PLANNING APPEAL HEARINGS AND INQUIRIES

VIDEOLINK TECHNOLOGY

A NOTE ON THE PROCEDURE RULES

Introduction

1. The purpose of this note is to address the question whether the Secretary of State and the Planning Inspectorate may hold planning appeal hearings and inquiries by means of videolink technology[1] under the current procedure rules. The relevant rules[2] are –

   (1) The Town and Country Planning (Hearings Procedure) (England) Rules 2000 (SI 2000 No. 1626 – as amended by SI 2009/455 and SI 2013/2137).

   (2) The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (SI 2000 No. 1625 - as amended by SI 2009/455 and SI 2013/2137).

   (3) The Town and Country Planning Appeals (Inquiries Procedure) (England) Rules 2000 (SI 2000 No. 1624 - as amended by SI 2009/455 and SI 2013/2137).

2. I shall focus on the procedural rules for hearings and public inquiries into appeals to be determined by inspectors – paragraph 1(1) and (2) above. The inquiries procedure rules for recovered appeals and called in planning applications – paragraph 1(3) above - are, in any event, similar for present purposes to those that govern appeals determined by inspectors following a

[1] E.g. Skype for Business, Zoom, live streaming technology
[2] This note considers the English procedural rules only

public inquiry.

3. This note does not address broader questions of fairness at common law and under the Human Rights Act 1998. Instead, this note assumes that a hearing or inquiry via video link that falls within the terms of the current procedure rules identified in paragraph 1 above will, in principle, meet the requisite standards of fairness at both common law and under the ECHR. It will be borne in mind that each set of procedure rules has been made by the Lord Chancellor in accordance with section 9 of the Tribunals and Inquiries Act 1992. Each set of rules was the subject of consultation with the Council on Tribunals prior to their enactment. Each set of rules was laid before Parliament prior to their enactment in accordance with the negative resolution procedure, as required by section 15 of the Tribunals and Inquiries Act 1992.

4. The current legislative basis for determination of the procedure for planning appeal proceedings in England is found in section 319A of the Town and Country Planning Act 1990. The relevant provisions of section 319A of the 1990 Act are set out below –

> "(1) The Secretary of State must make a determination as to the procedure by which proceedings to which this section applies are to be considered.
>
> (2) A determination under subsection (1) must provide for the proceedings to be considered in whichever of the following ways appears to the Secretary of State to be most appropriate—
>
> (a) at a local inquiry;
> (b) at a hearing;
> (c) on the basis of representations in writing.
>
> (3) The Secretary of State must make a determination under subsection (1) in respect of proceedings to which this section applies before the end of the prescribed period.
>
> (4) A determination under subsection (1) may be varied by a subsequent determination under that subsection at any time before the proceedings are determined.
>
> (5) The Secretary of State must notify the appellant or applicant (as the case may be) and the local planning authority of any determination made under subsection (1).

(6) The Secretary of State must publish the criteria that are to be applied in making determinations under subsection (1).

(7) This section applies to—

…

(b) an appeal under section 78 against a decision of a local planning authority in England;

…"

5. Annex K of the Planning Inspectorate's Planning Appeals: Procedural Guide (March 2020) states the criteria currently to be applied in determining the appropriate appeals procedure. This note assumes that those published criteria will remain in place during the current public health emergency. The process of determining the appropriate procedure is a written one, almost always carried out and notified by electronic communication. This element of procedure should present no additional difficulties during the current situation.

6. Moreover, following a determination that the appropriate procedure is either a hearing or a public inquiry, much of the preparatory work required under the applicable procedure rules is also carried out in writing; and communicated or published electronically. The same is also true of work done under the applicable rules after the hearing or public inquiry has taken place. Again, all these elements of procedure should present no additional difficulties during the current situation.

7. The following paragraphs therefore only address those elements of the applicable procedural rules for hearings and public inquiries that are presently carried out in such a way as to involve the actual assembly of participants in a public place.

Hearings Procedure Rules 2000

(i) The place at which the hearing is to be held

8. Rule 7(2) of the Hearing Procedure Rules requires the Secretary of State to fix

a place for the holding of the hearing and to notify every person entitled to appear at the hearing of that place –

> "(2) Unless the Secretary of State agrees a lesser period of notice with the appellant and the local planning authority, he shall give not less than 4 written weeks' notice of the date, time and place fixed by him for the holding of a hearing to every person entitled to appear at the hearing".
> (my underlining)

(ii) Publicity for the hearing

9. As to wider publicity of the holding of the hearing and the place at which it is to be held, rule 7(5) states -

> "(5) The Secretary of State may in writing require the local planning authority to take one or both of the following steps –
>
> (a) not less than 2 weeks before the date fixed for the holding of a hearing, to publish a notice of the hearing in one or more newspapers circulating in the locality in which the land is situated;
>
> (b) to send a notice of the hearing to such persons or classes of persons as he may specify, within such period as he may specify".

10. By virtue of rule 7(6), every notice published or sent under rule 7(5) must contain (amongst other information) –

(i) a clear statement of the date, time and place of the hearing, and

(ii) details of where and when copies of the local planning authority's completed questionnaire and documents sent by and copied to the authority pursuant to rule 6 may be inspected.

(iii) The persons entitled to appear at the hearing

11. The "persons entitled to appear at the hearing" are those identified in rule 9(1)-

(a) the appellant

(b) the local planning authority

(c) any statutory party.

12. The inspector may also permit other persons to appear at a hearing, and such permission "shall not be unreasonably withheld" (rule 9(2)).

(iv) Procedure at the hearing

13. Procedure at the hearing is set out in rule 11. Active participation is generally limited to the inspector (who has overall control over the process) and those persons entitled to appear. The persons entitled to appear are entitled to call evidence; otherwise, the calling of evidence is at the inspector's discretion. There is no entitlement to cross examine witnesses, but the inspector is given the power to permit it under the circumstances and the conditions stated in rules 11(2) and 11(3). The powers conferred on the inspector under rule 11 give him or her a substantial degree of flexibility as to how the hearing should proceed in any given case.

(v) Site inspection

14. Site inspections are dealt with in rule 12. Rule 12(1) empowers the inspector to adjourn the conclusion of the hearing to the appeal site. In any case where the inspector does not take that course, rule 12(2) (a) empowers him or her to inspect the appeal site during or after the hearing; and rule 12(2)(b) requires such an inspection to be carried out if either the appellant or the local planning authority require it. In the event that the inspector decides to inspect the appeal site under rule 12(2), he must offer the appellant and the local planning authority the opportunity to join him on that site inspection (rule 12(4)).

Appeals (Determination by Inspectors) Inquiries Procedure Rules 2000

(i) Case management conference/pre-inquiry meeting

15. I have assumed that the case management conference procedure stated in paragraph F.10 of Annex F of the Planning Appeals Procedural Guide will apply in the majority of cases. In any case in which the inspector decides to

hold a pre-inquiry meeting under rule 7 of the Rules, the procedural requirements as to notification, place, attendance and participation are no more onerous than those applicable to the inquiry itself.

(ii) The place at which the inquiry is to be held

16. Rule 10 of the Rules states the requirements for notification of the inquiry. Rule 10(2) requires the Secretary of State to fix a place for the holding of the inquiry and to notify every person entitled to appear at the inquiry of that place –

> "(2) Unless the Secretary of State agrees a lesser period of notice with the appellant and the local planning authority, he shall give not less than 4 written weeks' notice of the date, time and <u>place fixed by him for the holding of an inquiry to every person entitled to appear at the inquiry</u>".
> (my underlining)

(iii) Publicity for the inquiry

17. As to wider publicity of the holding of the inquiry and the place at which it is to be held, rule 10(5) states -

> "(5) The Secretary of State may in writing require the local planning authority to take one or both of the following steps –
>
> (a) not less than 2 weeks before the date fixed for the holding of an inquiry, to publish a notice of the hearing in one or more newspapers circulating in the locality in which the land is situated;
>
> (b) to send a notice of the inquiry to such persons or classes of persons as he may specify, within such period as he may specify; or
>
> (c) to post a notice of the inquiry in a conspicuous place near to the land, within such period as he may specify".

18. Rule 10(6) empowers the Secretary of State to require the appellant to put up and maintain *in situ* a site notice, if the land is under the appellant's control.

19. By virtue of rule 10(7), every notice published, sent, posted or put up under rules 10(5) and (6) must contain (amongst other information) –

(iii) a clear statement of the date, time and place of the inquiry, and

(iv) details of where and when copies of the local planning

authority's completed questionnaire and documents sent by and copied to the authority pursuant to rule 6 may be inspected.

(iv) The persons entitled to appear at the inquiry

20. The "persons entitled to appear at the inquiry" are those identified in rule 11(1) of the Rules. The inspector may also permit other persons to appear at a inquiry, and such permission "shall not be unreasonably withheld" (rule 11(2)).

(v) Procedure at the inquiry

21. Procedure at the inquiry is set out in rule 16. Active participation is generally limited to the inspector (who has overall control over the process) and those persons entitled to appear. The persons entitled to appear are entitled to call evidence. The appellant, the local planning authority and any statutory party are entitled to cross-examine persons giving evidence. Otherwise, the calling of evidence and cross-examination is at the inspector's discretion. Oral evidence in chief is to be limited to summaries. The powers conferred on the inspector under rule 16 give him or her a substantial degree of control over the efficient use of inquiry time.

(vi) Site inspection

22. Site inspections are dealt with in rule 17. Rule 17(1) empowers the inspector to inspect the appeal site unaccompanied by any other person. Rule 17(2)(a) empowers him or her to inspect the appeal site in the company of the appellant, the local planning authority and any statutory party during or after the hearing; and rule 17(2)(b) requires such an inspection to be carried out if either the appellant or the local planning authority require it.

Discussion

23. Both rule 7(2) of the Hearing Procedure Rules ['the HPR'] and rule 10(2) of the Appeals (Determination by Inspectors) Inquiries Procedure Rules 2000 ['the IPR'] are founded upon the inspector conducting the hearing or inquiry, as the case may be, at a place at which the parties entitled to appear may do so for the purpose of presenting their case. Both rule 7 of the HPR and rule 10 of the IPR also found upon the requirement that other persons be enabled to attend and follow the proceedings, whether or not such persons seek and/or are given the opportunity by the inspector to participate actively in the proceedings.

24. The obvious means of fulfilling those requirements is for the hearing or inquiry to take place at a venue at which the inspector, the parties entitled to appear and other persons interested in attending may assemble and be accommodated for the duration of the proceedings. That is what happens in practice in the ordinary course of proceedings under both the HPR and the IPR.

25. These, however, are not ordinary times. The question is whether the HPR and the IPR require that the hearing or inquiry must take place in a physical place at which both active and passive participants are able to assemble for that purpose.

26. It is clear from experience that other forms of judicial and quasi-judicial proceedings in England can be conducted in practice, without the need for actual physical attendance by the participants at a court or hearing venue. That experience extends not only to proceedings in which the participants make oral representations via video or audio link to the judge or tribunal (and are questioned upon those representations); but also to proceedings at which witnesses give evidence and are questioned on their evidence.

27. The technology exists to facilitate judicial and quasi-judicial proceedings being conducted in that way – that is to say, without the need in practice for the tribunal or the parties to be physically present and assembled in an actual venue for the purpose of conducting an oral hearing. That technology embraces both interactive video and audio linked hearings, and live streaming for those who wish only to observe the proceedings either visually and/or aurally.

28. It is therefore reasonable to assume that such technology is at least capable of being deployed in practice for the purpose of an inspector conducting a hearing under the HPR or an inquiry under the IPR.

29. On that assumption, would a hearing or inquiry conducted on that basis nevertheless be *ultra vires* the HPR and the IPR respectively?

30. There is a sound basis upon which to conclude that the answer to that question is in each case "No".

31. As a matter of language, it is obvious that in the modern world the concept of a "place" at which people come together and "appear" for the purpose of engaging in a public process includes a virtual place to which those persons who wish to participate gain access electronically. The experience of courts and tribunals mentioned in paragraphs 26 and 27 above illustrates the point.

32. Approaching the question on a purposive basis, both the HPR and the IPR require that both the inspector, those persons who are entitled to appear and those persons which may wish to seek permission to appear or at least to observe proceedings, should be able to do so. In practice, that means that all such persons should be notified in advance of the virtual place at which the proceedings will take place; of the arrangements for gaining access to that

place; of the means of participation; and of the hardware and software that will enable that access. Access must be readily available without payment by the participants via widely available hardware and software technology.

33. Provided that these basic requirements are in place, there is no reason in principle to doubt that both a hearing and an inquiry may lawfully be notified and conducted in accordance with the applicable requirements of the HPR and the IPR to which reference has been made above.

34. It may be objected that there will be persons who are unable to access the virtual place at which the hearing or inquiry is to be held and that this in itself renders such a process unlawful. That objection is without substance. It is already the case that there will be persons who would wish to take up the opportunity to attend a conventional hearing or inquiry but are unable in practice to do so, due to work commitments, child care commitments, absence abroad and so forth. In such cases, such persons typically arrange for others to make the points that they wished to make, or put their points in writing or on email, or sign a petition, and so forth. The key requirement is that the inspector and the persons entitled to appear should be able to do so. It is reasonable to assume that such persons will be able to gain access to a hearing or inquiry conducted electronically. Inspectors can be relied upon to make sensible arrangements to accommodate other persons, for example by encouraging those with the ability to gain access to act as spokesperson for other who are less able to do so; or by indicating that written representations may be made in the ordinary way.

35. As to publicity, rules 7 and 10 of the HPR and IPR respectively provide a range of methods, not all of which will be effective during the current emergency. The rules themselves, however, provide a measure of choice of method, and there is no reason in law why those should not be supplemented by publicity via the Planning Inspectorate's own website.

36. The same approach applies to site inspections. If an appointed planning inspector is able to continue to inspect an appeal site or its immediate locality on an unaccompanied basis under the current restrictions, it would be for the appellant and the local planning authority (and any statutory party in the case of an inquiry) to take a reasonable and pragmatic approach to the need for the inspector to be accompanied. There is no absolute requirement under either the HPR or the IPR for the inspector to be accompanied. No doubt the main parties would be able to notify the inspector of any particular matters that they would wish him or her to observe on an unaccompanied inspection of the site and its surroundings.

37. In the event that (as appears likely in many cases under the present restrictions) an inspector is unable to conduct an unaccompanied site inspection, that does not present an insuperable obstacle to his or her making a decision on the appeal. Under both the HPR and the IPR, unless one of other of the main parties requires the inspector to visit the appeal site (hearings), or one or other of the main parties or a statutory party does so (inquiries), it is a matter for him or her to decide whether a site inspection is needed. It would be open to the Planning Inspectorate to ask the parties to think carefully whether a site inspection is necessary in current circumstances. CGIs, often to a very high standard, may well have been prepared (or be in preparation) in appeals in progress that raise visual/design/landscape issues. Moreover, inspectors have access to a range of publicly available resources such as Google Earth. Parties may be encouraged to help the inspector with the electronic resources available. It should be possible for parties to agree in at least a substantial number of cases that a site inspection is not necessary.

38. In the case of appeal inquiries, it is necessary to address section 321(2) of the Town and Country Planning Act 1990, which applies to planning appeal proceedings –

> "(2) ….at any such inquiry oral evidence shall be heard in public and documentary evidence shall be open to public inspection".

39. On the assumptions discussed above, both of those requirements would be capable of being fulfilled. An inquiry conducted via an electronic process which enables both the inspector, the persons entitled to appear and other persons to hear (and observe) witnesses give their evidence would demonstrably achieve the first requirement. The requirement that documents be available for public inspection may be (and indeed is already often) achieved electronically (whether via the PINS website, the local planning authority website, or both). It will be noted that the purpose of section 321 of the 1990 Act is to reserve to the Secretary of State the residual power to hold planning inquiry proceedings wholly or partly in private, on the interests of national or site security. It is not a provision that bears directly on the subject matter of this note.

Conclusion

40. For these reasons, it is possible to conclude with confidence that neither the HPR nor the IPR creates any legal difficulty in principle for the Secretary of State and the Planning Inspectorate conducting planning appeal hearings or inquiries via videolink technology.

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On behalf of the Planning and Environmental Bar Association
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