;
    4. Describing the appeal proposal;
    5. Relevant policies (local and national);
    6. Reasons for refusal and further supporting analysis;
    7. Overall conclusions / planning balance.

- Final comments on representations by interested persons.

Changes in circumstances

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- See Annex B to the Procedural Guide, and paras. 1.7 to 1.9;
- Inform the Inspector of material changes to legislation or policy, or of recent relevant decisions on similar development proposals!
- A cautionary tale …

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Opposing Appeals by Hearings

Andrew Parkinson

Topics

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- Procedure;
- The theory of how a hearing should go;
- The reality;
- Practical tips

Procedure – sources of law/guidance

- Set out in the Procedural Guide on Planning Appeals – Annexe E in particular.
- Town and Country Planning (Hearings Procedure) (England) Rules 2000 (as amended).
- Business and Planning Act 2020 – combined procedure. Roundtable sessions (akin to a hearing) at Inquiries. But also now hearings can have a written representations element.

Key stages – see Appendix E.1 of Procedural Guide

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1. Receipt of appeal documents. PINS sets start date.

2. 1 week from start date: Send completed questionnaire and supporting documents. Write to interested people about the appeal.

3. 5 weeks from start date: Send full Statement of Case and agreed SOCG.

4. PINs then consider whether a “combined procedure” would be appropriate – opportunity to make representations.

5. Confirmation of hearing date: normally within 10 weeks of start date.

The theory of how a hearing should go

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- *"The hearing is an inquisitorial process led by the Inspector who identifies the issues for discussion based on the evidence received and any representations made"*: PINS Procedural Guide – para. E.1.1.

- Previous advice under Circular 05/00 - Annex 2:

  3. Under the hearings procedure, the Inspector leads a discussion about the issues, thereby saving the parties time and money. Everyone, including interested third parties, should be given a fair hearing. The Inspector obtains all the information necessary for his decision, but in a more relaxed and less formal atmosphere than at a local inquiry. A hearing is suitable where the development is small-scale; there is little or no third party interest; complex legal, technical or policy issues are unlikely to arise; and there is no likelihood that formal cross-examination will be needed to test the opposing cases. An important element of the hearings procedure is that the Inspector must be fully appraised of the relevant issues and arguments before the hearing opens so that he can properly lead the discussion.

- Dyason v The Secretary of State for the Environment [1998] JPL 778:

  "There is a danger upon the procedure now followed by the Secretary of State of observing the right to be heard by holding a 'hearing'…could lead not to a "full and fair" hearing but to a less than thorough examination of the issues. A relaxed hearing is not necessarily a fair hearing. The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden upon an inspector."

The reality

Agenda for roundtable session – Heritage

1. Effect of the proposal on the Conservation Area
2. Effect of the proposal on nearby Listed Buildings
3. AOB

Not always, but often:

- Vague agendas for discussion – e.g. *"Is the development located in a sustainable location"*
- "Consecutive speeches" approach to discussion

Practical tips

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- Arrive early!
- Importance of the Statement of Common Ground
- Ask questions
- Focus on where you can add value over your SOC/Proof
- Be prepared for all eventualities

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Costs: when to apply and how to avoid awards

Nick Grant & Joe Thomas

Legislative and Policy framework

Under s.250(5) of the Local Government Act 1972

The Minister causing an inquiry to be held under this section *may make orders as to the costs* of the parties at the inquiry and as to the parties by whom the costs are to be paid, and every such order may be made a rule of the High Court on the application of any party named in the order.

Paragraph 6(5) of the Town and Country Planning Act 1990 ('TCPA 1990') extends the power under s.250(5) to the 'appointed person' (i.e. an inspector).

Costs can now be awarded in cases involving written representations (s.322 and 322A of TCPA 1990).

Awards of costs, however, should be in accordance with the guidance contained in the Planning Practice Guidance (a highly material consideration).

What type of cases can costs be awarded in?

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- Nearly all planning proceedings!
  - Planning appeals
  - Enforcement appeals
  - CLEUDS and CLOPUDs
  - Tree preservation orders
  - Listed building enforcement

  - The Government has produced a thorough list of illustrative list of case types for which costs awards are available here.

Who can apply for costs?
What sort of costs can be awarded?

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- Both the Appellant and the Local Planning Authority may apply for costs. In addition, interested parties (including statutory consultees) who have taken part of the process.

- Costs do not depend on the outcome of the appeal.

- Costs can be awarded against a *successful* party.

- Costs can be awarded on a full or, more likely, a partial basis:
  - E.g. costs relate to one ground.
  - E.g. costs relate to one day of the hearing.
  - E.g. costs relate to one witness.

In outline – When will costs be awarded.

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- Parties in planning appeal normally meet their own expenses. Costs do not, as a rule, follow the result.

- However where a party has
  - (1) behaved unreasonably **and**
  - (2) this has **directly** caused another party to incur **unnecessary** or **wasted** expense,

  they **may** be subject to an award of costs.

- Therefore costs can only be awarded costs if both limbs are satisfied and even then the award of costs remains discretionary. Accordingly, extenuating circumstances may be taken into account.

First Limb – ‘behaved unreasonably’

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- Unreasonable is used in its ordinary sense not the sense that lawyers use it when describing *Wednesbury* unreasonableness. (*Manchester City Council v SSE & Mercury Communications Limited* [1988] JPL 774) and (*Swale Borough Council v Secretary of State for Housing Communities and Local Government & Anor* [2020] EWHC 3482 (Admin) (17 December 2020))

- Unreasonable behaviour may be either
  - Procedural
  - Substantive

- Unreasonable procedural behaviour may include failure to meet deadlines, failure of witness to attend, failure to prepare resulting in an adjournment, failure to attempt to resolve statements of common grounds, withdrawing the application without good reason.

- Unreasonable substantive behaviour includes running points which have no legal basis or substantive points with no evidence.

- Unreasonable behaviour during the whole planning application process will be taken into account. Therefore, unreasonable behaviour during the planning application can be taken into account.

Examples from the Inspector's Training Manual

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- Non-compliance with procedural requirements.
- Failure to substantiate a stated reason for refusal.
- Planning Authorities clearly failing to have regard to government policy or its own adopted policies.
- Appellants pursuing a clear 'no hope' case (e.g. Green belt without advancing very special circumstances)
- Late withdrawal of an appeal, late cancellation of an event or late cancellation of an enforcement notice. It is far better to ask for permission than forgiveness.

Second limb – directly caused unnecessary or wasted expense

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- The unreasonable behaviour must have *directly* caused unnecessary or wasted expense.

- An applicant for costs will need to *clearly demonstrate* how the unreasonable behaviour resulted in unnecessary or wasted expense. This could, for example, include time spent preparing for an appeal or ground which was withdrawn at the very last minute.

- Awards for costs must be for the direct costs, the PPG cites compensation for alleged delay in obtaining planning permission as an example of indirect costs which cannot be recovered.

How and when should an application for costs be made?

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- Written Representations – costs must be made in writing by any party no later than the final comments stage. Where the conduct relates to a site visit, the application should be made within 7 days of the site visits.

- In the case of hearings and inquiries:
  - Must be made before the hearing / inquiry is closed.
  - Ideally, however, applications should be made in writing before the hearing / inquiry.
  - Where the unreasonable conduct relates to behaviour at the hearing, the application should be made to the inspector before the hearing is adjourned.

- Where an application is withdrawn, an application for wasted costs must be made in writing (an application form is available) within 4 weeks of receiving notification.

Procedure if costs are claimed

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- Any written application will be disclosed to the party against whom the application is made, so that they can respond in writing. An applicant for costs, will then have an opportunity to make a final reply in writing.

- For hearing and inquiries, the party against whom the application is made will have an opportunity to reply, either at the event or in writing.

- The inspector makes the final decision. An inspector may award costs *without an application.*

- Where an application is withdrawn, the award of costs is taken by the Planning Inspectorate.

Appeals and Enforcement

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- Appeals by judicial review are very unlikely to be successful given the discretionary nature of a costs award (*R v Secretary of State for the Environment ex. parte London Borough of Ealing* [1999] EWHC Admin 345)

- Once the Planning Inspectorate has made an award for costs, it has no further role and it is for the parties to negotiate the award and agree arrangements for payment.

- Failure to settle an award of costs is enforceable through the Courts: *Maiden London Ltd v Ruddick & Anor* [2018] EWHC 3684 (QB).

Appeals and Enforcement

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- Costs recoverable? *Deutsche Bank AG v Vik* [2020] WL 03086205

- Basis of assessment
  - Standard – reasonable and proportionate
  - Indemnity – reasonable

- Reasonableness – assessed at time incurred.
  - Types of lawyer instructed
  - Reasonable brief fee: *Simpson Motor Sales (London) Ltd v Hendon Corp* [1964] 3 All ER 833

- Proportionality – reasonable relationship to matters such as complexity of litigation, conduct of paying party, importance of the litigation

Two Final Messages

- It is difficult to have costs awarded either against you or the appellant. Typically, only apply if a party has acted very poorly.

- That said, it is far better to ask for permission than forgiveness.

Thank you for listening

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