

STATES OF JERSEY



PLANNING APPEALS: REVISED SYSTEM (P.87/2013) – AMENDMENT

Lodged au Greffe on 13th August 2013
by Deputy J.H. Young of St. Brelade

STATES GREFFE

1 PAGE 2, PARAGRAPH (a) –

- (a) For the words “new Planning Appeals process” substitute the words “Planning Appeals Tribunal”.
- (b) After the word “established” insert the words “with full jurisdiction”.
- (c) After the words “points of law arising from such appeals” insert the words “which would be determined by the Royal Court;”.
- (d) Delete the words “with the new system consisting of an independent Inspector considering the case along with all the material evidence and reporting findings to the Minister for Planning and Environment who would then determine the appeal”.

2 PAGE 2, PARAGRAPH (c) –

- (a) For the words “of independent Inspectors to consider appeal cases and advise the Minister as appropriate” substitute the words “by the States of a panel of members to fulfil the responsibilities and duties of the Planning Appeals Tribunal, the panel to comprise a legally qualified Chairman, a Deputy Chairman and ten other persons including qualified and experienced Planning Inspectors and other suitable persons with appropriate skills and experience from whom individual tribunals would be drawn;”.
- (b) For the words “and appointing an Inspector with appropriate skill and experience to consider each appeal” substitute the words “and, in consultation with the Chairman of the Planning Appeals Tribunal, appointing Tribunal members from the panel with appropriate skills and experience to determine each appeal;”.

3 PAGE 2, PARAGRAPH (d) –

For the words “the new appeals system should be designed to allow appeals to be considered either on the basis of written representations or by means of an Appeal Hearing” substitute the words “the procedures of the Planning Appeals Tribunal should permit the appellant the option of an appeal to be determined on the basis of written representations or by means of an appeal hearing held by three members of the panel, subject to the overriding discretion of the Chairman of the Planning Appeals Tribunal to determine which appeals procedure is appropriate for each appeal;”.

4 PAGE 2, PARAGRAPH (e) –

- (a) For the words “process and engage the required Inspectors as appropriate” substitute the words “Planning Appeals Tribunal”.
- (b) For the words “the Minister for Planning and Environment” substitute the words “the Chief Minister”.

5 PAGE 2, NEW PARAGRAPH –

After paragraph (e) insert a new paragraph as follows –

“(g) to agree that the Chairman of the Planning Appeals Tribunal should publish an annual report of the work of the tribunal;”

and renumber existing paragraph (f) as paragraph (g).

6 PAGE 2, PARAGRAPH (f) –

- (a) Delete the words “detailed proposals on the structures and procedures for the new appeals process together with”.
- (b) For the words “new appeal process” substitute the words “Planning Appeals Tribunal”.
- (c) After the words “to be established” insert the words “no later than July 2014”.

DEPUTY J.H. YOUNG OF ST. BRELADE

Note: The proposition as it would read ‘as amended’ is set out for convenience in the Appendix.

REPORT

1. Introduction

I support the intention of the Minister's proposal, i.e. establishing a merits-based, independent, accessible and affordable planning appeals system to replace the Royal Court in respect of the appeals against the Minister's planning decisions listed in paragraph 2.3 of the Minister's proposition.

I bring my amendment because I consider the Minister's proposals are fundamentally flawed and contrary to the overwhelming weight of opinion from those working in the industry, members of the public, and the requirements of a fair, transparent and an independent appeal process.

My amendment seeks to amend the Minister's proposal for a revised planning appeals system to that of an independent planning appeals tribunal. This has been twice approved by the States, the most recent occasion being on 20th March 2013 when my proposition (P.26/2013) set out the case for the independent tribunal.

2. The fundamental flaw – lack of independence

The Minister's proposed revised system, with him deciding on planning appeals, totally lacks independence. The Planning and Building Law places the entire responsibility for all planning application decisions on the Minister. All such decisions whether taken by him, delegated to his officers or to the Planning Applications Panel, are made in his name and require his legal authority. He has the opportunity to intervene in these decisions at any stage. In these circumstances, it cannot be right that the Minister also seeks to appoint himself as final adjudicator of appeals. This judge and jury approach breaches the fundamental basis of justice that the appeal decision must be made independently of the decision which is the subject of the appeal.

No matter what complicated administrative procedures the Minister plans to introduce to try to circumvent this requirement for independence, it fails totally unless the Minister's legal responsibility for all planning decisions is removed entirely from the Planning and Building Law.

In this highly unlikely scenario, the Minister would become isolated from the planning decisions and have to decide planning policy in an ivory tower. If he were to become the appellate body, he would be far less equipped to do the job than a properly resourced and organised independent appeals tribunal.

At the moment, the Royal Court decides planning appeals independent of the Minister, so the Minister's proposed new system is worse in this respect than the present system. The Minister's argument that his present democratic sovereignty of decision-making would be lost because of introducing independent decisions on appeals clearly has no validity.

3. Comparison with other jurisdictions

The Minister cites the Isle of Man system. Their Minister does decide on planning appeals; however planning decisions in the Isle of Man are made by a Committee comprising of lay members, so the appeals arrangement, unlike our own Minister's plan, maintains the principal of independence.

In Guernsey, where planning decisions are made by the Environment Department headed by their Minister, their independent planning appeals panel, set up in 2008 with full jurisdiction to make decisions, has been an unqualified success.

In the UK, Planning decisions are made by elected councillors elected to planning committees of local authorities. Appeals are decided independently by the Planning Inspectorate.

4. Minister's plan to withdraw from making planning decisions

The Minister's plan to try to circumvent the requirement for independence by withdrawing entirely from all planning decisions has major problems. I believe this would be abdicating his legal duty which the States have elected him to carry out. He proposes to delegate all application decisions to the Planning Applications Panel, which is simply not acceptable. The Panel was never intended to operate as a standalone decision-making body. It was set up to work jointly with the Minister and assist him to make decisions, because the most difficult decisions require balance, and benefit from input from other members. The Minister has power of direction to the Panel over their processes. The Minister's proposal to withdraw entirely from deciding applications is tantamount to imposing on the Panel Chairman the role of the Minister. Application decisions would then be made out of context of the Minister's other responsibilities – setting the Island Plan Policies, approving master-plans and deciding on planning obligation agreements being just a few examples.

The Minister argues that he is proposing this because his predecessor was severely criticised for allegedly being too closely embroiled in individual planning applications and was exercising excessive personal influence over them. However, the Minister's proposal to abdicate from this role in determining applications as a counter-reaction goes too far in my view, and prevents a much better alternative being adopted, which would substantially improve the consistency and robustness of planning decisions.

The present two-tier arrangement of holding separate ministerial hearings and planning panel hearings has given rise to much criticism. Sadly, the planning processes have become convoluted and now seem more important than the outcomes. The process itself causes avoidable delays and leads to inconsistency and uncertainty of decisions. Rather than abdicating from application decisions as the Minister plans to do, there is a very strong case for the Minister to take greater part in decision-making and benefit from other members by chairing the full Planning Applications Panel to consider the most contentious applications. He already has the power under the law to restructure these arrangements, including setting up a Planning Applications Panel Sub-Committee to deal with less contentious applications.

5. Loss of balance: a single inspector or a tribunal

My experience tells me that decisions are nearly always improved by the input of others. My experience as a reserve member of Guernsey's Planning Appeals Panel has demonstrated that the lay members of the tribunal bring real benefit to the professional planning experts. Planning policies require the exercise of subjective judgement to interpret grey areas. This is greatly assisted by the presence of lay members, rather like Jurats in our Royal Court.

Their inclusion ensures their judgements are likely to be more balanced. The Minister's proposal for a single expert inspector from the UK, making judgments unaided about local nuances of planning policy, will tend to be a planner's court.

I believe the Plémont Inquiry illustrates the risks inherent in the Minister's proposal. Guernsey makes use of UK Planning Inspectors in carrying out inquiries into local plans and in appeals hearings; but does so only when they sit with 2 other members of their Appeals Tribunal. We should learn from their experience.

The Planning Appeals Tribunal should be no different.

6. Appeals on the papers

At present this system is available in the Royal Court, but feedback from appellants indicates that the opportunity to present their case in person is preferred. The Minister's proposal suggests that the majority of cases would be ranked as simple and required to be dealt with on the papers. The implication is that this is done to minimise costs. It is important to ensure that the appellant has the choice, as they may prefer not to face a hearing, but where a decision is made to opt for an appeal on the papers, this should be subject to the agreement of the Chairman of the Tribunal that this is appropriate in the circumstances of the case.

7. The composition and appointment of members of the Tribunal

In order to provide the States Assembly with a viable alternative to the Minister's proposed new system, I have consulted on the make-up of the Independent Appeals Tribunal which I propose.

The Judicial Greffe already administers a number of tribunals – the Employment Tribunal, which is shortly to have its role extended to include discrimination; the 3 Social Security Tribunals; and the Mental Health Tribunal. All benefit from the services of a panel of persons of appropriate skills and experience deciding on appeals. They are all appointed by the States on the recommendation of the responsible Minister, after recruitment and selection processes have been carried out by the Jersey Appointments Commission. The Independent Planning Appeals Tribunal should adopt the same process and should form part of the tribunal service which is being established by the Judicial Greffe. This will ensure effective independent administration of appeals and provide best value for money.

I propose the Planning Appeals Tribunal should initially comprise a Chairman and Deputy Chairman and Panel of 10 other members. They would be remunerated on terms and rates of payment set commensurately to secure suitably qualified persons. The rate would be set to take account of the preparation and writing-up of cases and would likely follow arrangements in Guernsey set out in paragraph 3.5 of the Minister's report.

Setting up a Panel of members as I propose will ensure sufficient Tribunal members are available to serve as a 3 member Tribunal to hear appeals on a timely basis, despite individual members being disqualified to sit in individual cases because of a conflict of interest or other commitments.

The Panel's members should include a mix of qualified UK Planning Inspectors to provide professional oversight, and other persons of appropriate skills and experience to ensure that each Tribunal has a balance between the Planning Inspector and the 2 other members. The mix of members selected for the Panel would be for the Minister to decide, in consultation with the Jersey Appointments Commission and Appeals Tribunal Chairman-designate, prior to submitting details of the recommended Panel members to the States for approval.

As experience has shown, the general practice when establishing quasi-judicial tribunals is to appoint a qualified lawyer as the Chairman of the Appeals Tribunal. In the case of the Planning Appeals Tribunal, there is no overriding requirement for the Chairman to hold a Jersey legal qualification, as the Tribunal processes are familiar ground to experienced English solicitors. This has a subsidiary advantage that it would not be necessary to pay the full judicial rate when they sit on cases, which is currently £736 per day. I anticipate a lower rate, much closer to that paid in Guernsey, as cited in the Minister's report at paragraph 3.5.

8. Financial and manpower implications

My amendment would increase the additional costs estimated by the Minister, which were stated to be £148,000 in paragraph 3.14 of the Minister's report. My amendment would not change the cost of £123,000 estimated for Planning Inspectors' fees, which was included in the Minister's estimate.

However, establishing an Independent Appeals Tribunal, as I have proposed, would require a Tribunal Chairman and Deputy Chairman to be appointed. Initially, there would be set-up time to be funded, and thereafter there would be an annual retainer. I estimate that their combined Year 1 cost should not exceed £25,000.

There would also be additional costs of the 2 other non- Planning Inspector members of the Panel, who would be required to sit in each Tribunal hearing if my amendment is adopted. They would be paid at a daily rate, increasing the annual cost by £30,000 – £40,000. This is based on the Minister's own estimate of the number of appeal hearings and the rates presently paid in Jersey to Tribunal members.

My amendment would not affect the Minister's estimate of administrative cost which would be incurred by the Judicial Greffe. The Tribunal would, however, be likely to give rise to a modest increase in direct ancillary expenses, which should not exceed £10,000 per annum.

My amendment will therefore increase the total cost quoted by the Minister by £75,000 per annum.

This modest extra cost is more than justified by the benefits I have outlined. It will be more than offset by the very substantial savings which will be released by Planning Officers and the Law Officers' Department. The simplified appeals tribunal processes will avoid the need for their officers to prepare the complex legal submissions and court bundles currently required of them.

PROPOSITION AS AMENDED BY AMENDMENTS OF DEPUTY YOUNG

THE STATES are asked to decide whether they are of opinion –

- (a) to agree that a new Planning Appeals Tribunal to replace the present appeal provisions in the Planning and Building (Jersey) Law 2002 should be established with full jurisdiction to determine appeals against decisions made under the Planning and Building (Jersey) Law 2002 entirely on their merits, with the exception of deciding points of law arising from such appeals which would be determined by the Royal Court;
- (b) to agree that applicants for planning permission should be able to require a decision to be made if an application has not been determined within an identified timescale;
- (c) to agree that appropriate mechanisms and procedures should be established with the agreement of the Jersey Appointments Commission to permit the appointment, by the States of a panel of members to fulfil the responsibilities and duties of the Planning Appeals Tribunal, with the panel to comprise a legally qualified Chairman, a Deputy Chairman and ten other persons including qualified and experienced Planning Inspectors and other persons with appropriate skills and experience from whom individual tribunals would be drawn, with the Judicial Greffe administering the appeal process; and, in consultation with the Chairman of the Planning Appeals Tribunal, appointing Tribunal members from the panel with appropriate skills and experience to determine each appeal;
- (d) to agree that the procedures of the Planning Appeals Tribunal should permit the appellant the option of an appeal to be determined on the basis of written representations or by means of an appeal hearing held by three members of the panel, subject to the overriding discretion of the Chairman of the Planning Appeals Tribunal to determine which appeals procedure is appropriate for each appeal and to agree that a fee may be charged for each appeal;
- (e) to request the Minister for Treasury and Resources to allocate funding from a source to be identified by that Minister for the years 2014 and 2015 for the Judicial Greffe to administer the Planning Appeals Tribunal, with the Chief Minister then being accountable for public finance and manpower purposes;
- (f) to agree that the Chairman of the Planning Appeals Tribunal should publish an annual report of the work of the tribunal;
- (g) to request the Minister for Planning and Environment to bring forward for approval by the States the necessary draft amendments to the Planning and Building (Jersey) Law 2002 to enable the Planning Appeals Tribunal to be established no later than July 2014.