The Rosewell Review

Georgina Reeves examines the main objectives of a recently published review of planning appeal inquiries and how the key recommendations set out in the report seek to achieve those objectives

Georgina Reeves is an associate in the planning and public law department at Dentons

Reform of planning appeal procedure and the inquiry process in particular is overdue. The publication of the *Independent Review of Planning Appeal Inquiries* or, as it is more commonly known, 'The Rosewell Review' (named after Bridget Rosewell who was appointed to chair the review by the Secretary of State for Housing, Communities and Local Government, James Brokenshire), earlier this year is timely (see www.legalease.co.uk/rosewell).

Each year there are on average over 15,000 appeals to the Planning Inspectorate (PINS) against local authority planning decisions (see the Rosewell Review). There is a broad consensus that appeals take too long to determine, and that those that go through the inquiry route face a daunting and costly delay. Such delays create uncertainty and add significantly to the risks for developers who cannot be sure what the legal and policy background will be by the time the inquiry takes place.

The vast majority of appeals are dealt with through written representations (93%), with 5% being determined through hearings and just 2% being subject to an inquiry. Although the overall number of planning appeal inquiries is relatively small (amounting to some 300 or so cases) (see the Rosewell Review above), these figures hide the true scale of housing development dealt with by way of inquiry.

In 2017/18, inquiry schemes sought permission for in excess of 42,000 residential units (figures taken from the Rosewell Review). A not inconsiderable number, particularly when considered against the backdrop of the government's target of building 300,000 new homes a year. If you then factor in that it takes an average of 47 weeks for inspector-decided cases to be determined (and considerably longer for cases determined by the Secretary of State which, by their nature, often involve major housing schemes), it is clear that the impact that the planning inquiry process can have on housing delivery should not be dismissed.

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So what does the Rosewell Review seek to achieve?

The central aim of the Rosewell Review was to make recommendations to halve current end-to-end inquiry times while crucially maintaining the quality of decisions. The report identifies three key areas of improvement:

- earlier engagement by all parties;
- greater certainty about timescales; and
- harnessing technology to improve efficiency and transparency.

Given the demanding brief (see www.legalease.co.uk/planning-appeal), there were concerns in some quarters that the report would recommend heavily restricting the use of inquiries or prohibiting them entirely in certain cases. However, it came out strongly in favour of the use of inquiries and found that there was 'much to commend in the current process', in particular, the quality of inspectors and their decisions, the benefits of oral presentation of evidence and the

value of rigorous cross-examination of witnesses. It did, however, make clear that inquiries are unnecessary in most instances and that the majority of appeals can be dealt with 'far more efficiently and equally effectively through written representations or a hearing'.

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Earlier engagement

The report identifies a number of ways in which earlier engagement can be achieved. In particular, it proposes that inspectors should have a more active role from the outset of the inquiry process going forward. To this end, the report recommends that the start letter should identify the inspector that will conduct the inquiry and proposes case management engagement between the inspector and the parties within seven weeks of the start letter. In most cases, it is envisaged that the latter would take the form of a conference call, with pre-inquiry meetings being reserved for the most complex and highly contentious schemes.

Under the proposals, the inspector would also determine how best to examine the evidence at the inquiry (whether it be by topic, oral evidence followed by cross-examination, round table discussion or written statement) at the pre-inquiry stage. At present such matters are too often only addressed on the first day of the inquiry leading to inefficiency and delay.

Appellants would also be expected to set out any proposed scheme amendments at this earlier stage in proceedings rather than raising them at the inquiry itself. The report makes reference to the case of *R (on the application of Holborn Studios Ltd) v London Borough of Hackney* [2017], in which the court held that the council had acted unlawfully by failing to consult in respect of amendments made to the scheme. Although the case does not concern an inspector's decision, inspectors would nevertheless be well advised to take heed of the findings and consider:

> ... whether, without re-consultation, any of those who were entitled to be consulted on the application would be deprived of the opportunity to make representations that they may have wanted to make on the application as amended.

The report further suggests that the inspector should be required to issue clear directions to the parties within eight weeks of the start letter (for example, requiring parties to seek agreement of particular matters in advance of the inquiry). It is hoped that earlier engagement such as this will help to narrow the grounds of dispute and shorten the inquiry process.

The report falls short of recommending that interested parties be prohibited from seeking rule 6 status beyond a prescribed stage of the process, instead proposing that steps be taken to encourage their earlier identification. In this vein, it suggests that letters from local planning authorities to those who commented on a planning application should explicitly state that if those parties wish to participate they should seek rule 6 status at the earliest opportunity.

If the aim is to speed up the end-to-end inquiry process, it remains to be seen why the government should not go further by requiring interested parties that have been notified to apply for rule 6 status within a set period unless exceptional circumstances can be demonstrated. Equally, the report does not propose any reduction to the six-month period within which an appeal must be submitted. Some within the industry believe a shorter period (for example, three months) would provide ample time for the necessary submissions to be prepared and professional advice to be sought regarding the appeal's prospects of success. Again, if one of the ultimate objectives is to bolster the speed of housing delivery, this could be an effective means of doing so.

Greater certainty about timescales

The report sets out various ways in which greater certainty about timeframes can be delivered, starting with proposals to streamline the process for deciding the appeal mode by requiring appellants to notify the local planning authority and PINS of their intention to appeal at least ten working days before the appeal is submitted. The report also proposes that the start letter should be issued within five working days of the receipt of each valid inquiry appeal. This is approximately six weeks less than the average timeframe currently achieved. However, the report is sparse on detail as to the reasons why this stage usually takes so long and how it envisages the reduction will be achieved (other than by requiring PINS to ensure that only complete appeals can be submitted).

The report also considers the scheduling of inquiries. Notwithstanding PINS' procedural guidance urging parties to 'work constructively to identify mutually acceptable dates', agreeing the inquiry start date is a frequent source of delay. The analysis in the report indicates that local planning authorities are the worst offenders in this respect and are responsible for rejecting dates 45% of the time, followed by appellants at 28%, PINS at 21% and rule 6 parties at 6%. The report recommends that PINS should in future lead the process of identifying a suitable date. This will involve:

- a senior inspector reviewing the case to verify that the parties' estimated number of sitting days is workable;
- all inquiries being scheduled to commence within 13 to 16 weeks of the start letter; and
- the inspector imposing a date for the inquiry.

The report also considers the benefits of the timely submission of documents and suggests that inspectors should take a more assertive approach, advocating for the imposition of

sanctions (namely an award of costs) where a party acts unreasonably or causes another party to incur unnecessary expenses. At present this power is rarely used. Indeed, the report found that PINS:

> ... could not recall any instance where an inspector... had initiated an award of costs (as opposed to deciding on an application for costs).

An unanswered issue is that too often it is difficult to identify specific costs that relate to unreasonable behaviour – save where there has been an unjustified refusal or an unsupported reason for refusal. The costs sanction normally has blunt teeth.

Along the same lines, the report also recommends that current procedural guidance on the conduct of inquiries is updated to 'encourage and support inspectors to take a more proactive and directional approach'. Inspectors are at times reticent about taking a proactive approach, for example, by cutting off witnesses that unnecessarily repeat evidence or managing the cross-examination process. PINS is no doubt mindful of the case of *Turner v Secretary of State for Communities and Local Government* [2015], in which the claimant contended that the inspector in question:

> ... gave an appearance of bias by the way in which he dealt with matters before and in the course of the inquiry and in his Report.

Ultimately the Court of Appeal held that the 'Inspector acted properly and without giving any appearance of bias', but the reverberations are arguably still being felt, particularly in inquiries where a party does not have legal representation.

The report also makes recommendations aimed at speeding up post-inquiry procedures. In this respect, it notes that at present it takes on average 11 weeks from the start of the inquiry to the issuing of a decision in inspector-decided appeals. The time periods to issue of the inspector's reports in Secretary of State-decided cases are longer still at 23 weeks for recovered appeals and 21 weeks for called-in applications. The report cites the practice of inspectors being programmed to go directly from conducting one inquiry to another, with inadequate time to focus on report writing, as one of the main reasons for these delays. The longer the delay, the greater risk of there being a change in material circumstances (for example, new case law arising or emerging policy becoming adopted policy). Such circumstances inevitably require further submissions resulting in further delays and mounting costs. For this reason, the report suggests that PINS should give greater attention and priority to this stage of the process and that the:

> ... [p]rogramming of inspector workloads should ensure there is enough time to write up the case immediately after the close of the inquiry.

Finally, in terms of timings, the report recommends that PINS is tasked with adopting the end-to-end targets set out in the table in the box below in respect of inspector inquiry decisions. It further recommends that in the case of inquiry appeals decided by the Secretary of State, the inspector's report should be issued within 30 weeks of submission of the appeal in all cases.

To ensure that PINS is taking appropriate steps to meet these ambitious targets by the proposed deadline of June 2020, the report recommends that PINS submits an action plan to the Secretary of State setting out:

- the organisational measures being put in place;
- how sufficient inspectors will be made available; and
- interim milestones to be met by September 2019.

I understand that this plan is currently with the Secretary of State.

This leads on to the issue of inspector availability. The shortage of inspectors, particularly suitably experienced senior inspectors, is arguably the root cause of many of the delays permeating the current system. The recruitment of more inspectors is

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Existing and proposed lengths of inquiry stages (inspector decisions)

Inquiry stage	Average length of stage (achieved 2017/18)	Proposed length of stage
Receipt to start letter	Seven weeks	One week
Start letter to inquiry start	29 weeks	Up to 16 weeks
Inquiry start to decision	11 weeks	90% of cases up to seven weeks 10% of cases up to nine weeks
End-to-end time from receipt of the appeal to decision	47 weeks	90% of cases up to 24 weeks 10% of cases up to 26 weeks

therefore critical to the success of the proposed reforms. Inspectors are highly qualified individuals, often with many years of experience in the industry. They are often tasked with making decisions in relation to proposals worth millions of pounds and their decisions can have an enduring impact on communities for generations. Given the crucial role that inspectors play in this respect, increasing their remuneration would seem an obvious means of attracting and retaining a sufficient number of inspectors, but it will ultimately boil down to a question of cost.

In the context of schemes worth tens of millions, developers would no doubt be prepared to contribute to accommodation costs if it resulted in an earlier inquiry date (and fully equipped venue) being secured.

Harnessing technology to improve efficiency and effectiveness

The report anticipates that:

> ... many of the current frustrations with submission and validation will be addressed by the Planning Inspectorate through the Operational Delivery Transformation project...

in particular, via the introduction of a new online planning appeal portal. A pilot of the portal is due to be launched in May 2019 with the wider rollout to all inquiry appeals scheduled to take place in December 2019. It is envisaged that the portal will reduce PINS' workload, with the use of mandatory fields helping to remove the need for manual validation checks and automated alerts notifying the various parties once documents are received and uploaded. Recommendation 1 of the report therefore requires PINS to meet these deadlines, while Recommendation 10 seeks to maximise use of the portal following its implementation by requiring the publication of all inquiry documents on the portal in a single location at the earliest opportunity following their submission. The launch of the portal should thereby reduce delays, cut costs and ensure that all of the parties are working from the same set of documents. The report goes further by recommending that PINS fully exploits technology to enhance efficiency and transparency, pointing to the use of webcasts by the Scottish Government Planning and Environmental Appeals Division and the potential use of transcription technology.

Venue costs and planning appeal fees

Planning authorities currently bear the costs of providing the appeal venue. This explains the reluctance of many authorities to use external venues (indeed, the report suggests that 88% of inquiries are held at council premises/offices) which can lead to delays in scheduling the inquiry if there is a lack of availability at council premises. Often such venues are not adequately equipped to host inquiries. The report therefore recommends that the Ministry of Housing, Communities and Local Government consults on the merits of appellants contributing towards venue costs. In the context of schemes worth tens of millions, developers would no doubt be prepared to contribute to accommodation costs if it resulted in an earlier inquiry date (and fully equipped venue) being secured.

Interestingly, the report parked the question of whether appeal fees should be introduced on the grounds that it is not yet clear whether their introduction is necessary to deliver the recommended improvements. It proposes that the outcome of PINS'

assessment of the impact of current changes in the pipeline and detailed operational plan should be awaited in this respect. The report does, however, confirm that the expert panel had no objection in principle to the introduction of such fees provided that:

- fee income is ring-fenced for use by PINS; and
- they are linked to specific performance outcomes.

Given the potential costs (such as debt servicing) stemming from substantial delays, some appellants would likely welcome the imposition of appeal fees if it resulted in measurable improvements in the turnaround times, provided that the fee was quantifiable at the outset (for example, based on a percentage of the application fee rather than a full cost recovery basis). PINS already charges for a number of its services (including local plan examinations and nationally significant infrastructure project applications); consequently, parts of the industry have already had to embrace such charges. Given that s200 of the Planning Act 2008 allows the Secretary of State to make regulations to provide for appeal fees, the imposition of fees has been on the table for some time and would not come as a surprise to many. Indeed, many in the industry think it is not so much a question of *if* appeal fees will be introduced but rather of *when*.

To ensure that performance outcomes were achieved, the introduction of appeal fees could be accompanied by a 'money back guarantee' (rather like that available in respect of planning application fees (www.legalease.co.uk/determining-planning). This would incentivise PINS to meet prescribed service standards while giving appellants recourse where it does not.

Arguments against the imposition of appeal fees often focus on depriving potential appellants of access to justice. To avoid this, fees could alternatively be charged for a 'fast track' service. This approach would, however, carry the risk that PINS would focus resources on such cases at the expense of others, and lead to even longer delays for non-fee-paying cases.

Given the vast majority of the report's recommendations rely on increased resourcing at PINS (either by way of greater manpower or the introduction of better technology), which will inevitably require greater funding, by effectively sitting on the fence on the matter of appeal fees, the report perhaps misses an opportunity which the government could have used as a hook for pushing forward with their introduction.

The proposals do not require legislative changes and could theoretically be delivered within the next 18 months according to the report.

Next steps

It will ultimately be for the Secretary of State to determine which of the 22 recommendations are taken forward and the time frames for any changes. Brokenshire welcomed the findings as 'fantastic' and providing 'a clear direction of travel on how we can ensure the appeals inquiry process is fit for purpose' (see www.legalease.co.uk/appeal).

Consequently, we would expect the majority of the recommendations to be implemented, not least because the proposals are pragmatic and build on current best practice. Furthermore, with the exception of Recommendation 3 (which would require appellants to give local planning authorities and PINS advance notice of their intention to request an inquiry), the proposals do not require legislative changes and could theoretically be delivered within the next 18 months according to the report. A number of the proposals (such as the PINS online portal) are helpfully already in the pipeline too. Indeed, the pilot scheme set up by PINS in March 2019 to test the proposed changes by processing a small number of appeal case in line with the revised procedures has since been extended to cover more inquiry appeals after making strong progress (www.legalease.co.uk/rosewell-update).

What is clear is that matters cannot remain as they are. There is an unquestionable need for reform to reduce the current delays. As Brokenshire accepts:

> Planning appeal inquiries have held up development and kept communities waiting in limbo – 47 weeks on average is far too long.

Brokenshire reiterated in his written ministerial statement of 13 March 2019 that ensuring faster decision-making within the planning system is a priority and announced that an accelerated planning green paper discussing 'how greater capacity and capability, performance management and procedural improvements can accelerate the end-to-end planning process' would be published later this year, drawing upon the findings of the Rosewell Review.

As the authors of the report acknowledge, many of the recommendations are interdependent. As such, their overall success or failure relies on the proposals being implemented in conjunction with each other as part of a comprehensive overhaul of the present regime.

If the problems with inquiries can be fixed, that will hopefully help resolve issues with the written representations and hearing routes of appeal. There is a need to do so given the similarly unacceptable delays in determining those appeals. ■

R (on the application of Holborn Studios Ltd) v London Borough of Hackney
[2017] EWHC 2823 (Admin)
Turner v Secretary of State for Communities and Local Government & ors
[2015] EWCA Civ 582