



Department for
Communities and
Local Government

Statutory consultee performance and award of costs

Summary of responses

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Summary of responses

Introduction

1. The Government is committed to ensuring a timely and effective planning system in order to support broader economic growth. The Government expects all those involved in the planning system - local planning authorities and local councils, applicants, residents, government agencies and planning practitioners - to play their part.
2. Statutory consultees play an important role in the planning system, supporting the delivery of development that best meets the needs of the local area. They are organisations and bodies, defined by statute, which must be consulted on relevant planning applications (See full list of statutory consultees in Annex A). While local planning authorities remain ultimately responsible for planning decisions, they 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 and therefore statutory consultees should take responsibility for the advice they give.
3. 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.
4. In July the Government consulted on amending guidance in the Award of Costs Circular¹ 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.
5. The Government also took the opportunity to consult on clarifying the guidance 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; and to remind appellants that the information they submit at application and appeal should be accurate and true.
6. The consultation closed on 11 September 2012, and we are grateful to the organisations and individuals who took the time to respond. In the light of the responses to the consultation the Government has published an addendum to Circular 03/09: Costs Awards in Appeals and Other Planning Proceedings at Annex B. This can be found on the Planning Portal website:
<http://www.planningportal.gov.uk/planning/appeals/guidance/guidanceonthepapealprocess>

¹ Circular 03/09: Costs Awards in Appeals and Other Planning Proceedings
<https://www.gov.uk/government/publications/costs-awards-in-appeals-and-other-planning-proceedings-circular-03-2009>

About the consultation

Overview of responses

7. In response to the consultation 91 responses were received; 47% (43) from local authorities; 9% (8) from other statutory consultees; 15% (14) from professional trade organisations; 8% (7) from the private sector including developers and private planning or consultants; 2% (2) from voluntary sector; and 19% (17) from other types of organisation or individuals.
8. This report summarises responses to the individual questions posed in the consultation document.

Amending the Award of Costs Circular in relation to statutory consultees and their advice

9. This question invited views on the proposal that statutory consultees 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 an application.
10. 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 technical issues where the authority may have limited expertise. Where the local authority has relied on this advice, and refused an application, it should not be directly at risk of costs if the statutory consultee's advice does not stand up to the scrutiny at appeal and the appellant makes a case that this behaviour led to unnecessary expense.
11. The proposal reinforced the message that statutory consultees are expected to be involved in appeals where they have advised refusal of an application, and therefore to encourage behaviour change to improve the quality of their engagement.
12. Of the responses that addressed this question 84 (95%) agreed with the proposal, and four (5%) disagreed. The broad view was that if permission was being refused on the advice of a statutory consultee, who had not withdrawn or amended that advice before an appeal, then they should be prepared to take responsibility for the advice given at an appeal, including bearing costs. The statutory consultees who responded were among those who agreed in principle to the change to the Circular.
13. Several respondents called for a reciprocal arrangement that statutory consultees could be awarded costs if the applicant has acted unreasonably. We consider that paragraph D6a of the addendum makes clear that this is the case.

14. While supporting the steer that statutory consultees should be prepared to substantiate their comments at appeal, some respondents questioned whether they could be subject to an award of costs if they did not attend a hearing or inquiry or provide written evidence. In coming to a decision on a planning application, the local authority will carefully consider the all the evidence provided to it and what weight to ascribe. We have revised the addendum to make it clearer that where a local planning authority 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. Where a local planning authority has placed significant weight on the view of the statutory consultee and this view is a central issue at appeal, the local planning authority may wish to request the statutory consultee to attend the appeal as a party to the decision. Planning Inspectors have existing powers to summons a body to an inquiry. Where the statutory consultee is a party to the appeal they may be liable to an award of costs to or against them. It would be for the Planning Inspector to decide in the particular circumstances whether a statutory consultee's involvement in the appeal was such that they could be considered a party and be subject to an award of costs. Paragraph 6a has been revised to reflect the additional points raised.

Clarifications to the guidance in relation to development plans

15. The Government gave a commitment during the passage of the Localism Act that it would revise its guidance 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, and the local planning authority had behaved reasonably. This had not previously been explicit and the proposed amendment is intended to clarify the existing position.
16. Of the 41 submissions which commented on this clarification the majority (36) agreed that it is helpful to clarify the guidance in relation to development plans. However, five disagreed and questioned the need to alter the Award of Costs Circular as any reasonable refusal, based on an up to date development plan and having regard to any other material consideration, would not result in an award of costs against the local planning authority.
17. This clarification was also seen as a helpful endorsement of the local plan is the keystone of the planning system, underlining the importance for local planning authorities to ensure they have an up-to-date development plan in conformity with the National Planning Policy Framework.

Clarifications to the guidance in relation to accurate information

18. Although the award of costs regime operates with regard to unreasonable behaviour at the appeal stage, the Government also wishes to reinforce the expectation that those applying for planning permission, and their agents, have gathered accurate information and formulated a truthful testimony with regard to the benefit and impact of a proposal. The proposed amendment to the Award of Costs Circular, inserting the additional example of when an appellant may be at risk of costs where they have relied on evidence that is manifestly inaccurate or untrue, is also intended to ensure the quality and accuracy of information relied on at the time of the planning application.
19. Of the 42 responses which commented on this proposed amendment only one felt that the change was unnecessary, as by definition providing inaccurate or untrue information would already be considered as unreasonable behaviour. The majority thought it was a helpful clarification. In fairness, it was noted that the same expectation of providing accurate and true evidence should also explicitly apply to local planning authorities. The addendum has been updated to reflect this.
20. Furthermore, responses also suggested that the example should include the deliberate concealment of information that would have influenced consideration of the benefit and impact of a proposal. We accept that this amendment would further clarify the requirement for both applicants and local planning authorities should ensure they provide full and truthful testimony and do not deliberately conceal evidence and have amended the wording in paragraphs B14 and B 16 of the Award of Costs Circular accordingly.

Other comments

21. There were 38 submissions which offered further comments on the measures in the consultation document, mainly commenting on the performance of statutory consultees and welcoming the proposals to drive up statutory consultees' engagement in the determination of planning applications and appeals.
22. Although the measures proposed to improve statutory consultees' performance standards were seen as desirable, there were some concerns over the level of impact they might have, and whether they might lead to an over-cautious approach in their responses to planning applications. A number of respondents thought that statutory consultees would become more risk averse in their handling of planning applications. It was suggested that they might increase their use of standing advice, or decide not to object to an application where previously they might have done so, in order to distance themselves from decision making and avoid involvement in appeals and thus any potential claim for costs against them.

23. Concerns were expressed that, despite their best intentions, some statutory consultees may not have sufficient resources to provide substantive responses to all applications on which they are consulted, or participate in appeals where their advice has been an important factor in the decision to refuse planning permission.
24. There were also concerns about inconsistencies of approach by statutory consultees, for example two regions within the same agency treating similar applications differently, or having had pre-application discussions which appeared to indicate that the statutory consultee's concerns were addressed and then objections were made by different officers when the application was submitted.
25. Timeliness was an issue raised in responses, with specific suggestions including the call for sanctions against statutory consultees who do not respond to applications within the 21 day deadline, or to amend the statutory time frame for responding to allow more time for major development applications. It is vital that all parties co-operate in providing information and adhere to deadlines at all stages of the planning process in order that decisions can be taken in the shortest time. The award of costs guidance has therefore been amended to strengthen the importance of timeliness as good practice throughout the planning process, and to make it clear that unreasonable delay at the application stage can be used as evidence in award of costs against any party at an appeal. The revised addendum includes new bullet points to be added to paragraph A28 related to good practice in the planning process, and B4 which notes examples of unreasonable behaviour by all parties that may give rise to an award of costs.
26. Respondents also cited examples of good practice by Statutory Consultees. These included areas where the statutory consultee had established good working relationships with local planning authorities. One statutory consultee was commended for establishing specialist casework teams to look at specific types of applications and work with the relevant industries to ensure good quality consistent advice. Another has put in place internal procedures to assess all potential objections to improve the quality and consistency of their advice nationally.
27. As stated in the consultation, the Government is committed to improving the performance of the key statutory consultees in the planning system. We want to embed a culture of continuous improvement within the agencies, and to ensure that engagement is carried out in a positive, timely and constructive manner. As part of our ongoing cross government improvement programme, English Heritage, Environment Agency, Health and Safety Executive, Highways Agency and Natural England have all produced draft improvement plans setting out how they will adopt more efficient working practices as part of their remit to promote the delivery of sustainable development. These plans include commitments to increase transparency in the way in which statutory consultees appraise their own performance, and how they solicit and act on customer feedback. Views expressed regarding statutory consultee engagement in this consultation

exercise are being taken into account as part of this wider improvement programme.

Impact of amending guidance in the Award of Costs Circular

28. The consultation included a draft impact assessment. Although it is not necessary to publish an impact assessment as the revisions to the Award of Costs Circular clarify existing guidance, the majority of responses (41 of the 49 respondents who addressed this issue) agreed with our appraisal of the impact of the change to the Award of Costs Circular. They agreed that the amendments should lead to behaviour change and improve the quality of statutory consultees' engagement in the planning system, but some acknowledged that there was a risk that statutory consultees may become more cautious in their approach in their responses to planning applications.
29. Of those who disagreed, one respondent believed that if an impact of the amendment to the Award of Costs Circular is to reduce unnecessary delay and costs, then the net costs to applicants and local planning authorities should decrease. Another questioned why we thought statutory consultees would become more cautious and not participate in constructive engagement.

Next steps

30. The revised addendum attached at Annex B will be published on the GOV.UK website, and will apply to all appeals submitted under the Planning Acts in England submitted after the date of the publication.
31. The Government sees the costs regime as an important tool in driving forward improvement in the planning system in order to promote growth, through ensuring that procedures are adhered to and decisions made in a timely manner. To support this further the Growth and Infrastructure Bill, currently before Parliament, will extend the powers of Planning Inspectors to initiate an award of costs in full or in part and to recover the costs of the Secretary of State in full or in part, in relation to all appeal procedures. The aim is not to add to the number of award of costs made, but rather to encourage all parties to adhere to deadlines throughout the planning process, and ensure positive decision taking. Detailed guidance will be provided following the passage of the Bill.

Annexes

Annex A - full list of statutory consultees

Canal and River Trust
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 Local Planning Authorities, and Local Highway 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 - 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 Acts² 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 parties³ who have behaved unreasonably⁴ 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, Inspectors and decision officers 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.

² 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).

³ The term “party” or “parties” is defined in paragraph A15 of Part A of the Annex to Circular 03/2009.

⁴ As summarised in A22 & A23 of Part A of the Annex to Circular 03/2009.

CANCELLATIONS⁵

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

Insert new text to PART A, paragraph A28

At the beginning of the bullet point list, insert:

- throughout the planning and appeal process, all the parties involved should make every effort to progress cases through the system as quickly as possible, in particular by responding in a timely fashion whenever their input is required.

Insert new text to PART B, paragraph B4

At the beginning of the bullet point list, insert:

- unreasonable delay in providing information or responding to requests, which adds to the time taken to determine a planning application which is later subject to an appeal.

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, or has deliberately concealed evidence. Equally, information the appellant relied on at the time of the planning application should have been accurate and true, and the appellant should not have deliberately concealed information”.

Insert new paragraph in PART B, after paragraph B15:

B15a. 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

⁵ 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.

for an award of costs against the planning authority for unreasonable refusal of an application.

Insert new text to PART B, paragraph B16:

Between the fifth and sixth sentences, insert: “Costs may also be awarded against a planning authority where at application stage or at appeal they have deliberately concealed relevant evidence”

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 in PART D, paragraph after D6:

D6a. In addition, local planning authorities often give significant weight to the advice of statutory consultees on specialist health and 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. Where a local planning authority has placed significant weight on the view of the statutory consultee and this view is a central issue at appeal the local planning authority may wish to request the statutory consultee to attend the inquiry or hearing, or make written representations, as an interested party. Where it is considered that the evidence of the statutory consultee is relevant to the determination of the appeal, the Inspector may use powers under section 250(2) and (3) of the Local Government Act 1972 to summon the statutory consultee, to an appeal held as an inquiry which may make them a party at the inquiry. Where the statutory consultee is a party to the appeal they 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 their evidence or advice changes.