

THE REFORMED APPEALS PROCEDURE

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Introduction

1. This Paper considers the effect of some of the reforms recently made to the planning appeal system. The essential nature and content of those reforms should by now be reasonably familiar, and although for ease of reference I have included a brief description of the main changes in an Annex, the paper itself will focus on the issues that have emerged through the operation of the new system, identifying areas where the effect of the changes is beneficial and those where the effect is sometimes proving to be less welcome.

Another new source of guidance

2. The guidance on the reformed appeals system has come in the form of notes issued by the Planning Inspectorate (“PINS”), rather than the Department for Communities and Local Government (“DCLG”). The precise reason for this innovation is not clear, though there is an obvious logic behind the procedural guidance being issued by the body with responsibility for operating the appeals procedure.
3. The status of the PINS Guidance notes is equivalent to Departmental Circulars. The Ministerial Statement announcing the change made clear that the new guidance has been approved by the Secretary of State (see PINS 01/2009 Annexe A), and in places the new guidance expressly replaces advice in previous Circulars.
4. There has been a marked proliferation of planning guidance and policy in recent years. For an individual wishing to understand what policy and guidance is available to guide the handling and determination of an application/appeal, there is a multiplicity of documents to consider.



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- a. The starting point is the **Development Plan**, which at the local level now comes in the form of multiple **Development Plan Documents** which are to be “*taken as a whole*” (section 38(2)(b) of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”). This collection of documents must, of course, be read together with the relevant **Regional Spatial Strategy** and a decision made as to whether they are wholly aligned. If not, the most recently adopted should triumph (section 38(5) of the 2004 Act).
- b. If, as is often the case, the Development Plan is still emerging under the new system, it will be necessary to analyse any ‘saved’ policies, together with the emerging plan and the raft of detailed assessments which now have to be prepared in order to produce a DPD.
- c. In addition, the local planning authority is likely to have published **Supplementary Planning Documents** as part of the **Local Development Framework**, which will also include the **Statement of Community Involvement**. These Supplementary Planning Documents can attract considerable weight.
- d. At national level there will be one or (more commonly) more **Planning Policy Statements (“PPS”)** that will need to be considered. Although not part of the development plan, and therefore strictly subservient to it, this is the policy of the decision-maker on appeal and in practice is thus likely to trump the development plan if the latter is out of step (see e.g. what is said in PPS3 in this respect).
- e. In addition, there are some PPS which have their own **accompanying guidance notes (e.g. PPS25 Good Practice Guide)**. These can go into considerable detail as to the application of the policy in the PPS to particular factual circumstances.
- f. Then there are **Departmental Circulars**. These cover both policy considerations relevant to the merits of development control decisions (e.g. the conditions circular) and procedural matters (e.g. the costs circular).



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- g. All of this must be read subject to any “**Dear Chief Planning Officer**” letters, which can be used to change guidance (see e.g. the letter dealing with *Grampian* conditions).
 - h. Now there are also **PINS Guidance Notes** intended for use by the general public. These are mainly procedural, but PINS has issued its own list of model conditions to supplement those in Circular 11/95.
 - i. PINS also provides detailed advice for Inspectors in the **Inspector’s Handbook** on matters going to the merits of development control decisions, such as design. This advice is now publicly available, and for any appellant it must be worth knowing what advice the Inspector will have received on these issues.
 - j. Regard should also be had to **DCLG advice notes to PINS** on the approach to certain issues, e.g. demonstrating a five year supply of deliverable sites.
 - k. In addition, there is **written guidance published by English Heritage** and **CABE** concerning matters within their respective remits. As bodies charged with advising the Secretary of State on these matters, their views must also be taken into account and are likely to be afforded considerable weight. Some of this guidance, such as ‘By Design’ is issued jointly with DCLG and is officially endorsed (not least in the Inspector’s Handbook advice on Design).
5. In my view this proliferation of guidance and policy documents is regrettable, because it makes the development control system more complex and time-consuming to operate without having any obvious positive impact on the quality of decision-making. That is not to pass any comment on the content of the guidance or the wisdom of the policies, but rather to question whether it is sensible to spread the advice over quite so many separate documents. It is unfortunate that the recent reforms have tended to accelerate this trend rather than seeking to reverse it.

Tactics and practical issues

Securing the client's preferred mode of appeal

6. One of the more controversial reforms to the appeal system is that now the final say as to the mode of appeal lies with the Secretary of State, or with the Planning Inspectorate on his behalf. Experience and anecdotal evidence suggests that increasingly the Planning Inspectorate is steering appeals towards the less formal modes of appeal. In my experience there is evidence of a clear readiness to refuse to accede to requests for a public inquiry, even in cases which plainly satisfy the published criteria.
7. The criteria themselves are perfectly sensible. The problem arises when decisions are taken which simply do not appear be reconcilable with those criteria. I am aware of a number of recent appeals where requests for a public inquiry were rejected even though:
 - a. evidence had to be given by a number of expert witnesses on each side;
 - b. material facts and matters of expert opinion were keenly disputed by the parties and could only sensibly be resolved through cross-examination;
 - c. the appellant (and in some cases the LPA) had instructed counsel to appear to present the case;
 - d. legal issues arose; and
 - e. the case was likely to take at least two days to hear.
8. By way of example, I recently appeared on behalf of an appellant in an informal hearing lasting two (extended) days where all three sides appeared together with expert witnesses (two for the LPA, three for the appellant and one for the local residents) and an entire day was spent trying to debate the differences in professional opinion between the two transportation witness without the structure and discipline provided by the formal inquiry process. At different points before and during the Hearing the appellant, the local planning authority and local residents

made separate complaints about the fairness of the procedure. Nevertheless, both PINS - in advance of the hearing - and the Inspector on the day strongly resisted the appellant's requests that the appeal be dealt with by way of an inquiry, even though those requests were supported by detailed representations and dark references to the Administrative Court.

9. When such decisions are made – and they do not appear to be isolated instances – they can give rise to a justifiable sense of grievance on the part of the disappointed appellant. It is not a “customer focussed” approach, in any normal sense, and in some cases can offend against the principles of fairness.

Why does it matter?

10. There are perhaps five main reasons why mode of appeal matters.
 - a. Firstly, the statistics published by PINS show that the success rates for appellants vary significantly depending on mode of appeal. When one examines the statistics for the period 2005-2009, a clear pattern emerges whereby the percentage of appeals allowed increases with the degree of formality of the procedure adopted.
 - i. For the written representations procedure, the success rate was 32-34%.
 - ii. For Hearings, the success rate was 36-39%.
 - iii. For Inquiries, the success rate was 42-54%.

That statistical picture is also reflected in my own experience; an inquiry will generally afford the appellant the greatest chance of securing a successful outcome.

- b. Secondly, the less formal procedures provide only a limited opportunity for detailed scrutiny of the other side's case. That may be one of the reasons for the statistical difference in success rates.

- c. Thirdly, I have found that the risk that the Inspector will make a challengeable error increases as the degree of procedural formality decreases. There are a number of obvious reasons why that might be. In an inquiry the Inspector normally has the benefit of experienced advocates on either side to identify and clarify the key points in dispute, including any potential legal issues. That is not the case with written representations or hearings. In written representations cases it is harder for the Inspector to seek and obtain clarification as to the nature and detail of the parties' cases. It is correspondingly more likely that points will be overlooked and/or misunderstood. This point is reflected in what was said by Pill LJ in *Dyason v. SSE* (1998) 75 P&CR 506 at 512:

“It is clear that at a hearing there is to be no formal cross-examination and that a hearing is the suitable procedure where “there is no likelihood that formal cross-examination will be needed to test the opposing cases”. The intention is to make the procedure “less daunting for unrepresented parties”. It is intended to “eliminate or reduce the formalities of the traditional local inquiry”. Planning permission having been refused, conflicting propositions and evidence will often be placed before an inspector on appeal. Whatever procedure is followed, the strength of a case can be determined only on an understanding of that case and by testing it with reference to propositions in the opposing case. At a public local inquiry the Inspector, in performing that task, usually has the benefit of cross-examination on behalf of the other party. If cross-examination disappears, the need to examine propositions in that way does not disappear with it. Further, the statutory right to be heard is nullified unless, in some way, the strength of what one party says is not only listened to by the tribunal but is assessed for its own worth and in relation to opposing contentions.

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”, that

the need for such consideration is forgotten. The danger is that the “more relaxed” atmosphere 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.”

- d. Fourth, the Hearings procedure affords no opportunity for any written response to the evidence relied on by the other side in its Hearing Statement. Whilst the guidance should not allow new evidence to be introduced in the Hearing Statements – hence the absence of any opportunity for a written response – in practice I have found that PINS does not always enforce compliance. Hence an appellant or a local planning authority can be faced with new expert reports and new factual evidence with no opportunity for a written response and limited opportunity to provide evidence in rebuttal at the Hearing itself. In those circumstances there could be strong grounds for arguing that the procedure is unfair. One of the “fundamental rights accorded to [an appellant] by the rules of natural justice or fairness” is a reasonable opportunity of learning what is alleged against him and of putting his own case to answer it (per Lord Diplock in *O’Reilly v. Mackman* [1983] 1 AC 237 at 279F-G). Sadly, my recent experience suggests that PINS is insensitive to such points, and it is only a matter of time before this falls to be tested in the courts.
- e. Fifth, I find that there is a greater risk that an unsuccessful client will be unhappy and feel frustrated if his appeal is rejected without having had all of the issues thrashed out in an inquiry. Whilst the absence of an opportunity to cross-examine the other side may not render the process unfair in any strict legal sense, many clients nevertheless perceive that they have not had a fair crack of the whip if the opposing evidence is not tested in this way.

Tactics for securing an inquiry

11. Although it is no longer possible to insist on an inquiry, there are certain practical steps that can be taken to make it more likely that one will be held:
- a. If there is any real possibility that an inquiry may be necessary, ask for one at the stage the appeal is lodged. Where the position is initially less clear cut, and a less formal procedure is requested, it is much harder subsequently to change tack and to persuade PINS to reach a different view.
 - b. Take particular care when completing the appeal form so as fully to articulate the reasons why an inquiry is appropriate having regard to the published criteria. Given that it will normally have been necessary to identify and instruct counsel by this stage in any event (see below), it would be as well to involve them in this drafting exercise – particularly in identifying why cross-examination and legal submissions are needed.
 - c. Don't automatically take 'no' for an answer. If PINS refuses your request, it must give reasons for doing so. I have found that many clients choose this moment to instruct counsel to draft a suitably stern letter to PINS explaining why its decision is wrong and/or unlawful. I am aware of a number of cases where that has proved to be successful, but it is not universally so.

Challenging a decision by PINS

12. If PINS has proved impervious to reason, and continues to refuse to hold an Inquiry, what are the remaining options?
13. A decision by PINS not to determine an appeal by way of an inquiry is not caught by the ouster clause in section 284(1) of the 1990 Act. The Court of Appeal has held that subsection (3)(a) and (b) of section 284 is confined to decisions taken in the disposal of the application or appeal, and in coming to a final decision on it (*Co-operative Retail Services Ltd. v. Secretary of State for the Environment* [1980] 1 WLR 271). A legal challenge may therefore be made to such a decision by way of judicial review, and it is not necessary to wait for the final outcome



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of the appeal and then challenge (if necessary) under section 288 or 289 as the case may be. That is not to say that an application for judicial review will necessarily be the right response, even if the decision is potentially unlawful. The following points would need to be considered carefully:

- a. If there is to be a Hearing, it may be better to seek to persuade the Inspector on the day that he or she should exercise their own discretion as to mode of procedure and deal with the appeal by way of a public inquiry. The decision on mode of appeal will not have involved the Inspector who will determine the appeal. By the first day, he or she will have had a better opportunity to read into the papers and reach an informed judgment on the appropriate procedure. It is notable that the ability of the Inspector to reach his own view on such procedural matters was one of the factors relied upon by Stephenson LJ in the *Co-operative Retail* case for rejecting a challenge to a decision not to adjourn a forthcoming inquiry. It was said that:

“If I thought that they would have no opportunity of pressing those objections but would be bound to do the best they could without any possibility of a further adjournment being granted, I might feel able to take the view that natural justice was being breached by the hard line taken by the Secretary of State. But I am not satisfied on the material we have that it would not be possible for all the parties to put adequately before the inspector, at any rate before the end of the inquiry, the objections which they wish to put before him, and I am by no means satisfied that if they were to try to persuade the inspector to grant an adjournment, their attempts would necessarily be defeated” (276E-G).

- b. If such an application were successful, it would be likely to give rise to the need for an adjournment, with all the delay and associated cost, but in many cases that will be the lesser of the two evils.

- c. If the application before the Inspector is rejected, the disappointed applicant could seek to have the inquiry adjourned to enable that decision to be challenged by way of judicial review.
 - d. Alternatively, it would be possible to continue – under protest – on the basis that an application for judicial review should only be made as a last resort, and if the appeal is determined in your favour the complaint would be academic. If the appeal is not then determined in your favour, a statutory challenge could be brought on the grounds of procedural unfairness (see e.g. *Performance Cars Ltd. v. Secretary of State for the Environment* (1977) 34 P&CR 92). Although on one view this is the least appealing of the available options, because the Inspector may well resent having a metaphorical gun held to his head when reaching his decision, I have found that the fear of challenge can lead some Inspectors to adopt a much more accommodating view when dealing with the introduction of new evidence by a disappointed appellant.
14. The choice between these various options will need to be made having regard to matters such as the strength of the client’s case on the underlying appeal, the length of time available before the Hearing takes place, and the view reached about the prospects of the Inspector reaching a different view to the one previously reached by PINS.
15. It will also obviously be necessary to give careful consideration to the likelihood of the High Court overturning the decision. As a general proposition, a procedural decision as to mode of appeal will normally be very difficult to challenge. Unless there is some clear error in the decision, or procedural unfairness resulting from it, the Administrative Court will instinctively be reluctant to overturn such a decision. I suspect it will only be in a small minority of cases that there will be any realistic prospect of successful challenge. Having said that, if there is a breach of the rules of natural justice, the courts will normally adopt a strict approach (see e.g. *Performance Cars*).

The need for, and implications of, ‘front-loading’

16. The thrust of the new PINS guidance is to require a great deal of additional work to be done by applicants and local planning authorities before the application is determined. As far as I am aware this has not been reflected in any adjustment in the target periods for applications for planning permission to be determined, a source of frustration for some local planning authorities.

Supporting material to be submitted with the application.

17. PINS 01/2009 states that the evidence relied on by the applicant during the consideration of the application by the local planning authority should be capable of forming the basis for an appeal (paragraph 1.10.2). That is reflected in PINS 10/2009 on the introduction of new evidence at appeal (see below).
18. The practical implication is that applicants should no longer be able to afford to rely on their ability to submit additional expert evidence to counter the reasons for refusal in the event that the application is rejected. Any technical studies, factual information or expressions of expert opinion that might need to be relied upon should be submitted before the application is determined. This calls for more extensive and detailed pre-application discussions to flush out – so far as possible – potential areas of controversy (i.e. potential reasons for refusal) which will need to be addressed by technical and other evidence when the application is submitted.
19. In general terms anything that encourages more effective pre-application consultation is to be welcomed. However, it is important that a balance is struck so that the time and expense involved in making an application for planning permission does not become over-burdensome.

Evidence to justify reasons for refusal

20. The burden on local planning authorities and their officers should be increased correspondingly. If there is to be a dispute over any matter which will depend on technical studies, expert opinion or factual information, the local planning authority will need to have any such evidence that it wishes to rely on available at the time it reaches a decision. Where technical issues arise which go beyond the expertise of the local planning authority's own

officers, it will no longer be safe to wait and see if there is to be an appeal before commissioning reports from external consultants.

21. The approach is the same in cases where members overturn officer's recommendations (PINS 10/2009 paragraph 5). If officers consider it likely that members may not accept their recommendation, it may be prudent to ensure that they understand that the new procedural guidance does not permit them to cast about for evidence to justify their decision after the event. If they want to reject their officers' advice, they will need to be confident that the evidence to justify that decision is already before them.
22. If this results in a greater degree of care by members when considering the advice of their officers and in particular in dealing with technical issues then it is to be welcomed. Again, however, a certain degree of flexibility is needed. If for example members disagree with their officer's view of the design merits of an application – a matter calling for the exercise of subjective judgment – it would be surprising if they were not entitled to engage a suitably qualified architectural witness to articulate and support their view, even though strictly speaking this would be new evidence. The alternative might be to defer determination to allow an expert report to be commissioned, but I am not sure that the additional delay involved is something to be desired.

Making arrangements before appealing

23. In cases where an inquiry is sought, PINS 01/2009 requires the following matters to be established by the appellant prior to submitting an appeal:
 - a. dates for the inquiry suitable to both parties;
 - b. number of witnesses for the appellant and topics;
 - c. overall time-estimates for the appellant's case; and
 - d. whether the appellant will be legally represented.

24. In practical terms, that requires the appellant to have instructed witnesses and counsel, and in most cases to have taken counsel's advice, before lodging an appeal.
25. The local planning authority will need to satisfy the equivalent requirements when it submits its questionnaire. However, because of the need to agree suitable dates before the appeal is lodged, it is likely to be necessary to instruct counsel and identify witnesses at that earlier stage so as to ensure their availability.

Introducing new evidence at appeal

What is new evidence?

26. 'New' evidence is evidence that was not before the local planning authority when it made its decision. "Evidence" is defined in PINS 10/2009 as "the raw material upon which the decision maker exercises planning judgment on the matters arising in the case. This may comprise, for example, technical studies, alternative site assessments, expert opinion or a range of factual information". Any such material should therefore be put before the local planning authority before the application is determined.
27. Whereas traditionally parties have felt free to commission expert evidence after the decision on an application for planning permission has been made, that is not how the reformed system is intended to operate. There is nothing to prevent or discourage parties from calling expert witnesses to explain their opinions at inquiry, but, save for certain exceptions, this should not involve new "evidence".

When is new evidence likely to be accepted?

28. The thrust of the guidance in PINS 10/2009 is that new evidence is only likely to be accepted where there has been a material change in circumstances since the local planning authority's decision (see paragraph 3).

29. It will not be sufficient for a local planning authority to rely on the fact that the decision involved overturning the officer's recommendation. In those circumstances members should satisfy themselves that the necessary material exists to justify their decision (PINS 10/2009 paragraph 5). In my experience, however, enforcement of this guidance is unpredictable, and I am aware of cases where local planning authorities have been allowed to produce large quantities of new expert evidence at appeal without any adverse comment from the Inspectorate.
30. If there has not been a material change in circumstances since the local planning authority's decision, the need and justification for any new evidence will need to be carefully articulated. Much will depend on the facts of the individual case, but I would suggest adopting an approach which explains clearly to the Inspector why a particular piece of evidence was not provided before the decision, why it is necessary for the Inspector to have that evidence now in order to ensure that the decision is soundly based, and why no unfairness would result from its admission.
31. Where new evidence does need to be introduced this should be signalled in the grounds of appeal (appellant) or the questionnaire (local planning authority) (PINS 10/2009, paragraph 7). In practice, this will tend to require the parties to obtain advice on evidence much earlier than has previously been the case. It should also be identified and agreed in the Statement of Common Ground (PINS 10/2009, paragraph 8). The guidance is silent on precisely what will happen if the need for new evidence is not agreed, though presumably the Inspector would then need to make a decision on whether such evidence is admissible.

Avoiding ambush and how to respond to new evidence from the other side

32. If the opposing party has not signalled an intention to produce new evidence in its grounds of appeal or questionnaire (as the case may be), they should be invited to agree in the Statement

of Common Ground that no new evidence is required. If they are unwilling to agree to this, the guidance indicates that any new evidence they wish to produce should be identified. Failure to identify the new evidence at this stage could be regarded as unreasonable behaviour.

33. A pro-active approach should thus help to flush out an intention to rely on new evidence at an early stage, and thus reduce the chances of ambush.
34. If new evidence is produced by the opposing party without warning, then (depending on its contents and implications) there will be broadly three options available:
 - a. Accept the evidence if it is either un-contentious and/or if no further evidence would be needed to respond to it.
 - b. Invite the Inspectorate to allow your client a fair opportunity to submit evidence in rebuttal.
 - c. Invite the Inspectorate to reject the new evidence.
35. Options b. and c. can be presented in the alternative, the essential point being that fairness requires that you should have an opportunity to know the case against you and to respond to it.

Making amendments to the scheme to overcome concerns

36. The move towards front-loading is also reflected in the new guidance on making amendments to the scheme (PINS Good practice Advice Note: Accepting amendments to schemes at appeal (PINS 09/2009)). Although decisions on whether to accept amendments are still to be made applying the familiar *Wheatcroft* principles, the focus is on ensuring that the scheme being considered at appeal is “essentially what was considered by the local planning authority”. An appeal is not to be regarded as providing a chance to amend the scheme in order to overcome reasons for refusal (paragraph 3).



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37. Where amendments are required, they are to be made as part of constructive dialogue before determination (paragraph 9). However, where the appeal is against non-determination or refusal against officer recommendation, and hence there is no chance for pre-determination changes, these will be assessed on appeal on *Wheatcroft* grounds (10 and 11).
38. Where consultation on amendments is required, this should be done using the free service for re-submitted applications and not through the appeal system (12).
39. Where constructive dialogue does not exist, the appellant can carry out consultation itself, with reference to the local planning authority's SCI. Particular care will be needed in such cases to ensure the consultation is adequate (13). Responses to such consultation are to be sent to the LPA and 'bundled' to PINS (15).
40. It is doubtful whether this will make the development control system more efficient, and I suspect that it will simply make it more bureaucratic. Moreover, given that the *Wheatcroft* test already serves to prevent changes being made where that would give rise to unfairness, I find it hard to see what purpose is served by this particular reform.

The Statement of Common Ground

41. The Statement of Common Ground can be an important document, closing off potential objections and issues, and laying the foundations for lines of cross-examination in due course. The process of agreeing its contents therefore requires a keen tactical awareness of the issues in a case and an understanding of the potential significance of agreeing to certain matters.

Timing

42. Under the new procedural guidance, Statements of Common Ground are now to be agreed within six weeks of the appeal start date (PINS 01/2009, paragraph 6.6.2).
43. Whereas previously the task of agreeing the Statement of Common Ground came after the parties had provided their Statements of Case, which made clear to all of those involved where the dividing lines were drawn, that is no longer the position. In the absence of Statements of Case, and in advance of the process of consideration which goes into their production, I have found parties to be more cautious about agreeing what is and is not in issue so as to avoid giving points away and restricting their freedom of manoeuvre.
44. It is too early to be certain, but my initial view is that the Statement of Common Ground is likely to be a more useful and detailed document if it is produced after Statements of Case, and in parallel with the process of producing proofs of evidence.

Content

45. The tendency towards caution has been exacerbated by a change in the approach to the contents of the Statement of Common Ground. Whereas the previous guidance in Circular 05/2000 Annex 3(ii) was specific as to what a Statement of Common Ground should contain – facts not opinion or comment, and statistical data, PINS 01/2009 is far more general. Experience suggests this is leading to an approach whereby the appellant will often throw in much of its positive case, forcing the local planning authority to spend many hours (and thousands of pounds in lawyers' fees) weeding out passages where comment and opinion are introduced, or where the language is deliberately slanted to be helpful to the appellant's case. Every time a passage is removed, its removal is then challenged by the appellants who demand detailed justification, and an exchange of e-mails ensues as to whether the Council's refusal to accept an individual point is reasonable. I have found that this can all too quickly descend into cross-examination by e-mail, with counsel advising on every question and answer - an entirely disproportionate and unproductive exercise, and a significant waste of public funds.
46. This takes place against the background of a stern warning that any delay arising from a failure to agree the Statement of Common Ground can result in an award of costs (PINS 01/2009

paragraph 6.6.3). What is unclear is the basis for such an award – would it be unreasonable if the delay was caused by the parties disagreeing over the contents, or only if a party failed to engage in the process at all? Time and experience will tell.

Tactics

47. In the light of the changes that have been made, how should participants seek to extract the most advantage from the process of agreeing the Statement of Common Ground? I would offer the following general suggestions:
- a. There is a significant advantage in producing the first draft of the document. Most negotiations over the statement of common ground focus on amendments to the text first circulated – it takes more effort to seek to undertake a wholesale re-drafting exercise. The structure, tone and basic content will therefore tend to be set by the party that takes the lead.
 - b. Don't allow yourself to be worn-down or brow-beaten into accepting one-sided content. If it is not agreed it does not go in.
 - c. Start from the lowest common-denominator and work up from there. The guidance requires a statement of common ground to be submitted within 6 weeks of the starting date. It does not prohibit the agreement of further common ground in due course, and I find that most inspectors welcome the agreement of further common ground throughout the process.

Conclusions

48. The purpose of the recent reforms is to make the planning appeal service “more proportionate, customer-focused and efficient, while maintaining the principles of fairness, openness and impartiality” (PINS 01/2009, Annexe A). That will only happen if it does not lead to the



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application process becoming yet more bureaucratic and burdensome, if participants in the process feel that they have had a fair crack of the whip, and if the new guidance is adhered to by the Planning Inspectorate on a consistent basis. So far, the indications are not encouraging.

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ANNEX**Overview of the main recent PINS guidance**PINS Procedural Guidance (PINS 01/2009)

1. PINS 01/2009 replaces DETR Circular 05/2000: Planning Appeals: Procedures (Including Inquiries into Called-In Planning Applications). Its purpose is to assist in making the appeal process “*more proportionate, customer focussed and efficient whilst maintaining the principles of fairness, openness and impartiality*” (1.1.2, see also Ministerial Statement at Annexe A to the Guidance). A number of unremarkable “*core principles*” are identified which are said to underpin the operation of a well functioning appeal system (1.4.2).
2. The main innovations in the guidance are as follows.
 - a. Grounds of appeal should grapple with the reasons of refusal and respond directly to them (1.7.1).
 - b. Hearing/Inquiry dates are to be agreed with the LPA prior to submitting an appeal and included on appeal form (1.8.1).
 - c. Where an inquiry is sought, the appeal form should also include number of witnesses, topics, overall time-estimates and whether legal representation (1.8.1).
 - d. New matters, which have not been considered by the LPA at the application stage, should be rare. The evidence relied on by the main parties during the consideration of the application should be capable of forming the basis for an appeal (1.10.2).
 - e. Conditions are to be suggested with the appeal documents (1.12.1).



- f. Planning obligations are to be submitted with the appeal or 10 days before the hearing/inquiry, or 9 weeks after start date in written representations cases (1.12.2).
- g. Expert evidence is now to include an appropriate form of endorsement (1.13.2).
- h. S.319A TCPA 1990 gives the Secretary of State the power to determine the appeal procedure. This is to be determined by reference to criteria in Annexe C.
 - i. Criteria for written representations
 - The issues can clearly be understood from the appeal documents together with a site inspection.
 - The Inspector will not need to test the evidence or clarify the issues through questioning.
 - No EIA is required, or the EIA is not in dispute.
 - ii. Criteria for a Hearing
 - The criteria for written representation are not met because questions need to be asked about, e.g. status of the appellant (gypsy etc.), the need for the development or the personal circumstances of the appellant are at issue.
 - There is no need for cross-examination; and
 - The issues are straightforward; and
 - Legal submissions are not required; and
 - The case is unlikely to last more than one day.
 - iii. Criteria for an Inquiry
 - The criteria for written representations and hearings are not met because the evidence needs to be tested.
 - The issues are complex and expert evidence is needed; and/or



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- The appellant is likely to need to be represented by an advocate 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.
- iv. PINS will give reasons for its choice where it disagrees with the preference of either main party (2.1.6). The determination can be varied at any point before decision on appeal is made (2.1.6). The exercise of the power to determine will be monitored by the Advisory Panel on Standards for the Planning Inspectorate (“APOS”). APOS reports to the Secretary of State, but does not comment on the merits of individual cases. It is therefore of limited if any utility as a means to challenging decisions on individual cases whilst they are in process.
- i. Costs awards are now available in written representations cases (2.1.8).
- j. If the local planning authority agrees that an inquiry is appropriate, it will need to identify the number of witnesses, topics, overall length of inquiry and whether there will be legal representation (2.3.3).
- k. The Householder Appeals Service is introduced – an expedited written representations procedure for appeals against refusals on householder applications (as defined in the GDPO and the Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009). This is an electronic service which proceeds on the basis of the material before the local planning authority when it made its decision. PINS only looks at material with questionnaire and the full grounds of appeal. The grounds of appeal therefore need to be clear and comprehensive (3.2.3). Additional third party comments not provided for (3.4.1). No further representations unless Inspector requests further information. Costs awards are available. There is a 12 week time limit for making an appeal.
- l. Under the Standard Written Representations Procedure, the local planning authority’s case should be sufficiently covered by background documents, the officer’s report, or

the full committee minute where against officer recommendation (4.3.1). If the local planning authority does not wish to treat the questionnaire and accompanying documents as its representations, further written representations can be provided within 6 weeks of the start date (4.3.2). The guidance does not indicate that new evidence should be introduced at this stage. Likewise, the appellant's case can either be set out in the appeal form and accompanying documents or in written representations submitted on the same timetable (4.4.2). There is an opportunity to comment on the other party's written representations 3 weeks later (4.6.1).

- m. Under the Hearings Procedure, Hearing Statements are to be provided within 6 weeks of the start date (5.4.1). These should be “concise and summarise the material already supplied by the appellant in the grounds of appeal ... and the local planning authority in the material they have supplied with the questionnaire” (emphasis added). No opportunity is provided for a written response to the other side's Hearing Statement, and that is presumably because it is not anticipated that the Hearing Statement will contain any new evidence.
- n. Under the Inquiries Procedure, the following innovations should be noted:
 - i. Bespoke timetabling where inquiry expected to last 8 days or more (6.3.1 and see below).
 - ii. Statement of common ground to be agreed within 6 weeks of the appeal's start date (6.6.2). Practical problems and tactics. Delay arising from failure to agree SOCG can result in an award of costs (6.6.3). Basis for award? SoCG should inform statements of case (6.7.1).
 - iii. Proofs are to be concise, aiming for under 3,000 words (6.8.4).

PINS Procedural Guidance: Enforcement appeals and determination of appeal procedure (PINS 02/2009)

3. The main points to note are as follows:
- a. ODPM Circular 02/02: Enforcement Appeals Procedure is to remain in force save for the determination of the appeals procedure (1.3).
 - b. The determination of the procedure is to be made by reference to the criteria at Annex A. The procedure will be determined within 7 working days of receipt of a valid appeal (2.6) and reasons will be given by PINS where the determination is not in accordance with the wishes of either of the main parties (2.7). The determination can be varied at any point before a decision on the appeal is made (2.7) and the exercise of this power is to be monitored by APOS.
 - i. Criteria for written representations:
 - Grounds easily understood from appeal documents and site inspection.
 - No ground (d) appeal.
 - No need for the Inspector to test or clarify the evidence.
 - No EIA required or in dispute.
 - Breach/requirements clear.
 - No legal issues.
 - ii. Criteria for Hearing:
 - Appellant's status in issue (e.g. gypsy)
 - Need for development in issue (e.g. agricultural worker's dwelling).
 - Personal circumstances of the appellant at issue.
 - No need to cross-examine.
 - Issues straightforward and no need for legal submissions.
 - Not likely to take more than one day.
 - iii. Criteria for Inquiry:

- Criteria for written representations/hearing are not met.
- Issues complex and likely to need expert evidence.
- Likely to need to be represented by an advocate because material facts and/or matters of expert opinion are in dispute and evidence needs to be tested in cross-examination.
- Legal submissions need to be made.
- Evidence needs to be given on oath (e.g. on ground (d) appeal).
- Breach/requirements of notice are unusual and particularly contentious.

PINS Good practice Advice Note: Accepting amendments to schemes at appeal (PINS 09/2009)

4. The main points to note are as follows.
- a. Decisions on whether to accept amendments are still to be made applying the familiar *Wheatcroft* principles (1).
 - b. The purpose of the guidance is to explain how that will be done in the light of the “core principles” in 1.4.2 of the Procedural Guidance (2).
 - c. The focus is on ensuring that the scheme being considered at appeal is “essentially what was considered by the local planning authority”. An appeal is not to be regarded as providing a chance to amend the scheme in order to overcome reasons for refusal (3).
 - d. Considering the issue of fairness to third parties is fact-sensitive, and the stage the amendment is sought will usually be relevant, together with reasons for seeking amendment (6). There is an increased emphasis on community engagement ((7) and (8)).



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- e. Where amendments are required, they are to be made as part of constructive dialogue before determination (9).
- f. However, where the appeal is against non-determination or refusal against officer recommendation, and hence there is no chance for pre-determination changes, these will be assessed on appeal on *Wheatcroft* grounds (10 and 11).
- g. Where consultation on amendments is required, this should be done using the free service for re-submitted applications and not through the appeal system (12).
- h. Where constructive dialogue does not exist, the appellant can carry out consultation itself, with reference to the local planning authority's SCI. Particular care will be needed in such cases to ensure the consultation is adequate (13). Responses to such consultation are to be sent to the LPA and 'bundled' to PINS (15).
- i. A warning is given on the costs implications if the advice is not followed (16).

PINS Good Practice Advice Note: Introduction of new evidence/material at appeal (PINS 10/2009)

5. The main points to note are as follows:

- a. Entirely new evidence or new matters should not be raised as a matter of course at appeal stage when such material could have been considered at the time of the application (1).
 - i. "Evidence" is defined as "the raw material upon which the decision maker exercises planning judgment on the matters arising in the case. This may comprise, for example, technical studies, alternative site assessments, expert opinion or a range of factual information".



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- ii. “Matters” are defined as “the issues or topics which are raised in the consideration of a case. For example impact on highway safety is an issue, nature conservation is a topic”.

- b. All relevant material should be sought by and provided to the LPA before it reaches a decision. The decision should not raise wholly unexpected issues requiring the production of new evidence (2).

- c. Absent a material change of circumstances, new issues and wholly new evidence should not need to be introduced at appeal. The parties should be confident of their cases on the material available at the time of the decision (3).

- d. Even in cases where members overturn officer’s recommendations, members should be clear that they have the evidence to back their decision should the matter go to appeal (5).

- e. Challenges to data or assumptions in any technical evidence should be discussed by the parties prior to the local planning authority’s decision (6).

- f. If, exceptionally, new matters or new evidence need to be introduced, this should be signalled in the grounds of appeal (appellant) or questionnaire (LPA) (7).

- g. In inquiries, any new evidence still to be produced should be identified and agreed in the statement of common ground (8).

- h. There is a warning as to the costs consequences of failing to follow the guidance (10).