

STATES OF JERSEY



INDEPENDENT PLANNING APPEALS TRIBUNAL: ESTABLISHMENT (P.26/2013) – COMMENTS

**Presented to the States on 18th March 2013
by the Minister for Planning and Environment**

STATES GREFFE

COMMENTS

Introduction and history

I am already conducting work to consider this matter.

This matter has been a live issue for some time, and it is not the first time the principle of change has been discussed.

When the Planning and Building (Jersey) Law 2002 was being prepared and ultimately brought into force in 2006, the question of a merits-based appeal system was discussed. This was prompted by a review of the Planning system in 2005 held by Chris Shepley, former Chief Planning Inspector for England and Wales.

In his report, Mr. Shepley recommended to the States of Jersey that a proposal for a separate appeals tribunal should be revisited in due course. He also recommended that there should be a proposal for an alternative system within the Royal Court for dealing with planning cases, that requests for reconsideration should be terminated and that third-party appeals were not introduced for the time being.

Many discussions took place at the time, and due to concerns over costs and the jurisdictional issues as to who makes planning decisions, there was a decision not to proceed with an independent tribunal at that time.

Ministerial Government came into force, third-party appeals were subsequently introduced, and the process for requests for reconsideration kept and simplified.

The Court system also saw changes in that appeals could be progressed “on papers” only, with a more informal modified procedure, or with a full Royal Court full hearing.

Further calls for change

Since March 2007 there have been 3 formal considerations of all or part of the planning applications process. Of these, 2 reports were presented to the States –

- *Committee of Inquiry to examine the operation of third party planning appeals in the Royal Court (up to 31st March 2008): final report (R.14/2009); and*
- *Committee of Inquiry: Reg’s Skips Ltd. – Planning Applications – Second Report (R.38/2011).*

There was also a report commissioned by the Minister for Planning and Environment –

- The Development Control Process Improvement Programme (PIP) (November 2010).

The PIP report was in part in reaction to R.118/2010 – *Committee of Inquiry: Reg's Skips Limited – Planning Applications – First Report* (presented 16th September 2010), which indicated that there were concerns over the operation of the development control service within the Department. All of these reports in some way investigated and considered the planning appeals' process.

The response to the proposition

This is already a key business plan commitment of my Department for this year as a result of the recent calls for this to take place. As I hope Members will appreciate by considering this comment, the issue of a new system must be done properly, and with proper consideration of all of the issues.

Much work was undertaken by the Department in 2012. This included visits to the Isle of Man, to Guernsey and to the UK, to consider how these other systems work in practice and to test the applicability of such systems here.

It is true to say that I would have hoped to launch a consultation paper on this issue in the latter part of 2012. Due to competing demands on the limited resources within my Department and the complexity of the issue, this has been delayed by 6 months into this year.

It does however remain a key issue on which I wish to progress a public debate. A draft of that consultation paper will be released on 15th March and I urge Members to read it, as it provides the wider context on this issue.

I am disappointed that Deputy J.H. Young of St. Brelade has brought this proposition at this time, when our briefings to his Scrutiny Panel have informed him that work is underway on this matter. I think, and I hope Members will agree after reading this, that it is far too early to make a decision on the solution for an appeals system, before the key questions as to what is required, are answered.

In answering these questions, I would hope Members would agree that the formal views of the public, the development industry, those involved in currently administering the present system and other key interests in the planning system, should be sought before we jump to a solution.

On this basis alone, I would urge Members to reject the proposition.

Before this Assembly can decide on this, I would ask Members to consider the following:

1 – Should the legal basis for an appeal against a planning decision be changed from the test of reasonableness to full planning merits?

2 – Who should apply that test when planning appeals are brought?

In their own right, these seem quite easy questions to answer. I wish here to outline some of the supplementary issues which will also need to be resolved, before these questions can be answered.

Further issues that Members need to consider:

- **What will be the impact of a full merits system?** This is likely to see a marked increase in the amount of appeals, as known planning decisions in Jersey are always contested and subject to much debate. The proposition does not show the likely impacts of this change.
- **What are the true resource implications of this increase? And how will it be funded in reality?** Deputy Young's proposition claims that resources can be taken from 4 departments to pay for a new tribunal. In reality this cannot and will not happen. Those departments will still incur costs associated with appeals, as responses to appeals will still be required by the Planning Department, legal advice will still be required, and cases to Royal Court will still occur. The proposition is mistaken therefore in the financial implications of such a move.
- **Should a fee be levied for an appeal? Are appellants willing to pay for an appeal and at what level?** With any clear integration of the issue it is clear that Government and the Judiciary will still be involved in planning appeals. To pay for a system, charges will need to be levied. What are the industry and the public willing to pay? The proposition does not answer this point.
- **Is the States Assembly willing to place the decision making in a body which is not democratically accountable, and sits outside of the Court and Ministerial Government process?** The solution preferred by Deputy Young is Guernsey. In designing their solution, they have in effect created a non-democratically accountable and off-Island decision-making body. I would argue this would not be acceptable to Jersey. The proposition does not answer this point.
- **Should planning decision-making in Jersey be undertaken by off-Island planning experts?** Is the Island willing for decisions to be taken regularly by off-Island experts? This proposition does not answer this point.
- **What is the impact on the role of the Minister for Planning and Environment? And how does that reflect on the public expectation that the Minister should be involved in and responsible for planning decisions?** The Environment Scrutiny Panel places a focus on me to become more involved in decision-making, whilst other members would wish to see me less involved. We must be very clear on whether any tribunal reports *to* the Minister, or reports *on* the Minister. If the Minister makes planning decisions personally or by Panel, then the Minister cannot receive recommendations from a tribunal on his own decisions. The solution would be to impose decisions from outside government, onto government, and I do not consider this would be politically acceptable. If however, the Minister were to act more like the Secretary of State in the UK, then it is clear he would not make regular planning decisions, which would remove the democratic accountability for such decisions from the Minister. The proposition does not discuss or answer this point.

- **Will a full merits appeals system remove the need to go to the Royal Court?** I would argue not. Legal challenges on decisions are still likely via a judicial review when such large financial sums are at stake through the development process. The proposition does not recognise this point.
- **What are the impacts on third-party rights of appeal as a result of changes to first-party rights?** There needs to be clarity as to when third-party appeal rights start, if a tribunal overturns a refusal and grants permission, do third-party appeal rights then commence as well? The proposition does not answer this point.
- **If the responsibility for deciding merits-based appeals was given to an independent body, who would appoint that body and what mechanisms would be put in place to support that body in a transparently independent manner?** The proposition does discuss appointments to such a body, but there will be a need for ongoing administration and support. Further discussion on this matter would be required.
- **If the responsibility for appeals was transferred to an independent person or body, should they/it be professionally qualified planners or equivalent with demonstrable experience of considering planning issues?** The proposition assumes that there would be sufficient qualified professionals locally who do not have an interest in the property system of the Island, or indeed would have to declare an interest. It also states that Planning Officers' decisions are subjective and that the tribunal's would be professionally based. This is an inappropriate statement to make, as the Planning Department employ professionally based staff to make professional decisions. I do not feel that the proposition truly understands the conflicts that would be inherent in getting local property-based individuals to make local property decisions.
- **Would it be appropriate to involve lay-people in the appeal process under suitable guidance from appropriately qualified individual/s?** The proposition states that Planning Officers make subjective decisions, whilst the tribunal would make decisions solely on planning merits. The proposition clearly does not understand the planning process, and by inserting lay-people into the decision-making process, then it is likely to increase subjectivity rather than reduce it.
- **Could the Complaints Board process be adapted to specifically address merits-based Planning issues or be wholly independent?** The proposition is silent on this matter, and it is one that needs to be considered before a solution is designed.
- **Should the Request for Reconsideration (RfR) process be retained and formalised, or should it be replaced by a single system that covers all appeals?** The proposition fails to appreciate, in the statistics it shows, that many applicants take the offer of a RfR to the Planning Panel as their own appeal. This is a very successful route, whilst results in around a quarter of decisions being reversed. This process needs to be enhanced and welcomed, and it is interesting to note that my officers have had recent contact with the England and Wales planning inspectorate, who feel this system could be

developed more there. If RfR statistics are added into the total appeals number, then Jersey is comparable to other jurisdictions.

- **Could the Royal Court Rules be amended to allow an easier way of registering and progressing an appeal?** The proposition assumes that the Royal Court will no longer be involved in decision-making in relation to appeals. This is not correct, as they could easily and likely be called upon to consider judicial reviews of planning decisions. The proposition also fails to assess whether changing the current Royal Court system would be a possible solution to the concerns over accessibility and cost.
- **Could more be done to assure potential appellants that any Hearing in the Royal Court is unlikely to be a daunting as they might expect?** I think it is clear that a discussion with the Court system would be a useful way forward, once we have had clarity from the consultation process as to the specific concerns over the current process. The proposition does not consider this point.
- **Why are more appeals not requested to be considered on the papers?** The Court system already offers a cheaper and less formal method by submitting papers only. The development of this route needs to be explored following consultation. The proposition does not consider this issue.
- **Will the decisions of the planning tribunal themselves be open to challenge and by what means?** This is an important matter. It needs to be clear on what basis any tribunal decision can be challenged. For example, is this a traditional judicial review of the decision or do other challenge rights exist? If a challenge can take place, then who administers this on behalf of the tribunal and at what cost? This is not considered in the proposition.
- **Is a tribunal administered by the Chief Minister's Department?** It is too soon to assume that the best place for tribunal administration would be the Chief Minister's Department. If a Panel is created, it could easily sit within the Judicial Greffe, or elsewhere. The proposition does not consider other options.
- **Are there alternatives to an independent tribunal?** Should we redesign the current Court system? Should there be an independent body? Should there be a hybrid of current arrangements? The proposition does not give Members any options, nor indeed discuss the benefits or otherwise of different solutions.
- **Should any new decision-making body have the ability to award costs against either party in the appeal?** Such appeal work does incur costs. There are very few planning consultants in the Island; and as such, appellants will use either architects or lawyers. This route will incur costs and appellants will seek reimbursement if they win. Does any tribunal have this power? The proposition again does not consider this.

Conclusion

I have already committed my Department to action this matter.

However, I fundamentally feel that before any system or solution is proposed, that there should be a proper public consultation on the matter. This is planned and in train. A Green Paper has been prepared and will be published in draft on 15th March 2013.

I also feel that before we jump to a solution, we need to be mindful of all the other inter-related issues which will inform this decision.

I would urge States Members to reject this proposition, not on its basic aspirations, but on the fact that I am already progressing this piece of work, and that this will lead to the redesign of the planning appeals system, based on all of the facts, and based on proper feedback from the community which we serve.