

CHOICE OF DISPUTE RESOLUTION PROCEDURE – PLANNING LAW

- 1.1 Planning appeals can be determined by three procedures: written representations, hearings and public local inquiries. I wondered whether these separate procedures accessed via a single entry point, could be a useful precedent for a system to channel housing disputes to different resolution procedures. This minute provides a broad overview.
- 1.2 This document does not represent the Law Commission's official view of the matters discussed, nor is it an authoritative statement of the law.
- 1.3 It was completed on 8 October 2004.
- 1.4 Section 78 of the Town and Country Planning Act 1990 ("the TCPA") gives the applicant a right of appeal to the Secretary of State (in Wales, the National Assembly) against a local planning authority's refusal of planning permission.¹
- 1.5 The Secretary of State can allow or dismiss the appeal or reverse or vary any part of the local planning authority's decision, and "may deal with the application as if it had been made to him in the first instance".²
- 1.6 In practice, most appeals are actually decided by an "appointed person" (ie a planning inspector).³ Only a few (mostly for large or controversial developments) are "recovered" and determined by the Secretary of State (by a Minister or officials at the Office of the Deputy Prime Minister ("ODPM")), after considering the inspector's report and recommendations.⁴
- 1.7 An appeal has to be made on the standard notice of appeal provided by the Secretary of State.⁵ This is available on the Planning Inspectorate's website at http://www.planning-inspectorate.gov.uk/pins/forms/s78_appeal%2011-2003.doc, and is used whatever procedure is ultimately adopted to determine the appeal. 1 of the 8 pages of the notice of appeal relates to the choice of procedure.

Primary legislation governing planning appeal procedures

- 1.8 The key provisions of the TCPA governing planning appeal procedures are:
 - (1) section 79(2), which requires the Secretary of State to give the appellant and local planning authority the right to appear before and be heard by a person appointed by him (ie an inspector) before he determines an appeal under section 78, if either of them so wishes.

¹ Section 78 provides for other appeals (eg if the local authority fails to determine an application in a prescribed period). Other appeals using the same or similar procedures are provided for elsewhere in the TCPA, or in other legislation such as the Planning (Listed Buildings and Conservation Areas) Act 1990. I don't intend to discuss these in this minute.

² TCPA, section 79(1).

³ See Schedule 6 to the TCPA and the Town and Country Planning (Determination of Appeals by Appointed Person) (Prescribed Classes) Regulations 1997 (SI 1997/420).

⁴ TCPA, Schedule 6, paragraph 3(1) provides for recovery of appeals by the Secretary of State.

⁵ See TCPA section 78(3), and the Town and Country Planning (General Development) Procedure Order 1995 (SI 1995/419), article 23(1).

- (2) section 320(1), which allows the Secretary of State to cause a local inquiry to be held for the purposes of the exercise of any of his functions under any of the provisions of the TCPA.
- (3) section 323, which allows the Secretary of State to make regulations prescribing the procedure to be followed in cases where a person has a right to appear before and be heard by an inspector, but which are to be disposed of without an inquiry or hearing (ie it allows for regulations prescribing a written representations procedure);
- (4) Schedule 6, which governs appeals to be determined by an inspector.
 - (a) Paragraph 2(2) requires the Secretary of State to ask the appellant and local planning authority if they wish to appear before and be heard by the inspector.
 - (b) If both parties don't want to appear and be heard, paragraph 2(3) allows the appeal to be determined without the appellant and local planning authority being heard.
 - (c) If either of them wants to appear and be heard, paragraph 2(4) requires the inspector to give them both the opportunity.
 - (d) Paragraph 6(1) allows an inspector to hold a local inquiry, and requires him to, if the Secretary of State directs, whether or not the parties have asked for an opportunity to appear and be heard before the inspector.

Secondary legislation governing planning appeal procedures

1.9 The relevant secondary legislation governing the appeal procedures in England is:

- (1) **Written Representations:** The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2000 (SI 2000 No. 1628);
- (2) **Hearings:** The Town and Country Planning (Hearings Procedure) (England) Rules 2000 (SI 2000 No. 1626);
- (3) **Inquiries:** The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000 No. 1624), for recovered appeals, and The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (SI 2000 No. 1625).

Nature and choice of planning appeal procedures

1.10 The notice of appeal gives the following explanations of the procedures:

Written Representations

This is normally the simplest, quickest and most straightforward way of making an appeal. Three out of every four people making an appeal choose this method. The written procedure is particularly suited to small-scale developments (e.g. extensions to buildings, individual houses or small groups of houses, appeals against conditions and changes of use). It is also very popular with people making their own appeal without professional help. The process involves the submission of written “grounds of appeal” followed by a written statement and any supporting documents. It also provides an opportunity to comment in writing on the Local Planning Authority’s reasons for refusing permission (or failing to determine the application). An Inspector will study all of the documents before visiting the appeal site/area and issuing a written decision.

Note: The Inspector will visit the site unaccompanied by either party unless the relevant part of the site cannot be seen from a road or other public land, or it is essential for the Inspector to enter the site to check measurements or other relevant facts.

Hearings

This process is likely to be suited to slightly more complicated cases which require detailed discussion about the merits of a proposal. Like the written procedure, the process starts with the submission of “written grounds of appeal” followed by a full written statement of case and an opportunity to comment in writing on the Local Planning Authority’s reasons for refusing permission (or failing to determine the application). The Planning Inspectorate will then arrange a hearing at which the Local Planning Authority and the appellant(s) will be represented. Members of the public, interested bodies (e.g. Parish/Town Councils) and the press may also attend. At the hearing the Inspector will lead a discussion on the matters already presented in the written statements and supporting documents. The Inspector will visit the site/area and issue a written decision in the same way as the written procedure.

Although you may prefer a hearing the Inspectorate must consider your appeal suitable for this procedure.

Inquiries

This is the most formal of procedures. Although it is not a court of law the proceedings will often seem to be quite similar as the parties to the appeal will usually be legally represented and expert witnesses will be called to give evidence. Members of the public and press may also attend. In general, inquiries are suggested for appeals that:

- are complex and unduly controversial;
- have caused a lot of local interest;
- involve the need to question evidence through formal cross-examination.

- 1.11 Paragraph 23 of ODPM's Circular 05/00 "Planning Appeals Procedures Including Called-in Planning Inquiries" states that:

For any appeal under section 78 of the Town and Country Planning Act 1990, the appellant and the local planning authority have a statutory right to appear before and be heard by a person appointed by the Secretary of State. If neither party wishes to be heard, and the Secretary of State does not consider it necessary to hold a hearing or an inquiry, the appeal is determined by means of the **written representations** procedure. Where either of the principal parties exercise their right to be heard, they will be asked to state which procedure they would regard as suitable, giving their reasons. The Planning Inspectorate, acting on behalf of the Secretary of State, will decide whether a hearing or inquiry is to be held taking into account the circumstances of each appeal, including any preferences already expressed by the principal parties ...

- 1.12 Regulation 3 of the Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2000, provides that:

These Regulations apply where, after they come into force,⁶ an appellant informs the Secretary of State in the notice of appeal that he wishes the appeal to be disposed of on the basis of written representations.

If the appellant does not want to appear before and be heard by an inspector, the appeal will therefore start to be processed according to the written representation procedures. However, once the Secretary of State has notified it of the appeal, the local planning authority is required to complete an appeal questionnaire in which it indicates whether it is happy with written representations and, if not, whether it would prefer a hearing or an inquiry.⁷

- 1.13 So while either party can prevent the use of the written representations procedure, they don't have the last word as to whether a hearing or public inquiry will be adopted. It is, broadly speaking, the decision making body which chooses the appropriate procedure for a particular case. Even if both parties were content with written representations or a hearing, the inspector or Secretary of State could hold a public inquiry if he considered it necessary.

Planning appeals procedures as a precedent for housing disputes?

- 1.14 At the 9 September seminar, one suggestion was for a body to advise parties to housing disputes about different dispute resolution mechanisms, and possibly to direct them to an appropriate mechanism (a "gatekeeper", "filter" or "sieve").

⁶ 1 August 2000.

⁷ The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2000, regulation 6.

- (1) The single notice of appeal for all three procedures, as opposed to separate forms depending on choice of procedure, is attractive. It would not, however, be very user friendly for a housing dispute “gatekeeper” to require the completion of an 8 page form before parties could access any of the available dispute resolution mechanisms (whether court procedures or ADR such as an ombudsman or mediation service).
- (2) The planning appeals system combines an element of choice by the parties, as to the mechanism adopted, with an element of direction.
 - (a) A party cannot insist on the lengthier costlier public inquiry procedure if the Planning Inspectorate considers that the appeal could be adequately determined by a cheaper hearing.
 - (b) Nor can the parties require written representations to be used if the decision maker considers there are wider public interest issues which would merit a closer examination at an inquiry.
- (3) The planning appeals system is not a precedent for a gatekeeper wholly *outside* the decision making process (such as a Citizens Advice Bureau) to require parties to use a particular dispute resolution mechanism. It could be a precedent for allowing the courts to require the parties to use different procedures in different cases, depending on the issues at stake, (although arguably that’s what the Civil Procedure Rules already try to do, with small claims and fast track and multi-track procedures).
- (4) The Circular emphasises the need for efficiency and discipline, to reduce costs and delays, as well as the need for fairness in the decision making process. Paragraph 10 of the Circular states that “hearings will be used rather than inquiries in all suitable cases”. This approach reflects our concerns about proportionality in housing dispute resolution mechanisms.
- (5) The planning appeals system does not provide a precedent for a system where parties can be directed to use ADR. (The Planning Inspectorate has, however, run pilot schemes for the use of mediation in planning cases).

1.15 In conclusion, I think that planning appeals procedures are of relatively limited value as a precedent for a system to allocate housing disputes to different resolution mechanisms, although the combination of direction and choice of procedure is interesting.