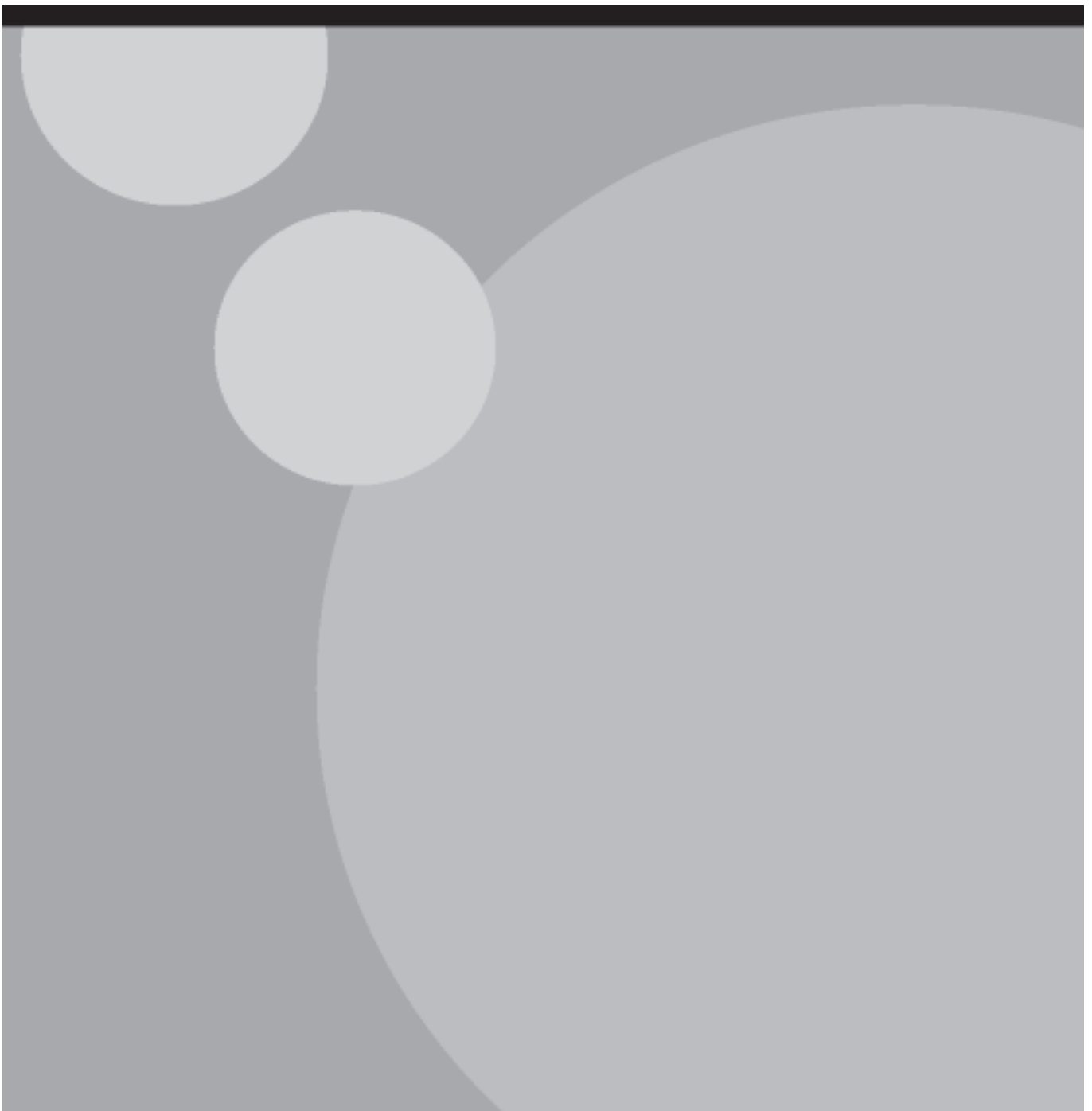




Statutory consultee performance and award of costs

Consultation





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Consultation

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July, 2012

ISBN: 978-1-4098-3561-5

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Introduction

1. The Government is committed to ensuring local authorities deliver an efficient planning service. Planning decisions should follow due process and shape long term development on behalf of local communities in conjunction with safeguarding amenity and protecting the environment. The Government expects all those involved in the planning system – local members and communities, residents, applicants, landowners, government agencies and planning practitioners – to play their part.
2. Statutory consultees are organisations and bodies, defined by statute, who must be consulted on relevant planning applications (See full list of statutory consultees in Annex A). Local planning authorities can give significant weight to the advice of the key statutory consultees on specialist technical issues where an authority may have limited expertise. This can mean authorities are reluctant to determine applications without input from these key bodies.
3. Comments made by these bodies can also lead to the imposition of planning conditions and, in a limited number of cases, lead to a refusal of planning permission, either entirely or partially based on the advice the statutory bodies have provided.
4. Statutory consultees therefore play an important role in the delivery of development that best meets the needs of the local area. While local authorities remain ultimately responsible for planning decisions, statutory consultees should take responsibility for the advice they give.
5. The Government is keen to promote good practice and ensure advice continues to be of high quality, appropriate to each particular case and provided within the statutory time frame of 21 days. It is consulting on amending guidance in the Award of Costs Circular^[1] to promote a proportionate response on the part of statutory consultees when they are advising on planning applications and their subsequent responsibility for that advice at appeal.
6. The Government is also taking the opportunity to clarify guidance in the Awards of Costs Circular that councils should not be liable for an award of costs against them if they refuse a planning application that is clearly contrary to a development plan where no material considerations including national policy indicate that planning permission should have been granted. Appellants will also be reminded that information they submit at application and appeal should be accurate and true.
7. Together these measures should result in clearer, stronger advice from statutory consultees to local authorities and applicants which should then

¹ Circular 03/09: Costs Awards in Appeals and Other Planning Proceedings

result in quicker, more efficient and fully justified decisions from local authorities. There is no aim to increase the incidence of costs awards or appeals.

Summary of consultation

Topic of this consultation:	To deliver Autumn Statement and Localism Act commitments to improve engagement by statutory consultees in the determination of planning applications and appeals, and clarify guidance that a council should not be at risk of paying appeal costs where it has made decisions on the basis of an up-to-date plan.
Scope of this consultation:	<ul style="list-style-type: none"> ○ The Government proposes to amend guidance in Circular 03/09: Costs Awards in Appeals and Other Planning Proceedings in relation statutory consultees and their advice at appeal. ○ The Government is also announcing clarifications to the guidance in Circular 03/09 in relation to local councils and their development plan, and in relation to ensuring evidence submitted at appeal is manifestly accurate and truthful. ○ The Government is also requiring the five main statutory consultees to report on, and be accountable for, their performance on dealing with planning applications as part of their individual Improvement Plans.
Geographical scope:	These proposals relate to England.
Impact Assessment:	A draft impact assessment is attached to this consultation.

Basic Information

To:	This is a public consultation and it is open to anyone to respond. We would particularly welcome views from statutory consultees and local planning authorities.
Body/bodies responsible for the consultation:	Department for Communities and Local Government (Planning Development Management Division)
Duration:	The consultation is published on 3 July 2012 and ends on 11 September 2012. This is a 10 week period.

Enquiries:	Maria Darby Tel. 0303 44 41463 E-mail: maria.darby@communities.gsi.gov.uk
How to respond:	By e-mail to: StatCons@communities.gsi.gov.uk A downloadable questionnaire form, which can be emailed to us, will be available on our website at www.communities.gov.uk/consultations Alternatively, paper communications should be sent to: Maria Darby Statutory consultee performance/award of costs - Consultation Planning - Development Management Division Department for Communities and Local Government Zone 1/J3 Eland House Bressenden Place London SW1E 5DU
Additional ways to become involved:	If you require this material in an alternative format, please contact us.
After the consultation:	A summary of responses will be published as soon as possible after the consultation closes.
Getting to this stage:	This consultation seeks views on the detail of how to implement Government announcements made in October/November 2011.
Previous engagement:	The Award of Costs Circular was fully revised in 2009.

The policy context

8. Statutory consultees are organisations and bodies who must be consulted on relevant planning applications. The main national statutory consultees respond to planning consultations on a total of over 60,000 occasions each year (See full list of statutory consultees in Annex A).
9. In November 2011, the Government committed to improving the performance of the key statutory consultees in responding swiftly to applications. The focus of this work is on the five main statutory bodies^[2] bringing forward improvement plans by Spring 2012.
10. The Government also announced in November 2011, that it will ensure that there is a more effective mechanism for applicants to obtain an award of costs, if there is an appeal against refusal of a planning permission, where a statutory consultee has acted unreasonably.
11. In instances where an application for planning permission is refused by a local planning authority, there is a right of appeal for the applicant to the Secretary of State for the Department for Communities and Local Government. If any party to the planning appeal acts unreasonably adding unnecessary cost to another party, then a claim for an award of costs can be submitted at the appeal to recover some or all of that expense. In 2011, there were no awards of costs against statutory consultees.
12. During the passage of the Localism Act, the Government committed to revising its guidance on the award of costs regime so that there should be no grounds for an award of costs against a local planning authority if it refuses a planning application that is clearly contrary to a development plan and where no material considerations including national policy indicate that planning permission should have been granted.

² English Heritage, Natural England, Environment Agency, Highways Agency and Health & Safety Executive

The legal context

13. The Government can set out time limits for processing planning applications in secondary legislation^[3] and does so through the Development Management Procedure Order.

<http://www.legislation.gov.uk/ukxi/2010/2184/article/20/made>

14. Currently statutory consultees have 21 days within which they should respond to consultations unless otherwise agreed with the local authority.

15. The ability to award costs is set out by primary powers^[4] and the Government has issued guidance - Circular 03/09: Costs Awards in Appeals and Other Planning Proceedings - on what is unreasonable behaviour which may warrant a claim for an award of costs.

<http://communities.gov.uk/documents/planningandbuilding/pdf/circularcostsawards.pdf>

16. When determining planning applications, local planning authorities must have regard to the views of statutory consultees^[5]. The primacy of the development plan is set out by Section 38(6) of the Planning and Compulsory Purchase Act 2004 which states *"If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."*

3 Section 54 of the Planning and Compulsory Purchase Act 2004

4 Section 250 (5) of the Local Government Act 1972 enables the Secretary of State to make "orders as to the costs of the parties at the inquiry and as to the parties by whom the costs are to be paid". This power is applied to various planning proceedings by sections 320, 322, 322A of, and Schedule 6 to, the Town and Country Planning Act 1990; by section 89 of the Planning (Listed Buildings and Conservation Areas) Act 1990; and by section 37 of the Planning (Hazardous Substances) Act 1990

5 Section 71 of the Town and Country Planning Act 1990 gives the Secretary of State powers to prescribe that a local planning authority must take certain views into account when determining an application. Regulation 16 and Schedule 5 of the Town and Country Planning (Development Management Procedure)(England) Order 2010 set out general consultation requirements and require local planning authorities to take account of any representations from a statutory consultee.

Consultation proposals

Changes to the Award of Costs Circular 03/09

Amending guidance on statutory consultees

WHAT WE INTEND TO DO

17. A revision to the Circular which provides guidance to the Planning Inspectorate when assessing submissions from parties at an appeal for costs to be awarded for unreasonable behaviour from another party. The revised wording is contained in the draft addendum in Annex B, and the full Award of Costs Circular can be found here:

<http://communities.gov.uk/documents/planningandbuilding/pdf/circularcostsawards.pdf>

18. The addendum will cancel paragraphs 7 and 8 of Part D of the Circular. It should be the case that statutory consultees act reasonably in the same way that other third parties as defined by regulation^[6] are expected to do.
19. In addition, the addendum will amend guidance in paragraph 24 of Part B and insert a new paragraph 6a to Part D to support the intention that statutory consultees^[7] should take responsibility for their advice on appeal and should not be excluded from consideration of an award of costs on the grounds of unreasonable behaviour where their advice has been relevant to the refusal of the application.

WHY ARE WE DOING THIS

20. Statutory consultees play an important role in the planning system. Local authorities often give significant weight to the advice of the key statutory consultees on specialist issues where the council has limited or no expertise.
21. Where a council has relied on this advice and refused the application, it should not be the council that is directly at risk of costs if the statutory consultee's advice does not stand up to scrutiny at appeal, and the appellant makes a case that this behaviour lead to unnecessary expense (such as additional technical reports).

⁶ Set out in Rule 11 of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 and Rule 9 of the Town and Country Planning (Hearings Procedure) (England) Rules 2000

⁷ With particular reference to the main consultees who provide expert health and safety, environmental, heritage and transport advice

22. The aim is not to increase the opportunity for seeking award of costs, but for applications for an award of costs to be properly considered based on the specialist advice that is given, and the ultimate decision that is made by the local planning authority. Planning advice should remain of the highest quality.

EFFECT OF THE CHANGE

23. This change potentially increases the liability of statutory consultees; particularly those that offer expert health and safety, environmental, heritage and transport advice; where their actions are deemed unreasonable and lead to unnecessary costs by other parties. However the intention is to encourage behaviour change rather than drive financial penalty. It would be the case that statutory consultees could submit a claim for costs
24. There would be no change to the guidance in relation to other third parties, such as parish councils or adjoining local authorities. Appellants would be able to seek costs, if it is appropriate, from local authorities, statutory consultees or other third parties – and vice versa.
25. Local authorities should continue to have confidence to determine applications where advice is given in the knowledge that they are not at undue risk from actions by statutory consultees. The proposals intend to reinforce the message that we expect statutory consultees to be involved in appeals where they have advised refusal of an application. The existing guidance remains where the local authority can consider early on whether a reason for refusal should be maintained if the consultee is not party to the appeal.

QUESTION A

Do you agree with the proposal to amend the Award of Costs Circular in relation to statutory consultees and their advice?

Clarifying guidance regarding the development plan

WHAT WE INTEND TO DO

26. A new paragraph B15a will be inserted into the Award of Costs Circular to advise appeal parties there should generally be no grounds for an award of costs against a local authority where it has refused a planning application that is clearly contrary to a development plan where no material considerations including national policy indicate that planning permission should have been granted. The draft addendum to the Circular is set out in Annex B.

WHY ARE WE DOING THIS

27. Guidance in paragraph 15 of Part B states that *“planning authorities are at risk of an award of costs against them if they prevent or delay development which should clearly be permitted having regard to the development plan, national policy statements and any other material considerations.”* Examples of unreasonable behaviour are already set out in paragraph 29 of Part B of the Circular. However there remains a perception that councils have been ‘forced to pay’ for the applicant’s appeal costs even where they have acted reasonably and determined the application with proper reference to the development plan and other relevant material considerations. This is not the Government’s intention and the additional paragraph clarifies the existing position.

EFFECT OF THE CHANGE

28. The risk to local authorities of an award of costs against them if they refuse applications when relying on an out of date development plan does not change. The guidance however is made clearer. The Award of Costs Circular continues to operate in the same way for appellants who should not pursue unnecessary appeals when the local policy context is consistent with national policy. The change does not affect statutory consultees or other third parties.

Clarifying guidance on accurate and truthful information

WHAT WE INTEND TO DO

29. An additional example of when an appellant may be at risk of costs will be inserted into paragraph B14 of the Award of Costs Circular. This would include instances where an appellant has relied on evidence that has been shown to be manifestly inaccurate or untrue. Equally, information the appellant relied on at the time of the planning application should have been accurate and true.

WHY WE ARE DOING THIS

30. The award of costs regime operates with regard to unreasonable behaviour at the appeal rather than application stage. However the Government wishes to reinforce the expectation that those applying for planning permission, including consultants and agents acting on behalf of clients, should do so having taken the appropriate time to gather accurate information and formulate a truthful testimony with regard to the benefit and impact of a proposal.

EFFECT OF THE CHANGE

31. The aim is not to increase the incidence of cost awards but to ensure the highest quality and accuracy of planning proposals.

Other measures

32. At the time of the Autumn Statement in November 2011, a complementary measure was proposed in the National Infrastructure Plan to bring forward measures for consultation on strengthening existing time-limits for the provision of responses by statutory consultees on planning applications including key statutory bodies bringing forward an improvement plan by spring 2012.
33. The key statutory bodies – Environment Agency, Natural England, Highways Agency, English Heritage and Health & Safety Executive – have published draft improvement plans in the spring in line with the commitment in the Autumn Statement 2011. These plans set out a range of measures to improve the quality of service provided in relation to their role as a statutory consultee in the planning process and in some cases in their role as a licensing/consenting body.
34. In the context of finalising these plans, the Government will consider carefully the measures that are proposed both in relation to monitoring the views of local authorities on how satisfied they are with the quality and timeliness of the advice provided and obtaining a better understanding of the cases that take longer than 21 days to be resolved, with a view to ensuring that the key statutory bodies transparently account for, and improve, their performance.

QUESTION B

Do you have any other comments on the consultation?

Consultation questions - response form

The Government welcomes your views on all aspects of the proposals set out in this consultation.

How to respond:

The closing date for responses is 11 September 2012.

This response form is saved separately on the DCLG website.

Responses should be sent preferably by email:

Email responses to: StatCons@communities.gsi.gov.uk

Written responses to:

Maria Darby
Statutory consultee performance and award of costs - Consultation
Planning - Development Management Division
Department for Communities & Local Government
Zone 1/J3, Eland House
Bressenden Place
London
SW1E 5DU

About you

i) Your details:

Name:	
Position:	
Name of organisation (if applicable):	
Address:	
Email:	
Telephone number:	

ii) Are the views expressed on this consultation an official response from the organisation you represent or your own personal views?

Organisational response

Personal views

iii) Please tick the box which best describes you or your organisation:

District Council

Metropolitan district council

London borough council

Unitary authority/county council/county borough council

Parish council

Community council

Non-Departmental Public Body (NDPB)

Planner

- Professional trade association
- Land owner
- Private developer/house builder
- Developer association
- Voluntary sector/charity
- Other

(please comment):	
-------------------	--

**iv) What is your main area of expertise or interest in this work
(please tick one box)?**

- Chief Executive
- Planner
- Developer
- Surveyor
- Member of professional or trade association
- Councillor
- Planning policy/implementation
- Environmental protection
- Other

(please comment):	
-------------------	--

Would you be happy for us to contact you again in relation to this questionnaire?

Yes No

ii) Questions

Please refer to the relevant parts of the consultation document for narrative relating to each question.

Question A: Do you agree with the proposal to amend the Award of Costs Circular in relation to statutory consultees and their advice?

Yes No

Comments

Question B: Do you have any other comments on the consultation?

Clarifications to the guidance in relation to development plans

Clarifications to the guidance in relation to accurate information

Any other comments

The consultation includes a draft impact assessment of the proposals.

Question IA1: Do you have any further evidence, positive or negative, of the behaviour of statutory consultees in the planning appeal process?

Yes No

Comments

Question IA2: Do you agree with our appraisal of the impact of the change to the Award of Costs Circular?

Yes No

Comments

Thank you for your comments.

Consultation criteria

About this consultation

Representative groups are asked to give a summary of the people and organisations they represent, and where relevant who else they have consulted in reaching their conclusions when they respond.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you want the information that you provide to be treated as confidential, please be aware that under the Freedom of Information Act 2000, there is a statutory code of practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department for Communities and Local Government will process your personal data in accordance with the Data Protection Act 1998 and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties. Individual responses will not be acknowledged unless specifically requested. Your opinions are valuable to us. Thank you for taking the time to read this document and respond.

If you have any queries or complaints regarding the consultation process, please contact:

DCLG Consultation Co-ordinator

Zone 6/H10 Eland House

London SW1E 5DU

email: consultationcoordinator@communities.gsi.gov.uk

Annex A

Full list of statutory consultees

British Waterways
Civil Aviation Authority
Coal Authority
Crown Estate Commissioners
Department for Culture, Media and Sport
Department of Energy and Climate Change
Department for Environment, Food and Rural Affairs
Department for Transport
Environment Agency
English Heritage
Forestry Commission
Garden History Society
Health and Safety Executive
Highways Agency
Ministry of Defence
Natural England
National Air Control Transport Services and Operators of Officially
Safeguarded Civil Aerodromes
Rail Network Operators
Sport England
Theatres Trust
Toll Road Concessionaries

Planning Bodies (including County Planning Authorities, District
Planning Authorities, Greater London Authority, Local Highway
Authorities, Local Planning Authorities)

Please note all statutory consultees are not consulted on all planning
applications. The circumstances for statutory consultation are set out in the
Development Management Procedure Order:

<http://www.legislation.gov.uk/uksi/2010/2184/article/20/made>

Annex B

Draft addendum to Award of Costs Circular 03/09

ADDENDUM TO CIRCULAR 03/2009: COSTS AWARDS IN APPEALS AND OTHER PLANNING PROCEEDINGS

INTRODUCTION

1. This addendum to Circular 03/2009 (the Circular) amends guidance on the award of costs in England in proceedings under the Planning Acts⁸ in relation to grounds when an award of costs against local planning authorities may not be appropriate, and in relation to grounds when an award of costs against statutory consultees may be appropriate.
2. The costs awards regime seeks to increase the discipline of parties when taking action within the planning system, through financial consequences for those parties⁹ who have behaved unreasonably¹⁰ and have caused unnecessary or wasted expense in the process. A party may be ordered to meet the costs of another party, wholly or in part, on specific application by the aggrieved party.
3. While the content of this addendum has no statutory status, and is guidance only, it will be fully taken into account by the Secretary of State and Inspectors where costs are at issue in planning and planning-related proceedings.
4. The Government has published the National Planning Policy Framework which cancels Planning Policy Guidance (PPGs) and Planning Policy Statements (PPSs). References within Circular 03/2009 to PPGs and PPSs should generally be read as references to the Framework. However readers should refer to the Framework for national planning policy rather than any examples of cancelled policy in the Circular. The Government may, in the future, revisit the remainder of the Circular in the context of a wider review of planning guidance following the publication of the Framework.

SCOPE OF ADDENDUM TO CIRCULAR

5. The guidance in this addendum will apply to all appeals, called-in planning applications and other referred applications under the Planning Acts in England which are made after the date of this addendum.

⁸ For the purposes of this Circular the Planning Acts are the Town and Country Planning Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990, and the Planning and Compulsory Purchase Act 2004 (as amended).

⁹ The term “party” or “parties” is defined in paragraph A15 of Part A of the Annex to Circular 03/2009.

¹⁰ As summarised in A22 & A23 of Part A of the Annex to Circular 03/2009.

CANCELLATIONS^[11]

11. Paragraphs D7 and D8 of Circular 03/2009.

Addendum

Insert new text to PART B, paragraph B14:

At the end of the second sentence, insert “This would also be the case in instances where an appellant has relied on evidence that has been shown to be manifestly inaccurate or untrue. Equally, information the appellant relied on at the time of the planning application should have been accurate and true”.

Insert new paragraph after PART B, paragraph B15:

B15a. Therefore, conversely, where a planning authority has refused a planning application on the grounds that it is contrary to development plan policy, and no material considerations including national policy indicate that planning permission should have been granted, there should generally be no grounds for an award of costs against the planning authority.

Insert new text to PART B, paragraph B24:

At the end of the third sentence after “the consultee’s advice” insert “and whether the consultee can substantiate its advice (see D6a below)”.

Insert new paragraph after PART D, paragraph D6:

D6a. In addition, local planning authorities often give significant weight to the advice of statutory consultees on specialist health & safety, environmental, heritage or transport issues where the planning authority does not have detailed technical expertise. Where a council has relied on the advice of the statutory consultee in refusing an application then the statutory consultee would be expected to substantiate its advice on appeal and may be liable to an award of costs to or against them. Any allegations of unreasonable behaviour directed at a statutory consultee should be drawn to their attention at an early stage. Statutory consultees should, at the earliest opportunity, notify the planning authority if its evidence or advice changes.

11 D7. A statutory consultee who is asked by the local planning authority to provide a technical or expert witness at the inquiry or hearing, will not be regarded as a separate party in its own right liable to an award of costs. In that situation, the planning authority will be treated as the party expected to defend any appropriate costs application made. Normally, to be treated as a separate party liable to an award of costs, a statutory consultee will need to be separately represented at the event with its own advocate, in which case the consultee will be regarded as a third party, except in certain circumstances set out in D10 where the consultee will be treated as a principal party for awards of costs purposes. Any allegations of unreasonable behaviour directed at a statutory consultee, as distinct from the planning authority, should be drawn to their attention at an early stage before the event, so that there is adequate time to prepare and co-ordinate a response which avoids disproportionate work in handling a costs application.

D8. If an award of costs is made against the planning authority but the authority considers the statutory consultee should bear responsibility, the resolution of any difference of view will be a matter for the two parties.

Annex C - Consultation stage impact assessment

Title: Improving Statutory Consultee Performance IA No: 1276 Lead department or agency: DCLG Other departments or agencies: N/a	Impact Assessment (IA)				
	Date: 28/06/2012				
	Stage: Consultation				
	Source of intervention: Domestic				
	Type of measure: Other				
Contact for enquiries: Neil Holdsworth, 030 3444 1716					

Summary: Intervention and Options	RPC Opinion: AMBER
--	---------------------------

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
-	-	-	Yes
			Zero Net Cost

What is the problem under consideration? Why is government intervention necessary?

Statutory consultees have a duty to respond to requests and provide advice to local authorities on planning applications. However, applicants and other interested parties have expressed some concern that the timing of input from statutory consultees and a lack of responsiveness are leading to unnecessary delay, cost and uncertainty in the planning process. The statutory framework is delivered by Government through a combination of regulation and guidance. Therefore this should be reviewed to look at how to enhance the role of statutory consultees as they respond to planning applications, with a view to establishing improvements that would increase both the quality of advice given by statutory consultees, and its timing.

What are the policy objectives and the intended effects?

To better hold statutory consultees - in particular those who provide specialist technical advice - to account for the timeliness and quality of advice they have given.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 1 - Do nothing.

Option 2 - Revision to guidance in the 'Award of Costs Circular' to adjust the responsibility and accountability of statutory consultees who in particular provide specialist technical advice to substantiate their advice to local authorities and applicants during the appeal process.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: 12/2014					
Does implementation go beyond minimum EU requirements?				N/A	
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro No	< 20 No	Small No	Medium No	Large No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: 0	Non-traded: 0	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister: _____ Date: _____

Summary: Analysis & Evidence

Policy Option 1

Description: Revision to guidance in the 'Award of Costs Circular' to adjust the responsibility and accountability of statutory consultees who in particular provide specialist technical advice.

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: -	High: -	Best Estimate: -

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	-	-	-
High	-	-	-
Best Estimate	-	-	-

Description and scale of key monetised costs by 'main affected groups'

This consultation stage Impact Assessment poses a series of questions that will help the Government build up an evidence base to inform a final stage Impact Assessment of the provision

Other key non-monetised costs by 'main affected groups'

Potential short term transitional costs to those statutory consultees engaged in responding to significant numbers of planning applications on specialist technical matters in adapting to new guidance - although these should result in more efficient working practices in the longer term.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	-	-	-
High	-	-	-
Best Estimate	-	-	-

Description and scale of key monetised benefits by 'main affected groups'

This consultation stage Impact Assessment poses a series of questions that will help the Government build up an evidence base to inform a final stage Impact Assessment of the provision.

Other key non-monetised benefits by 'main affected groups'

Clearer and more proportionate advice from statutory consultees on technical matters which leads to quicker and more robust planning decisions for the benefit of local planning authorities (who often do not have specialist expertise in-house) and applicants. Potential for a minor reduction in refusals of applications, and consequential reduction in planning appeals - saving time and resources for the planning and construction sector, unlocking on development that should be permitted.

Key assumptions/sensitivities/risks	Discount rate (%)	-
<p>A reduction in constructive engagement or legitimate concerns being raised by statutory consultees - mitigated through effective Business Improvement Plans.</p> <p>Increase in number of speculative 'award of costs' submissions from applicants or local authorities against statutory consultees - mitigated with communication on what is reasonable behaviour via the Planning Inspectorate.</p>		

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:	In scope of OIOO?	Measure qualifies as
Costs: -	Yes	Zero net cost
Benefits: -		
Net: -		

Evidence Base

Introduction

The Government announced in the Autumn Statement (HM Treasury, November 2011)¹ that it will ensure that there is a more effective mechanism for applicants to obtain an award of costs, if there is an appeal against refusal of a planning permission, where a statutory consultee has acted unreasonably.

The Department for Communities and Local Government is responsible for the overall framework within which Statutory Consultation operates. We are therefore bringing forward focussed revisions to Circular 03/09: Costs Awards in Appeals and Other Planning Proceedings² (the '**Award of Costs Circular**'), to adjust the accountability and responsibility of Statutory consultees for the specialist technical advice they give to local authorities and applicants.

The accompanying consultation document also takes the opportunity to clarify guidance in the Awards of Costs Circular for councils and appellants. This does not introduce new policy, but is clearer in presentation.

Statutory consultees have a statutory duty to respond to requests from local authorities for advice on planning applications. They are, for the most part, public funded organisations with a sponsor Government Department although some are civil society organisations. Many have consenting responsibilities in their own right separate to the planning system. Their remit covers highly specialised environmental issues alongside planning policy expertise. The five main statutory consultees are:

- The Environment Agency
- Natural England
- The Highways Agency
- The Health and Safety Executive
- English Heritage.

The problem now under consideration

The Government is addressing statutory consultee performance specifically on applications submitted under 70 of the Town and Country Planning Act 1990. The government want to ensure that statutory consultees play a proportionate and effective role in the planning system, and do not delay the progress of planning applications unnecessarily.

The Infrastructure cost review³ (*Infrastructure Cost Review*, HM Treasury, December 2010.) identified delays in the planning and consenting regime as a key reason that UK infrastructure is more expensive to build than in other European countries. The Penfold Review⁴ (*Final Report*, BIS, July 2010) found concern from planning applicants who were experiencing uncertainty about the timing of decisions from consenting bodies, difficulty in resolving differences between consenting bodies and a lack of responsiveness.

We have specifically looked at how to improve the role of statutory consultees as they respond to planning applications, with a view to establishing improvements that would increase both the quality of advice and its timing, and have identified two specific areas:

- At the planning application stage, where applications are referred to statutory consultees who are required by law to respond to consultations within 21 days.
- Ensuring that the advice given is proportionate and robust, and statutory consultees are accountable. This is particularly important where a local authority relies on the specialist technical advice of a statutory consultee in the refusal of an application which subsequently proceeds to appeal, delaying development.

¹ http://www.hm-treasury.gov.uk/as2011_documents.htm

² <http://www.legislation.gov.uk/ukxi/2010/2184/contents/made>

³ http://hm-treasury.gov.uk/d/cost_review_main211210.pdf

⁴ <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/p/10-1027-penfold-review-final-report.pdf>

Rationale for intervention

Government is responsible for determining the framework within which statutory consultees operate. In doing so it seeks to balance the benefits of their input to the planning system, such as proper consideration of environmental impacts, against the costs that this can have for applicants in terms of delays and uncertainty.

Some statutory consultees are key providers of specialist technical advice to local planning authorities and we consider that intervention is necessary to change behaviour and improve the performance of statutory consultees in the planning system by ensuring they respond in a timely manner and that the advice they provide is robust, and to hold them accountable where this is found not to be the case.

This consultation stage Impact Assessment poses a series of questions that will help the Government build up an evidence base to inform a final stage Impact Assessment of the provision.

Policy objective

- To better hold statutory consultees - in particular those who provide specialist technical advice - to account for the timeliness and quality of advice they have given.

Description of Options Considered

Option 1 – Do Nothing

The first option is to do nothing – and to continue the current arrangements for statutory consultation. However, the Government's Autumn Statement attributed importance to improving the performance of statutory consultees.

If no action is taken it is highly likely that statutory consultees will not improve their performance when they are consulted on planning applications, and applicants and local authorities will continue to be aggrieved where decisions are delayed as a consequence. This option would not impose any *additional* costs but it is rejected on the grounds that it would not achieve any of the policy objectives and planning outcomes would continue to be sub-optimal.

Option 2 – Revision to the Award of Costs Circular – Preferred Option

Option 2 is to introduce a change to Circular 03/09: Costs Awards in Appeals and Other Planning Proceedings (the 'Award of Costs Circular').

This sits alongside other measures to improve performance as set out in paragraph 6.17 of the National Infrastructure Plan (HM Treasury/Infrastructure UK, November 2011). In particular, the key statutory bodies - Environment Agency, Natural England, Highways Agency, English Heritage and Health & Safety Executive - have published draft improvement plans in the spring in line with the commitment in the Autumn Statement 2011. These plans set out a range of measures to improve the quality of service provided in relation to planning, and where appropriate non planning, consents. The intention is finalise these improvement plans later this year.

A revision to the Award of Costs Circular will provide revised guidance to the Planning Inspectorate. In practice this means that statutory consultees who in particular provide specialist technical advice may be regarded as a separate party in their own right liable to an award of costs at appeal, if they have not substantiated their advice. To avoid a claim for costs we expect consultees to focus the quality and clarity of advice they give as part of their role in responding to planning applications and appeals.

Costs and benefits of preferred option

The department has looked at existing data-sets in our appraisal of this change.

- In 2010/11, nearly 440,000 planning applications were made in England, of which 86% were approved. Only 4 % of planning applications went to appeal
- Of the 15,852 appeals determined in 2010/11, some 32% were upheld, meaning that in the majority of cases the decision of the local planning authority was supported.
- In 2010/11, there were 1,685 award of cost decisions, of which 570 were granted (431 to the appellant, 136 to the local authority, and 3 to Third Parties). No awards of costs were made against statutory consultees.
- Annual returns of statutory consultee performance submitted to the Department under Article 20 of the Development Management Procedure Order indicate that, in the vast majority of cases, Statutory consultees provide a response to consultations within 21 days or such other period agreed in writing with the Local Authority. What is less clear is the quality of the responses received by local authorities, and whether they enable the local authority to conclusively determine the application.
- Across England, statistics maintained by the department indicate that local authorities determine planning applications within the statutory 13 week period in around 62% of Major Planning applications. This demonstrates that, in a significant number of cases, local authorities miss their statutory targets. This could be due to a number of factors, including the role of statutory consultees in commenting on such applications⁵. It is notable to contrast this with the statistics on the extent to which local authorities determine minor and other planning applications within statutory timescales (72% and 84% respectively). Such applications are much less likely to involve consultation with statutory consultees.
- Data held by the Department indicates that there were around 2000 appeals by planning applicants against the local authority failing to determine a planning application within their statutory timescale⁶.

A small percentage of planning applications proceed to appeal. Where there is evidence of unreasonable behaviour by one of the parties in an appeal scenario, an inspector can award costs against the appellant, the local authority or a Third Party. An award of costs would be made on the basis that the unreasonable behaviour of one party has led to unnecessary costs on the part of another in dealing with the appeal. The changes to the Award of Costs Circular will ensure the advice from, in particular, statutory consultees that offer expert health & safety, environmental, heritage and transport advice - on which local authorities often do not have in-house expertise - is properly sustained and justified. This should ensure any potential unnecessary costs to planning applicants or local authorities as a result of this advice are minimised. There is no change to the guidance in relation to other Third Parties, such as parish councils or adjoining local authorities. Similarly appellants will still be able to seek costs, if it is appropriate, from local authorities, statutory consultees or other Third Parties and vice versa.

Generally, the Department expects the costs regime to encourage reasonable behaviour and timely decisions by all parties throughout the planning process. The revisions to the Award of Costs Circular intends to change the emphasis of the current guidance so that statutory consultees will now be governed by similar expectations placed on other Third Parties to act reasonably or face costs, highlighting the expectation that they should support the council responsible for making the ultimate decision on a planning proposal where their advice is key to whether the development should gain planning permission or not.

Impact on statutory consultees who provide specialist technical advice

To the extent that statutory consultees review their working practices to avoid either financial penalties or reputational damage, there should be benefits. These are more likely to occur over the longer term as organisational and cultural changes take effect. The Department takes the view that the potential for any additional costs imposed on statutory consultees – where it is proven that they have been unreasonable in their advice and have not substantiated it at the appeal stage, and so where they have an ‘award of

⁵ <http://www.communities.gov.uk/documents/statistics/xls/1929700.xls>

⁶ Figures gathered in 2009-2010

costs' against them – will be outweighed in the long term by a positive behavioural influence on statutory consultees in the planning application process.

For example a behaviour change as a result of these incentives it is expected to make statutory consultees increasing likely to provide reasonable advice in all consultations. This may reduce administrative costs if it leads to fewer appeals being made against decisions based on statutory consultees' advice.

It is not possible to estimate the positive behavioural impact of the policy with certainty at this stage but it should be possible for statutory consultees to take reasonable actions in every case and so to avoid *any* cost awards against them. No data on the actual amount for cost awards is currently accessible. The actual amount of a cost award is a matter for the parties involved to negotiate between themselves following a decision – by the planning inspector - on the principle of whether unreasonable behaviour has taken place. Currently statutory consultees who provide specialist technical advice are working on developing improvement plans with their sponsor Departments to meet other measures outlined in the Autumn Statement. This will assist in providing information on their working practices which will be considered at later stages of policy development and aid assessment of the behavioural impact of the proposals.

If, as a result of this option and as a worst case outcome, a statutory consultee finds itself subject to a submission for an award of costs against it for unreasonable behaviour at appeal where it has not substantiated its technical advice there will be no net additional benefit from the policy, just a transfer of resources away from statutory consultees. However there should be no net economic impact since any cost to them should be offset by an equal benefit to applicants - making the situation more equitable.

Where an award of costs would have been successful against the local planning authority in the case of an unsubstantiated reason for refusal, the transfer of resources may be from statutory consultees to local planning authorities. Whilst the magnitude of costs awards is important from a distributional perspective, given current data the total number of awards is likely to be low, there will be no net additional costs. A more likely outcome is that there will be a reduction in net costs from appeals as the incentives for the statutory consultees to provide proportionate and robust advice are strengthened.

Consultation Question IA1 – Do you have any further evidence, positive or negative, of the behaviour of statutory consultees in the planning appeal process?

Impact on local authorities

The amendments to the circular clarify how the award of costs regime applies and who should be responsible. Encouraging improvements to the quality and rigour of the specialist technical advice given by statutory consultees should give local authorities more confidence that advice received from a statutory consultee is robust and would stand up to scrutiny were the application to proceed to appeal.

Ultimately, authorities are responsible for their planning decision and should fully interrogate advice from statutory consultees to decide what weight to give it prior to making a decision. This may result in a reduction in the total number of cost awards against local authorities, through a reduction in the instances where applications are refused on the basis of advice from statutory consultees which are found, at appeal, to be unjustified.

Whilst we do not currently have data on the extent to which refusals are made on the basis of unjustified interventions from statutory consultees, it is a reasonable assumption that changes to the guidance in the Award of Costs Circular will make it less likely that a statutory consultee would provide incomplete or unsubstantiated advice. It is a reasonable expectation, therefore, that the amount of unjustified refusals should decrease and a consequential minor decrease in appeals will result.

The reduction in cost awards against the local authority (and those that the authority could be liable for) will be equivalent to those listed above as a cost to the statutory consultee. This is a transfer that will create no additional net cost.

Impact on planning applicants

Applicants should also benefit from more proactive engagement and robust advice from statutory consultees so that solutions to facilitate development can be found earlier in the application process which, coupled with any slight decrease in the number of refusals and a consequential reduction in the number of appeals, leads to savings for applicants.

Any reduction in delays to advice from statutory consultees will benefit local authorities since there would then be a greater likelihood of processing planning applications in accordance with their own statutory timescales⁷.

As a consequence, applicants may benefit from quicker decisions. The costs of planning delays to applicants are thought to be significant although are difficult to quantify. A number of studies have attempted to value the burden of planning delay. In a report for the Department for Communities and Local Government, Professor Ball of the University of Reading suggested 'financing costs of holding onto land and other assets whilst their projects are being evaluated' are around £1bn per year⁸.

Impact on the Planning Inspectorate

Any minor reduction in the number of appeals and cost applications will have a positive impact on the resources of the Planning Inspectorate. Our evidence indicates that costs to the Planning Inspectorate range between £1000 and £15,000 per appeal.

There were 15,832 appeals determined by the Planning Inspectorate in 2010/11. Based on the above estimates a small reduction in appeals as a result of improved statutory consultee engagement could deliver a significant benefit. For illustrative purposes, a reduction in appeals of only 1 per cent for any reason would have removed 158 appeals last year allowing the Planning Inspectorate to allocate inspector resources more efficiently and timetable other appeal decisions sooner.

Risks

- There is a risk that the change to the Award of Costs Circular might make some statutory consultees more cautious in the specialist technical advice they give or less willing to engage constructively with the planning process. This could result in legitimate concerns not being raised in the planning consultation stage but can be carefully managed through an effective improvement plan.
- There is a small risk that changes to the Costs Circular that make statutory consultees accountable for costs might increase the number of speculative and vexatious submissions for costs at the appeal stage. By their nature these submissions would, of course, be unsuccessful but this risk can be mitigated with effective communication to the Planning Inspectorate and applicants.

Wider impacts

Economic - Any possible additional cost to statutory consultees should be offset by an equal benefit to applicants and landowners so there will be no net economic impact from the policy - rather a transfer of resources which will make the situation more equitable.

Small and Micro businesses - No change. The proposals will apply equally to all businesses where they are applying for planning permission.

Social - No impacts identified.

Environmental - These proposals make no change to the policy expectations or legal duties of local authorities or statutory consultees in safeguarding or improving environmental assets as required. Those applying for development consent must still have regard to environmental policy and regulation.

Other specific impact tests - None.

⁷ set out in Article 29 of the Development Management Procedure Order

⁸ Ball, M (2010) <http://www.communities.gov.uk/documents/507390/pdf/1436960.pdf>

Summary and overall analysis

In summary, at this stage, the costs and benefits can be summarised as follows:

Costs

The policy may result in minimal short term transitional costs for statutory consultees, particularly those providing specialist technical advice, in ensuring that any follow on advice provided in defence of any subsequent appeal is proportionate and well evidenced.

Benefits

Generally, the Improvement Plans for the key statutory bodies should result in less delay at the planning application stage, as statutory consultees provide more comprehensive advice and alert local authorities and applicants at an earlier stage where more information is required – benefitting local authorities and applicants. We also consider that, in the long term, it could benefit statutory consultees themselves as working practices improve and they focus on what and when advice is needed.

In tandem, we consider that the main benefit of the change to the Costs Circular should be an improvement in the quality and assessment of the need for advice received from the statutory consultee concerned, as they become more accountable for the advice through the costs system. This should benefit all users of the planning system, particularly applicants and local authorities, and may also speed up the processing of planning applications.

We also consider the greater accountability imposed on statutory consultees through the Costs Circular could result in a very minor decrease in the total number of planning applications refused, and consequently proceed to appeal. This may then lead to savings for applicants, local authorities and the Planning Inspectorate.

Overall, we consider that the impact of the proposals should, at the very least net out, with the potential for the benefits identified to outweigh any short term costs. We are looking to gather further data through the consultation exercise to support this analysis and monetise possible costs and benefits, as required.

As part of an **implementation plan**, an assessment of the proposals will be undertaken with annual data gathered over 2012/13 and 2013/14 from the Planning Inspectorate, local authorities and statutory consultees. This will test the predicted outcome of a small reduction in unnecessary refusals - and resultant appeals and successful costs awards - and review the improvement plans that statutory consultees are bringing forward under other measures.

Consultation Question IA2 – Do you agree with our appraisal of the impact of the change to the Award of Costs Circular?