

PRESENTATION TO COUNCILS

THE ROLE OF THE PLANNING APPEALS COMMISSION

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1. Content of Presentation

The presentation provides information for Councillors on the work of the Planning Appeals Commission. The areas to be covered are as follows:

- ❖ The background to the Commission and our functions under planning and other legislation;
- ❖ general information about the planning appeals process including the types of appeals, appeal procedures, how decisions are made and the award of costs in appeals;
- ❖ the Commission's role in regionally significant and called in applications; and
- ❖ the Commission's role in development plans.

2. Background on the Planning Appeals Commission

The Commission is an Independent body and is not part of any government department or agency. It was originally established through the 1972 Planning Order and the 1991 Order and 2011 Act have continued to make provision for it. The Commission is a technical tribunal and its role is to adjudicate on disputes and provide advice to government departments on a wide range of planning and environmental matters. There are appeal bodies similar to the PAC in the other jurisdictions in the UK and Ireland - An Bord Pleanála in the Republic, the Planning Inspectorate in England and Wales and the Department for Planning and Environmental appeals in Scotland.

The Planning Order requires the Commission to have a Chief Commissioner and Deputy Chief Commissioner but otherwise it is for the sponsor department, Office of the First and Deputy First Ministers (OFMDFM) to decide the number of Commissioners. It is a relatively small organisation comprising 18 Commissioners and 15 administrative staff. Commissioners are public appointees appointed by the First and deputy First Ministers. With one exception all Commissioners are town planners from a wide range of backgrounds including law, geography, economics and environmental science. The remaining Commissioner is an architect who advises on many of the design issues before the Commission. Administrative staff are civil servants provided by OFMDFM but they work under the direction of and are ultimately responsible to the Chief Commissioner.

The role of OFMDFM as sponsor department is to decide the number of Commissioners, the remuneration and allowances to be paid to commissioners and to provide support staff. It is emphasised that its role is purely sponsorship of the Commissions - OFMDFM has no role in deciding appeals or providing advice or direction to the Commission about any of its functions. A Memorandum of Understanding sets out the respective roles and responsibilities and is available on the publications page of the Commission's website – www.pacni.gov.uk .

3 The Functions of the Planning Appeals Commission

The Commission has wide ranging functions across various pieces of legislation. There are over 80 functions under planning and other legislation – almost 40 of these arise from the Planning Order but there are others in relation to such areas as environmental impact assessment, pollution, waste, greenhouse gas emissions, to name but a few. Members of PAC are also members of the Water Appeals Commission or WAC which has over 50 functions under a range of environmental legislation including water, drainage, fisheries and marine licensing.

The Commission makes decisions in some cases and reports to Departments with recommendations in other cases. Its decision making function relates to appeals against a wide range of planning and environmental matters. Decisions at first instance are currently made by government departments but after 1st April, many of those decisions will be made by Councils. The Commission's role is to review the decision made at first instance and in these cases the Commission makes final decision.

Decisions can be made by a single Commissioner or by a group of Commissioners. Where a group decision is made there must be a panel of at least 4 Commissioners but in some cases decisions will be taken by the Commission as a body. Decisions are always set out in writing and they address the main issues raised in the appeal, setting out the Commissioner's views on the main issues in contention between the parties. The Commission does not have any power to review its decisions and challenges can only be made on judicial review to the High Court.

In many cases the Commission's role is to conduct public inquiries, independent examinations and hearings and report to government Departments with advice on how the case should be decided. This is referred to as its hear and report function and currently arises mostly in major planning applications under Article 31 of the Planning Order and to consideration of objections to development plans. After 1st April 2015, the hear and report function will apply to planning applications of regional significance under section 26 of the Act, 'called in' applications under section 29 and local development plan examinations under section 10.

In all of the above cases, the Commission will continue to report to DOE as it has done in the past. The report can be made by a single Commissioner or by a panel of Commissioners but, while the Commission provides written advice and recommendations to Departments, the Department makes the final decision after consideration of the Commissioner's report.

4. Appeals

Over the past 3 years the Commission has determined an average of almost 400 planning appeals a year. The majority of these were against refusals of planning permission. Over the past year approximately 70% were against refusals of planning permission, 5% against non determination of planning applications and 16% against enforcement notices and refusal of lawful development certificates.

The 2011 Act reflects the previous planning legislation in that it allows for a right of appeal against just about any decision made or notice served by the Council. The most frequent appeals are in respect of refusal of or non determination of planning

applications. There is no right of appeal in cases that are called in to be determined by the Department.

Sections 58 and 60 of the 2011 Act set out the scope of appeals where an application is made to the Council. Appeals can be made in 3 circumstances:

- ❖ Where a permission or consent is **refused**;
- ❖ Where a permission or consent is **granted subject to conditions**; or
- ❖ Where the council does not issue its decision within a specified period - this is called a **non determination appeal**. The current period is 2 months or within such extended period as may be agreed between the council and the applicant.

The right of appeal lies only with the applicant. There is no third party right of appeal although third parties have the right to participate in the appeal process once the applicant exercises his or her right of appeal. The current period for lodging an appeal is 6 months but this will be reduced to 4 months from the date of notification of the decision under the 2011 Act. In the case of non-determination appeals the 4 month period starts after the 2 month period (or any mutually agreed extended period) has expired. The Commission has no discretion to extend the period. Appeals must be made in writing but can be submitted by post, in person or on line. The appeal fee is £126.

5. Appeal Procedures

A number of procedural guides which are available on the PAC website and can also be obtained from our offices on request. They provide detailed guidance on the processes followed by the Commission when an appeal is received.

All appeals are acknowledged and a reference number is provided. The planning authority is notified and background papers are requested. This is an important part of the process as it allows the Commission to check that it has a valid appeal. The type of documents requested at this stage are copies of the decision, proof of advertising, proof of payment of fee, copies of the professional planning officer's report and other documents that would be relevant to the decision such as the views of consultees. It is important that these documents are provided promptly as the appeal cannot be progressed without them. The Department is currently required to provide them within 14 days and it is expected that this timescale would also be met by the Councils.

As well as background papers, the Commission also asks for copies of any representations made in respect of the proposal. The Commission contacts anyone who has written to the planning authority to notify them about the appeal and offer them the opportunity to participate in the process. There is also a statutory requirement that we advertise the appeal and allow any other interested third parties to participate in the process

Appeals can be pursued either by the exchange of written evidence or by hearing. The type of procedure depends very much on the nature of the case and there is no correlation between the type of procedure chosen and the outcome of the appeal.

There is right to appear before and be heard by the Commission and if the appellant or the Council request a hearing the Commission will arrange for one to be conducted. This right does not extend to third parties who must follow the procedure chosen by the appellant or the Council.

The right of hearing differs from the situation in other jurisdictions – in England Wales and Scotland the appellate body decides the most appropriate method of deciding the appeal and in the republic the right of hearing does not include appearing before An Bord Pleanala; hearings are held at the discretion of the Bord.

In all cases, whether written or hearing, the parties are invited to provide a statement setting out their case which is exchanged in advance with the other parties. The Council's case at appeal will normally be presented by their planning officers but it may not be appropriate for the planning officer to represent the Council at appeal where the application has been decided by the Council against officer's recommendations. Individual Councils will have to decide who is to represent their case in these situations.

Hearings

Hearings can be either formal or informal. A **formal hearing** is appropriate for only the most complex cases where evidence is tested through cross examination of witnesses. The Commission has held only a few formal hearings in the past 5 years.

An **informal hearing** takes the form of a round table discussion led by the Commissioner. The Commissioner identifies the main issues and matters for discussion. No cross-examination is allowed but Commissioner has a duty to investigate any issue on which he or she requires further information. The purpose of the hearing is to enable the Commissioner to collect whatever information he or she requires to reach an informed and reasoned decision.

Hearings in the greater Belfast area are held in the Commission's offices in Park House, Great Victoria Street. Council premises are normally used outside Belfast but this matter is currently under review now that the Council will be the planning authority.

Written representations

There are 2 types of written representation appeals:

- ❖ with an accompanied site visit
- ❖ with a Commissioner's site visit when none of the parties are present.

The accompanied site visit allows the parties to point out various features on the ground or to emphasise particular viewpoints that they want the Commissioner to look at. It is not a forum to debate issues or an open air hearing. The Commissioner has the discretion to ask simple factual questions and may sometimes clarify non- site specific matters. Accompanied site visits are particularly helpful where access to land or buildings is difficult. All the parties to the appeal are expected to accompany the Commissioner in the interests of transparency. An unaccompanied site visit is appropriate in the majority of cases where the issues depend on judgement and Commissioners are very experienced in making their assessment of the physical features put forward by the parties in their evidence.

The Commissioner will always make an assessment on the basis of the evidence whether the written representations procedure is appropriate to the case. If they feel that a hearing is necessary, they will change the procedure and ask the parties to attend a hearing.

Irrespective of the procedure followed, the majority of decisions are made by a single Commissioner. Group decisions are normally reserved for particularly complex cases or cases where there is ambiguity in policy interpretation and the Commission as a body then determines the approach to be taken in order to ensure consistency in decision making. All decisions are made in writing.

6. Issues at Appeal

Section 59 introduces a new provision that wasn't in the previous Planning Order. It prevents any party raising a matter that was not before the Council at the time the decision was made. This provision is aimed at preventing the use of the appeals process as a mechanism for the last minute introduction of new or radically amended proposals or entirely new reasons for refusal. Such behaviour has had the effect of delaying the process as the Commission has always given the parties time to address the new issues to ensure fairness to all.

New matters can be raised in specific circumstances. These are if it can be demonstrated that the matter couldn't have been raised beforehand or that the failure to raise the matter was due to exceptional circumstances. It is important to note that the provisions of Section 59 do not interfere with the requirement to have regard to the development plan or any other material consideration in reaching a decision. It is likely that this new provision will be robustly tested and it will be for the Commission to decide on the basis of the individual circumstances of each case whether a matter is new and whether it should be allowed to be introduced.

7. Principles of the appellate system

As a tribunal, the Commission must follow the rules of Natural Justice in the conduct of its work– openness, fairness and impartiality;

- ❖ Openness means all proceedings are public and all information and papers provided to the Commission are made available to all parties. There are no private meetings, side conversations, back channels or hidden pressures. The Commission expects the parties to provide copies of all documents that could potentially assist in determining the appeal, even embarrassing material. Withholding papers could represent a breach of the other parties' human rights. It could also be considered unreasonable behaviour in the event of an application being made for costs.
- ❖ Fairness means that all parties have an equal right to participate, put their case and have their views properly considered. The Commissioner always checks at before closing a hearing that all the parties are satisfied that they have had an opportunity to put their case.

- ❖ Impartiality means that the Commissioner does not have a predisposition towards any one party's case. If a Commissioner had a previous involvement with a scheme or has a perceived personal or financial interest in the outcome of an appeal, he or she cannot be involved in decision making on that matter.

8 The Commission's approach to decision making

The Commission is not a planning authority – it does not make decisions at first instance, except in cases where the planning authority has failed to make a decision within a reasonable time scale. The Commission doesn't have a role in policy making – policy is a matter for the Department and the Councils. Its role is to apply policy within the evidential context of the case. Decisions are reached using judicial techniques but are administrative in nature. Commissioners apply expertise and judgment in weighing up the pros and cons of schemes.

As a public body, the Commission seeks to make the best possible decisions in the public interest. The public interest is a very broad term. For example, interests of acknowledged importance are identified in statute or published policy but these are not the only public interests to be considered - equity and consistency are also public interest issues, because they are essential to secure public confidence in the system.

The Commission's ability to decide appeals in the public interest is inhibited to an extent in that decisions are made within the evidential context presented. Decisions cannot be based on matters not raised before the Commissioner or on which the parties have not had an opportunity to comment. Commissioners have a duty to investigate an issue if they think the information is inadequate to enable them to reach sound conclusions on a key issue. This can be done either in writing or through oral proceedings when all parties would be given an opportunity to give their views.

9 The decision making process

The Commission's responsibilities in relation to decision making are the same as the Council's at first instance. Section 45 of the Act states that regard must be had to the local development plan, so far as material to the application, and to any other material consideration. Section 6(4) explains the meaning of 'regard' - it says that the determination must be made in accordance with the plan unless material considerations indicate otherwise. This is referred to as the 'plan led' system and differs from the 1991 Planning Order which placed the development plan and other material considerations on an equal footing.

Planning policy statements are material considerations. They cover a wide range of topics and most will remain in place until the Councils prepare their own local development plans. A draft strategic planning policy statement is currently being finalised and will set an overarching context for the preparation of development plans and the determination of planning applications. The draft document contains a presumption in favour of sustainable development.

Policy cannot cover every eventuality. The Commission is not required to follow policy slavishly but departure from policy requirements must be explained in the decision. Policy must also be correctly understood and applied.

Guidance is supplementary to policy and therefore carries less weight but in so far as it is a material consideration, Commissioners are required to have regard to it.

Depending on the proposal, a wide range of material considerations may arise, for example, the need for the project, its economic benefits, infrastructural considerations, conservation of the built and natural heritage to name but a few.

Commissioners are not experts in every technical area but rely on the parties to provide the relevant information in their evidence. The Commissioner's fundamental task is to weigh up the evidence from all parties in the context of law and policy, resolve any factual disputes, form a judgment on each of the main issues in contention and arrive at an overall conclusion.

The options are to allow or dismiss the appeal, reverse or vary any part of the decision or deal with the application as if it had been made to the Commission in the first instance. In practice these 'de-novo' powers are rarely used for the reason that the Department is the planning authority and the Commission's role is as an appellate body. The same principle will apply after April 2015. In exceptional cases where there is a clear matter of public interest these powers may still be invoked, for example, if a decision was made that failed to recognise that a proposal was in a conservation area. In such circumstances, the Commission would alert all the parties and provide them with an opportunity to comment before reaching its decision.

10. Other appeal types

In addition to planning appeals, there is a range of other decisions and consents for which the Councils will have responsibility and against which there is a right of appeal. There is also a right of appeal in some of these cases against a failure to take a decision within a specified period. These cover subjects such as:

- ❖ Notices requiring a planning application
- ❖ Listed Building Consent
- ❖ Conservation Area Consent
- ❖ Hazardous Substances
- ❖ Enforcement
- ❖ Trees
- ❖ Certificate of Lawfulness of Existing or Proposed Use or Development
- ❖ Minerals

Some of the requirements are different from planning appeals, particularly in relation to the timescale for lodging the appeal but in all cases there is a right of hearing.

11. Award of Costs

Section 205 of the 2011 Act makes provision for the first time for the Commission to award costs - this has been done for some time in other jurisdictions. Statistically, about 20% of hearing cases and 4% of written representation cases have applications for costs in the England and Wales. About 2/3 of the claims are against Councils and costs are awarded in about 10-12% of cases.

Unlike the Courts, costs awards do not necessarily follow the outcome in the appeal – they are not necessarily awarded against the losing party. The purpose of the costs regime is to provide redress where one party to an appeal has put another party to unnecessary expense because of unreasonable behavior. Examples of unreasonable behavior could be:

- ❖ A party not complying with procedures such as not turning up at a hearing or submitting late information;
- ❖ where the planning authority fails to produce evidence to substantiate its reasons for refusal;
- ❖ where the planning authority fails to have regard to government policy or its own policies;
- ❖ an appellant challenging a decision which is clearly contrary to policy and where very limited information of other material considerations is advanced;
- ❖ the planning authority taking a decision contrary to its professional officer's advice without reasonable planning grounds;

In order for a claim to be successful, the unreasonable behavior must have resulted in unnecessary expense to the other party. For example:

- ❖ Time and effort was expended on part of a case that shouldn't have had to be pursued;
- ❖ an appeal is withdrawn after the parties have prepared their evidence;
- ❖ a hearing is delayed without good reason.

Costs applications must be timely – normally a claim should accompany the statement of case for the appeal unless the alleged unreasonable behavior takes place at the appeal hearing or site visit. There are a few points to emphasise:

- ❖ Costs can be awarded in appeals covering all of the functions which I have already outlined;
- ❖ they can be awarded irrespective of the appeal procedure;
- ❖ they can be awarded in favour of and against any party to an appeal - this includes the appellant, the Council and any third party objectors and/or supporters (awards against 3rd parties are rare);
- ❖ applications for costs must come from the parties themselves – they are not initiated by the Commission;
- ❖ costs can be awarded in full or in part.

The Commission has issued draft guidance on costs awards. This is a consultation document which has been sent to the Councils and is also available on the PAC website.

12. Hear and report functions – Planning Applications

Hear and report functions arise under Section 26 of the Act – development of regional significance. These applications will be determined by the Department, not the Councils. The Department may cause a public local inquiry to be held by the PAC or a person appointed by the Department. The Minister has said that the PAC will be the first port of call for these inquiries and we would expect to continue with this important work in view of our expertise and experience in this area. Where no public inquiry is to be held, the Department must notify the applicant and **the council** of its proposed decision and either may request a hearing.

Irrespective of whether a public inquiry or hearing is held, the Commission will prepare a report and recommendation to the Department but the final decision rests with the Department. The Commission is currently dealing with a number of major applications that have been referred by the Department such as the north south electricity interconnector and 3 retail cases in Magherafelt. We are also considering a modification to the planning agreement at Belfast City Airport which is being considered under a different part of the Planning Order.

Section 29 applications are those applications which are called in by the Department from the Council. In such cases the Department makes the final decision as in Section 26 cases. The same arrangements apply for public inquiries and hearings as under Section 26 applications and the Council will still have right to participate in any hearing or inquiry

13. Hear and report functions - Development Plans

Section 10 of 2011 Act sets out the arrangements for independent examination of local development plans. The legislation requires all development plan documents to be submitted to the Department for independent examination. There are two stages in the development plan process, namely the plan strategy and local policies plan. The examination may be conducted by the Commission or a person appointed by the Department. There is an expectation in the legislation that the PAC will be appointed unless the Commission is unable to meet the development plan timetable.

There is a right of hearing to anyone who made representations seeking to change a development plan document. The PAC makes recommendations to the Department but it is the Department which then directs the Council to adopt the Plan with or without modifications or to withdraw the plan. The purpose of the examination is to ensure that procedural requirements are met in terms of content of the plan and to determine whether the plan is 'sound'. The Commission welcomes the new system which will allow for a more strategic and focused approach to conducting and reporting on development plans than was possible under the old system. This will allow for more efficient processing of development plans.