

Report to Planning Services Scrutiny Standing Panel



Date of meeting: 3 June 2010

**Subject: Planning Appeals and the Instructing of
Counsel**

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Committee Secretary: Mark Jenkins (01992 56 4607)

Recommendations/Decisions Required:

That the Planning Appeals and Instructing of Counsel report be noted.

Report:

The purpose of this Report is to inform Members how Planning Appeals dealt with by way of the Public Inquiry process are handled by Legal Services.

Background:

Appeals against the refusal of planning permission, refusal of a CLD Certificate, the issue of an Enforcement Notice are made to the Secretary of State via the Planning Inspectorate (PINS). Appeals can be dealt with by way of Written Representations, Informal Hearings or by Public Inquiry (PI).

Up until recently the Appellant's decision in respect of the process to be adopted for the appeal was usually given considerable weight. However, PINS now determines the most appropriate appeal procedure using the guidance set out in Annex C to PINS 01/2009. To that end the Public Inquiry procedure will normally be used when the evidence needs to be tested and/or questions need to be asked and if:

- the issues are complex and likely to need evidence to be given by expert witnesses;
- there is likely to be a 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;
- legal submissions may need to be made.

As costs can now be awarded in written representation appeals this process has become more favourable with Appellants who previously would have rejected that option if they thought the local planning authority had behaved unreasonably and believed that a costs application might be successful.

Accordingly, the effect of the new policy and guidance is that fewer Appeals will be dealt with by way of Public Inquiry.

Legal Services is only instructed by Planning Services to deal with Appeals when it involves a PI and they require legal representation. Written Representation cases and Informal Hearings are dealt with by the appropriate Planning Officer, with assistance sought from Legal if advice is required on any legal issue arising.

Planning Services instruct Legal when an appeal is to be dealt with by way of a Public Inquiry. The decision as to who will do the advocacy is left with Legal to decide. These matters are usually allocated to the Senior Lawyer.

The decision whether or not to instruct Counsel is based on the complexity of the issues, whether the matter is 'politically sensitive', if there is an expectation by local residents that sufficient resources will be used to defend the Councils position, the case relates to Gypsy and Traveller sites and the number of days scheduled for the PI to be dealt with.

The Senior Lawyer will usually undertake the advocacy in cases where the PI is scheduled for one day, the issues are relatively straightforward and there is no reasonable expectation that the matter should be dealt with by Counsel.

It is not usually a good use of resources for the Senior Lawyer to undertake the advocacy in the more time consuming cases as the necessary preparation time and attendance at the PI takes the officer away from other duties which are not easily covered by other members of the Legal team. However, the Senior Lawyer will be fully involved in the arrangements for the PI, ensuring that Counsel is properly instructed, that all deadlines are met and acts as a contact point for interested Councillors and local residents.

Number of Public Inquiries

In 2007 there were instructions in respect of 15 Public Inquiries of which only 11 were proceeded with by the Appellant. Of these 4 were dealt with by the Senior Lawyer and 2 related to G&T sites.

In 2008 there were instructions in respect of 7 Public Inquiries of which only 4 ended were proceeded with by the Appellant. All of these were dealt with Counsel. There were no G&T cases.

In 2009 there were instructions in respect of 6 Public Inquiries of which 3 were proceeded with by the Appellant. 1 was dealt with by the Senior Lawyer the remaining 2 were G&T cases and dealt with by Counsel

So far this year instructions have been received in respect of 3 Public Inquiries, one has been altered to Written Representations; the other 2 are going to be dealt with by the Senior Lawyer.

As can be seen there has been a steady decline in the number of appeals progressing by way of PI and that trend is likely to continue especially in view of the new guidance.

Involvement of Members

For the past couple of years a new protocol has been introduced in respect of all appeals to be dealt with by PI. This protocol seeks to engage interested Members and Parish/Town Councils in the process. District Councillors and Parish/Town Councillors are often contacted by local residents who object to the proposed Development seeking guidance on how best their views can be taken into account. Such Councillors and interested parties may have valuable evidence and information which will help the Council in opposing the appeal. This is especially so where the Council is restricted in the case it can put forward at the PI as it must relate to the reasons for refusal.

Accordingly, once Legal has been instructed whether or not Counsel is to be instructed Local Ward Councillors, the Chair and Vice Chair of the relevant Planning Committee and the Clerk to the relevant Town/Parish Council will be invited to attend a meeting at which those attending will be briefed on the Councils case, its strengths and weaknesses, the Appellants case and then given the opportunity to explain what other issues they would like raised as part of the objection to the proposal. If this cannot be undertaken by the Council then guidance will be given as to how best to get that information before the PI.

The Senior Lawyer will liaise with those who wish to take an active part, or just wish to be kept informed, and circulate copies of all relevant material as is produced by or received by the Council. The Senior Lawyer will also seek to be a contact point during the PI to assist as necessary.

It is understandably usually only the cases where Counsel is instructed that the invitation is taken up, with these being the more contentious cases. This appears to be a successful arrangement and has worked well with such meetings having been held in respect of 'Mushroom Farm, Laundry Lane', 'Lorry Park Skilletts Hill Farm, Honey Lane', 'The Meadows Bumbles Green' 'Hallmead Nursery, to name a few.

Appointment of Counsel

Legal Services has Lexcel which is the Law Society Accredited Practice Management Standard. One of the standards to be met is to have a policy on the use of external third parties. The use of Counsel is thus covered by Lexcel.

Legal Services has a list of Approved Counsel from which Counsel is to be appointed when necessary. The list has been drawn up from recommendations and by experience. Counsel will be removed from the Approved List if their performance, or that of their clerks, is not satisfactory.

If Counsel is required and there is no one of the Approved List with the relevant expertise and/or level of seniority, the appropriate Legal Officer will seek recommendations from either the instructing officer who may have knowledge from attending relevant training, by reference to another local authority or by reviewing information available on line about Counsel. In all cases the Legal Officer will be looking for the appropriate expertise in the subject matter and level of experience. It is also important that Counsel is approachable and ready to be part of the team. Cost will also be a factor but not necessarily the determining one. Some larger Authorities do have fee arrangements with sets of Chambers whereby preferential rates are given based on the volume of work.

For a District Council, Epping Forest is involved in a fair amount of litigation, in the County Court, Magistrates Court, Crown Court and High Court as well as Tribunals and PI's. Some of this work has to be put out to Counsel because of the level of the Court where only Counsel have the necessary rights of audience or due to the complexity of the matter. However, the amount of this work is not on the same scale as say for County Councils and London Boroughs so it has not been possible to set up such arrangements. Although, some chambers will quote their 'local authority' rate so not being a party to an arrangement is not always detrimental.

Legal Officers do have good relationships with the Chambers that are regularly used and those Chambers are fully aware of the need to provide a good service at a competitive price. Invariably when quotations are sought from competing chambers there is very little difference, if any, in the quotes that are provided in respect of Counsel of the same standing.

The Councils Financial Standing Orders apply and quotes must be obtained if the fees to be paid to any one Counsel in a financial year will exceed the authorised limit.

Legal Services is a member of a number local authority forums through which information and best practice is shared. One of these forums is the Law Society Local Government Group for Business Support Managers and one of its members is looking into the feasibility of creating an in-house barristers chambers through partnership working with neighbouring Councils. Legal Services will be expressing an interest in this project to see if it would be beneficial to EFDC.

Gypsy and Traveller Sites (G&T)

In respect of PI's relating to G&T cases where ever possible Mr Mark Beard of 6 Pump Court will be instructed. Mr Beard has acted for EFDC for over 10 years and has good knowledge of the District and its planning policies. In addition over the past 3 years Mr Beard has been particularly involved in assisting the Council in respect of G&T issues generally but in particular the G&T DPD and the Government Direction. Mr Beard also acts for a number of other local authorities in respect of G&T matters and is always up to date on the relevant Government advice and policies. Accordingly Mr Beard brings all this knowledge to any PI relating to G&T's and does not have to be briefed specifically on this issue.

Conclusion

Counsel is therefore only used when considered necessary, with any appointment being made on the merits of the case and the level of expertise required and Legal Services will seek to get Best Value in terms of both the quality of the service and the cost.