Briefing note

Minister and Assistant Minister for the Environment

DETERMINATION OF APPEALS

February 2024

1. Purpose

This note has been prepared and updated to provide advice about the process for the determination of appeals where decisions are to be made by the Minister for the Environment; or an Assistant Minister for the Environment, or any other minister, under delegation.

The note covers general issues and provides specific advice about:

- the basis for appeals and the appeals process
- declaring and avoiding conflicts of interest and the appearance of bias
- the minister's decision on appeal
- making a decision that is not fully compliant with the inspector's recommendations
- imposing new or additional conditions; and
- referring an appeal back to inspector for further information / advice.

2. Context

2.1 Who can appeal and against what?

The Planning and Building (Jersey) Law 2002 includes various provisions for appeals to be made in relation to planning decisions[1]. These include, but are not limited to, decisions about the award or refusal of planning permission; the attaching of a condition to permission; the listing of a building or place; the listing of a tree; and the service of certain notices.

Appeals can be made by various parties with an interest in planning decisions. These include applicants (first party appeals); and those who have submitted representations objecting to development proposals prior to determination where they have a property interest within 50 metres of an application site (a 'third party' appeal). Owners and, where different, occupiers also have rights of appeals in relation to listing decisions and the service of notices.

2.2 Administration of the appeals process

The appeals process is prescribed by the Planning and Building (Jersey) Law 2002[2]. The Judicial Greffe administers appeals against planning and building decisions so that cases are considered independently.

Once an appeal is received by the Judicial Greffe, it is assigned to an independent planning inspector drawn from a pool of qualified inspectors based in the UK[3].

[1] These are set out at Articles 108-110 Planning and Building (Jersey) Law 2002 (jerseylaw.je)
[2] This is set out at Articles 112-115 Planning and Building (Jersey) Law 2002 (jerseylaw.je)
[3] Inspectors are appointed in accord with Article 107 of the Planning and Building (Jersey) Law and are employed by the States Employment Board.

Minor appeals are often dealt with by exchange of written statements, while others might involve a hearing chaired by the inspector. All parties receive each other's cases with an ability to comment on submissions. The inspector considers all submissions received and will travel to the island to visit the site.

Under the provisions of the law, the inspector is required to consider an appeal, without undue delay, and following the consideration of written representations or (as the case may be) the appeal hearing, the inspector shall make a report in writing to the Minister and the report shall include –

(a) the inspector's recommendation as to the determination of the appeal; and

(b) the reasons for such recommendation.

The inspector's report is submitted to the Judicial Greffe, who will then forward the report to the Cabinet Office and Ministerial Office in order that the report might be considered by the relevant decision-maker.

At all stages after the receipt of the inspector's report, the Judicial Greffe will attend and note any subsequent meetings involving the decision-maker.

2.3 Impartial professional support

Chartered town planners are available to provide impartial professional advice and support to the decision-maker in the determination of an appeal. This support is provided by officers who will not have been involved in any aspect of the matter under consideration. In this respect, this role is usually fulfilled by officers from the Place and Spatial Planning team in the Cabinet Office.

Their role is <u>not</u> to provide professional advice about the merits or otherwise of any aspects of appeal case, but simply to offer professional support to enable any decision to be given appropriate effect.

A summary of the inspector's report and recommendations will be prepared by officers, together with the inspector's report and a collection of relevant plans and background papers for the Minister's information and attention, in order that they might determine the appeal.

A meeting between the Minister, or relevant decision-maker; impartial planning advisor; and the Judicial Greffe is then arranged to assist with and enable decision making.

Any decision or determination is required to be recorded by formal ministerial decision. Any ministerial decision and associated report is prepared by the impartial professional advisor and processed by the Ministerial Office for formal signature by the decision-maker.

All meetings are attended by the Judicial Greffe and noted.

3. Making a decision

3.1 Preliminaries: avoiding conflict of interest and the appearance of bias

In anticipation, or upon receipt, of an inspector's report in relation to an appeal, the decision-maker should consider whether they may be conflicted.

Ministers are under an express obligation to avoid conflicts of interest as set out in the Code of Practice for Ministers and Assistant Ministers[4] which provides as follows:

> *"**Ministers and Assistant Ministers must scrupulously avoid any danger of an actual or perceived conflict of interest** between their ministerial position and their private interests or any other public role they hold, ensuring that their actions do not compromise their judgement or place themselves under an improper obligation. **They should be guided by the general principle that they should either dispose of the interest giving rise to the actual or perceived conflict or take alternative steps to prevent it**. In some cases, it may not be possible to devise a mechanism to avoid such a conflict of interest. In any such case, the Chief Minister must be consulted.*

Determining an appeal under the 2002 Law is a quasi-judicial process, and the decision makers must ensure that they decide cases fairly, are impartial between the parties, and are seen to be fair and impartial in order to avoid any appearance of bias. Apparent bias occurs ***"where a fair minded and informed observer would conclude that there was a real possibility of bias***[5]*"* by the decision maker. What fairness requires can vary from decision to decision, and it is not safe to assume that what is fair in one decision will also be fair in another.

Decision makers should avoid predisposition e.g. expressing a general view on various types of development; and predetermination, e.g. expressing a view – whether positive or negative - about a particular development proposal in advance of being presented with the evidence about it.

Should a decision-maker consider that they are, in any way, conflicted in determining an appeal, then the decision should pass to an Assistant Minister to whom the Minister has delegated responsibility to determine such appeals. Where this is not possible, then the Minister must alert the Chief Minister so that the Chief Minister may take such action as is appropriate in the circumstances under Article 27 of the States of Jersey Law 2005.

The decision-maker should declare any relevant interests or relationships prior to the commencement of any meeting at which the determination of an appeal is to be considered.

Important

If aware that there may be a real, or perceived, conflict of interest, then the Minister should either delegate the decision to an authorised decision maker or should seek legal advice as to whether the decision should be delegated.

This principle also applies to any other decision-maker where there may be a real or perceived conflict of interest.

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[4] Codes of Conduct and Practice for Ministers and Assistant Ministers (gov.je)

[5] See Fauvel v Minister for Environment 21-Oct-2023 (jerseylaw.je) [2023]JRC193

3.2 Minister's decision on appeal

Decisions must be reached only on the basis of evidence and considerations which are relevant to the planning merits of the case. The decision maker must not take into account any evidence or considerations which are not relevant to planning, not relevant to the decision, or not before them as part of the evidence in the case.

It is not the Minister's or other decision-maker's task to re-assess the whole of the original planning application or appeal case: that is the role of the inspector and for which there is a process available to the Minister should further information be required (see below)

Decisions must not be fettered by pre-determined views and cases should not be judged before decision-makers have considered the evidence. Decision-makers may hold tentative views on the merits of individual cases but they should be open to persuasion and alternative points of view. They should only reach their final conclusions once they have considered all the evidence and representations.

The Minister must, therefore, approach (and be seen to approach) each decision with an open mind and must not have a predetermined view on a proposal. The Minister is entitled to have and express opinions about general planning issues not related to particular cases . The Minister must not, however, prejudge decisions, and it is important that the Minister does not make any public or private comments which could give rise to the impression that they have already made their mind up about the planning merits of a proposal.

The Minister or other decision-maker should consider whether the inspector's report and recommendations appears comprehensive, evidenced, sound and just.

To assist with their decision-making, the decision-maker may wish to visit the appeal site, even though the inspector will have done so. This can help to better understand the planning issues, the site and its context. Any site visit should not involve any of the parties to the appeal, but may usefully involve impartial professional support, usually fulfilled by officers from the Place and Spatial Planning team; and the Judicial Greffe.

At no time prior to the determination of an appeal should the decision-maker engage in discussion with any party involved in the appeal; or engage in any commentary, for example, through social media. Decision-makers should also be aware of and avoid engaging with unsolicited representations.

Having considered the inspector's report, the Minister or decision-maker is able to refer the appeal back to the inspector for further consideration of any issues that they may specify. This may arise, for example, but is not limited to, where new material considerations have arisen during the course of an appeal process.

The Minister may allow, or dismiss, an appeal in whole or in part; or reverse or vary any part of the original decision-maker's decision.

3.3 Making a decision that is fully compliant with the inspector's recommendations

The Planning and Building Law[6] [Art 116(1)] requires that:

"Having considered the inspector's report ...the Minister shall determine the appeal, and in so doing shall give effect to the inspector's recommendation unless the Minister is satisfied that there are reasons not to do so." [*emphasis added*]

As the Law requires the Minister to give effect to the inspector's recommendation, unless there are clear reasons not to do so, the default position should be that the Minister agrees with and determines an appeal in accord with the inspector's recommendations.

If the Minister chooses to follow the inspector's recommendations in full, then a succinct ministerial decision will be prepared to reflect this. This is because the inspector's reasons become the Minister's reasons.

No further appeal shall lie from the Minister's determination on this basis except to the Royal Court on a point of law.

3.4 Making a decision that is not fully compliant with the inspector's recommendations

The Minister is not bound by and does not have to follow the inspector's recommendation but where they are satisfied that there are reasons not to do so, they must explain fully, in their ministerial decision, why the recommendations were not followed.

Article 116(4) imposes an obligation to give **full reasons** in the event that the inspector's recommendation is not followed. It states that:

"The Minister shall make reasonable arrangements for access ... to the inspector's report ...and the notice given by the Minister under that paragraph shall include...

(b) if and to the extent that the Minister does not give effect to the inspector's the full reasons for the Minister's decision." [*emphasis added*]

The Royal Court has, previously, referred to a recent authoritative statement from the House of Lords of the position in England and Wales in the context of appeals against decisions by planning inspectors[7]. The statement is also considered relevant to the reasoning of ministerial decisions that do not follow an inspector's recommendations. The statement reads:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues', disclosing how any issue of law or fact was resolved.

Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn.

[6] Planning and Building (Jersey) Law 2002 (jerseylaw.je)

[7] House of Lords (delivered by Lord Brown) in the case of South Bucks. D.C. v. Porter (16) ([2004] 1 W.L.R. 1953, para. 36)

The reasons need refer only to the main issues in the dispute, not to every material consideration. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

The Royal Court has adjudged[8] that:

"[t]he requirement for full reasons is so that the party whose arguments have not been accepted by the Minister understands the reasons why that is the case. This requires the Minister to address expressly the findings of an inspector and to set out the reasons why the Minister has reached a different conclusion."

"...where [the Minister's] reasons are different to the conclusions reached by an inspector, the Minister must explain the weight attributed to each consideration. It is not enough...for the Minister...simply to form a different view."

The Royal Court has further stated that:

"Requiring reasons to be given in full does not mean that such reasons cannot be brief, as long as they can be understood and do not give rise to a substantial doubt as to whether the decision maker erred in law. What is required for a court to set aside a decision.... is a genuine doubt as to what has been decided and why."

There is nothing inherently wrong with a short decision. Brevity is an administrative virtue, and there exists no heightened obligation on the Minister to provide better reasons simply because it is a decision of a Minister instead of an Inspector. Reasons should not, however, be general; and they should be focussed and explicitly address the relevant issues.

A way to ensure that full reasons are given is to cross reference the Minister's differences to the paragraphing of the inspector's report, where the Minister or decision-maker might agree and disagree with the inspector's conclusions and recommendations; and in the case of disagreements, to say why this is so.

Any decision should also be supported by concluding remarks to demonstrate that the decision-maker has considered all material considerations and has weighed them accordingly as part of a considered and balanced planning decision.

No further appeal shall lie from the Minister's determination on this basis except to the Royal Court on a point of law. In light of previous consideration of cases by the Royal Court and others, adopting this procedure for decision-making that does not accord with the recommendations of the inspector will not remove the risk of appeal being brought but should help reduce the risk of success on the grounds of a lack of full reasons for a decision.

[8] Para 59. Fauvel v Minister for Environment 21-Oct-2023 (jerseylaw.je) [2023]JRC193

Important

If minded to make a decision that does not give effect to the inspector's recommendation (in part or in full), the Minister or other decision-maker should refer their draft reasons for the decision to the Law Officers' Department for consideration and advice prior to determination.

3.5 Imposing new or additional conditions

The addition of conditions to a planning permission can enhance the quality of development and enable development to proceed where it would otherwise have been necessary to refuse planning permission, by mitigating the adverse effects. The imposition of conditions should be exercised in a way that is clearly seen to be fair, reasonable and practicable. To this end, conditions should be kept to a minimum, and only used where they satisfy the following tests[9], such that they are:

- necessary;
- relevant to planning;
- relevant to the development to be permitted;
- enforceable;
- precise; and
- reasonable in all other respects.

Often, an inspector will recommend, or suggest, that conditions be added to a permission in the event that the Minister decides that planning permission be granted on appeal. Where this is the case, then the addition of conditions, as recommended, is in accord with the provisions of the law at Article 116(1), as referred to above (see section 3.4).

Where the decision-maker considers it prudent to attach a condition that has not been considered or recommended by the inspector, then it is evident that the applicant / appellant would not have had the opportunity to comment upon the condition and its possible impact upon them. Nor would the applicant / appellant have had the opportunity to challenge the imposing of the condition on appeal.

In such circumstances, it may be appropriate for the matter to be referred back to the inspector for further consideration and recommendation. This will be dependent upon the circumstances of the case and require consideration of the extent to which any condition might alter the form of development to the extent that it has not been the subject of consultation; or where it is unclear why a condition has been imposed. Any such referral would afford the opportunity for the inspector to invite further comment on any proposed condition, if considered appropriate to do so.

Important

Should the decision-maker wish to impose a condition that has not been considered by the inspector, they might refer the appeal back to the inspector for consideration and recommendation.

[9] The tests are adopted from the UK's National Planning Policy Framework 4; 'Decision making'.

3.6 Referring an appeal back to an inspector for further information / advice

There will be occasions when the decision-maker is not comfortable making a decision based on the information before them. This may be owing to any number of reasons including:

- insufficient discussion on a particular topic,
- possible misinterpretation of policy,
- lack of sufficient information in the original submission; and
- the need to have regard to new material considerations.

In such circumstances, the Law [Art. 116.(2)(b)] allows the Minister to ***"refer the appeal back to the inspector for further consideration of such issues as the Minister shall specify"***.

Any such decision to refer an appeal back to an inspector should be formally recorded in a ministerial decision requesting that the inspector prepares a supplementary report covering the issues of interest to the Minister. Depending upon the nature of the issues of interest, the ministerial decision may not be published, particularly where this might indicate the potential outcome of an appeal determination.

In the case of a referral back, the inspector's initial report would not be published until such time that the supplementary report is received, considered and the appeal determined.

4. Recording and issuing an appeal decision

The determination of an appeal is recorded by way of a ministerial decision.

Any ministerial decision and associated report is prepared by the impartial professional advisor.

The wording of any ministerial decision summary will be concise and simply reflect the decision; with the ministerial decision report setting out the full reasons for the decision. A separate schedule of reasons for refusal or conditions may also be appended to the report.

Ministerial decisions are processed by the Ministerial Office for formal signature by the decision-maker. Once signed, the decision is formally registered and published on the government website. The Judicial Greffe circulates the ministerial decision and inspector's report(s) to all interested parties.

Other internal notification is also made, post-determination, for strategic and significant planning decisions in order that key Government officers and Council of Ministers are informed prior to public release of any such decision.

After the planning decision has been issued, it enters its legal challenge period, where an aggrieved party can bring a legal challenge against the decision. If the challenge is successful, the Royal court will probably quash the decision and remit it back to be retaken.

As the reasons for the decision are either in the inspector's report (where the Minister has 'gone' with the recommendation), or set out in the ministerial decision where the Minister has decided not to accept all or part of the inspector's recommendation, the Minister and officials should not comment on the decision, summarise or interpret it. Requests for comments should be dealt with by referring the enquirer back to the Ministerial Decision and/or the inspector's report as appropriate in the circumstances.