



SIX PUMP COURT

PLANNING UPDATE, APRIL 2009:

THE REMOVAL OF THE RIGHT TO BE HEARD **AND THE CHANGES TO THE APPEAL RULES**

(Note by William Upton, barrister)

They told us it was coming, in the 2007 White Paper and in the debates on the Planning Bill, and now it has happened - there is no longer a statutory right to appear before and be heard by a planning inspector after April 6, 2009. This has been removed by the government under the provisions of the Planning Act 2008.¹

The Planning Inspectorate, acting in the name of the Secretary of State, now has the power to determine which procedure should be used for planning and enforcement appeals under the new section 319A. They will make this determination within seven working days of receiving the appeal, and will notify the parties accordingly.² There is no right of appeal against this, although they can change their minds and their decision can be challenged through the courts. This notification is now the "starting date" for each appeal process, and all the time limits are measured from this point.

The Inspectorate has indicated the criteria it will apply in deciding which appeal method should be used. These have had the Ministerial seal of approval. There are two separate lists, for normal appeals and for enforcement appeals (see below).

We do seem to have moved a long way from the approach taken by our forefathers that an appeal served two purposes. In 1958 the Franks Report said this: "The intention of the legislature in providing for an inquiry or hearing in certain circumstances appears to have been twofold: to ensure that the interests of the citizen closely affected should be protected by the grant to them of a statutory right to be heard in support of their objections and to ensure that thereby the Minister should be better informed about the facts of the case."

The emphasis now is clearly on the latter point and on administrative efficiency. The Inspectorate must now satisfy their political masters that they are delivering on their targets. There has also been an emphasis in the Barker and Eddington Reports on relying primarily upon written evidence. The mindset is also that "Case law demonstrates that the right to be heard can be satisfied by the provision of evidence through written

¹ s.319A of the 1990 Act (as inserted by s.196 of the Planning Act 2008). The right to appear before and be heard by "a person appointed by the Secretary of State" which is contained in the 1990 Act in various sections, and in the Listed Buildings Act 1990, has been disappplied by the amendments made in Sched. 10 of the Planning Act 2008.

² The Town and Country Planning (Determination of Appeal Procedure) (Prescribed Period) (England) Regulations 2009 (SI 2009 No.454) states that the "prescribed period" in s.196A is seven working days from the receipt by the Secretary of State of a valid appeal.

representations.”³ As Garry Hart said, when heartily criticising these sort of proposals way back in 1997, “The right to be heard is to be reduced to a right to be read”.⁴

So, if an appellant, a local authority or an interested party considers that they are not being heard – what can they do? In my opinion – shout ! They will need to persuade the Inspectorate that their interests outweigh the apparent public interest in the timely delivery of appeal decisions. After all, the courts will still expect the Inspectors to act fairly, and to observe the rules of natural justice. This succeeded recently,⁵ despite the government’s argument that the “default position” is “one of adherence to timetables so as to meet the wider public interest of due disposal of disputes.”

Note this co-incides with changes to the rules- those for written representation appeals have been completely replaced, and the rules for informal hearings and local inquiries have been amended:

- (a) **written representations**⁶; this method would be suitable when the Inspector does not need to clarify any matters beyond the written statements, nor to test the evidence by questioning. Costs can now be awarded for unreasonable behaviour;
- (b) **hearings**⁷; These usually take the form of a round-table discussion, generally without cross-examination of witnesses, led by the Inspector. A Hearing is likely to be suitable when the whole case is unlikely to take more than one day to be heard, and where the issues are straightforward (and do not require legal or other submissions to be made). It is unlikely to be suitable where a substantial number of third parties wish to speak, or where complex policy or technical issues are likely to be raised – when an inquiry should be held.
- (c) **public inquiries**.⁸ The prescribed timetable has been changed regarding the submission of documents – after the LPA’s questionnaire and accompanying documents, the next document required is the Statement of Common Ground⁹. This innovation is intended to inform the contents of the parties’ Statement of Cases as well as the Proofs of Evidence. Procedure at the inquiry remains largely a matter for the Inspector, subject to the overall requirement of fairness. However, there is a new emphasis on the parties avoiding surprises at the inquiry, and trying to agree as much as possible – which will no doubt be reflected in the new Costs Circular which is due.

³ Lord Patel of Bradford, Hansard 12 Nov 2008:Col. 687 – relying on the government lawyers’ advice.

⁴ The JPLC papers from the Oxford conference in 1997 stand as a warning about what we are losing.

⁵ See *Powell v Secretary of State for the Environment Food and Rural Affairs* [2009] EWHC 643 (Admin) (on the related area of a footpath inquiry).

⁶ See Part 2 of The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009 (S.I. 2009 No.452). For Wales, the rules currently remain Welsh SI 2003/390 (W.52).

⁷ See Town and Country Planning (Hearings Procedure) (England) Rules 2000 (SI 2000/1626), as amended by the Town and Country Planning (Hearings and Inquiries Procedure)(England)(Amendment) Rules 2009 (SI 2009/455); see the Planning Inspectorate’s Procedural Guidance on the Appeal Process.

⁸ Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624), for appeals determined by the Secretary of State, and the Town and Country Planning (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (SI 2000/1625), for appeals determined by an Inspector - as amended by the Town and Country Planning (Hearings and Inquiries Procedure)(England)(Amendment) Rules 2009 (SI 2009/455). See the Planning Inspectorate’s Procedural Guidance on the Appeal Process.

⁹ The requirement for this document has been moved forward in the process, to just 6 weeks after the starting date – it should therefore inform the statements of case. The amendment to the Inquiry Rules was made by SI 2009 No.455 (see amended rule 3(9) and rule 4(7)).

Planning Inspectorate (available on their website)¹⁰:

Criteria for determining the procedure (indicative) (planning appeals)

These criteria have been approved by Ministers and will be applied from the 6 April 2009.

Written representations

If your appeal meets the following criteria, the most appropriate procedure would be written representations: -

- the grounds of appeal and issues raised can be clearly understood from the appeal documents plus a site inspection; and/or
- the Inspector should not need to test the evidence by questioning or to clarify any other matters; and/or
- an environmental impact assessment (EIA) is either not required or the EIA is not in dispute.

Hearing

If the criteria for written representations are not met because questions need to be asked, for example where any of the following apply: -

- the status of the appellant is at issue, eg Gypsy/Traveller;
- the need for the proposal is at issue eg agricultural worker's dwelling; Gypsy/Traveller site
- the personal circumstances of the appellant are at issue, eg; people with disabilities or other special needs;

The most appropriate procedure would be a hearing if: -

1. there is no need for evidence to be tested by formal cross-examination; and
2. the issues are straightforward (and do not require legal or other submissions to be made) and you should be able to present your own case (although you can choose to be represented if you wish); and
3. your case and that of the LPA and interested persons is unlikely to take more than one day to be heard.

Inquiry

If the criteria for written representations and hearings are not met because the evidence needs to be tested and/or questions need to be asked, as above, the most appropriate procedure would be a local inquiry if: -

- the issues are complex and likely to need evidence to be given by expert witnesses; and/or
- you are likely to need to be represented by an advocate, such as a lawyer or other professional expert because material facts and/or matters of expert opinion are in dispute and formal cross-examination of witnesses is required; and/or
- legal submissions may need to be made.

NOTE: Where proposals are controversial and have generated significant local interest, they may not be suitable for the written representation procedure. We consider that the LPA is in the best position to indicate that a hearing or inquiry may be required in such circumstances.

¹⁰ http://www.planning-inspectorate.gov.uk/pins/appeals/planning_appeals/new_indic_criteria.html

Criteria for determining the procedure (indicative) (enforcement appeals)

These criteria have been approved by Ministers and will be applied from the 6 April 2009.

Written representations

If your appeal meets the following criteria, the most appropriate procedure would be written representations:-

1. the grounds of appeal and issues raised can be clearly understood from the appeal documents plus a site inspection and do not include a ground (d) appeal; and/or
2. the Inspector should not need to test the evidence by questioning or to clarify any other matters; and/or
3. a an environmental impact assessment (EIA) is either not required or the EIA is not in dispute; and/or
4. the alleged breach and the requirements of the notice are clear and there are no complex legal issues.

Hearing

If the criteria for written representations are not met because questions need to be asked, for example where any of the following apply:-

- the status of the appellant is at issue, eg Gypsy/Traveller;
- the need for the proposal is at issue eg agricultural worker's dwelling; Gypsy/Traveller site
- the personal circumstances of the appellant are at issue, eg; people with disabilities or other special needs;

the most appropriate procedure would be a hearing if:-

1. there is no need for evidence to be tested by formal cross-examination;
2. and the grounds of appeal, the allegation and the requirement of the notice are straightforward (and do not require legal or other submissions to be made) and you should be able to present your own case (although you can choose to be represented if you wish); and
3. your case and that of the LPA and interested persons is unlikely to take more than one day to be heard;

Inquiry

If the criteria for written representations and hearings are not met because the evidence needs to be tested and/or questions need to be asked, as above, the most appropriate procedure would be a local inquiry if:-

- the issues are complex and likely to need evidence to be given by expert witnesses; and/or
- you are likely to need to be represented by an advocate, such as a lawyer or other professional expert because material facts and/or matters of expert opinion are in dispute and formal cross-examination of witnesses is required; and/or
- legal submissions may need to be made or evidence needs to be heard under oath (e.g. where a witness is giving factual evidence about how long the alleged unauthorised use has been taking place); and/or
- the alleged breach or the requirements of the notice are unusual and particularly contentious.

NOTE: Where proposals are controversial and have generated significant local interest they may not be suitable for the written representation procedure. We consider that the LPA is in the best position to indicate that a hearing or inquiry may be required in such circumstances.