

COSTS AWARDS GUIDANCE

Planning Appeals Commission



Planning Appeals
Commission

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Introduction

[1] The Planning Act (Northern Ireland) 2011, which came into operation on 1st April 2015, empowers the Planning Appeals Commission to make orders as to the costs of the parties in planning and related appeals. This guidance explains how the Commission proposes to exercise that power. The guidance has no legal force but is intended to assist those taking part in the appeals process.

The Planning Appeals Commission

[2] The Planning Appeals Commission is a statutory tribunal, independent of any government department or agency. Members of the Commission are public appointees and are called Commissioners. They have varied backgrounds and qualifications including town planning, architecture, environmental science and law. Commissioners study evidence, inspect sites, conduct hearings and take appeal decisions on behalf of the Commission. Administrative staff are responsible for the Commission's day-to-day work. While they are available to deal with queries from the public about procedures, they are unable to comment on the merits of individual appeals or on the likelihood of costs being awarded in particular cases.

[3] This guidance should be read in conjunction with the following publications, which contain flow charts illustrating the stages of the appeal process. The publications can be downloaded from the Commission's website www.pacni.gov.uk and are available on request from the Commission:-

- *Procedures for Planning and Water Appeals*
- *Procedures for Enforcement Notice, Listed Building Enforcement Notice and Submission Notice Appeals*
- *Procedures for Appeals about Lawful Development Certificates*

The Scope of Costs Awards

[4] Sections 205 and 206 of the 2011 Planning Act are reproduced as Annex 1 to this guidance. Section 205 enables the Commission to make costs awards in appeals under the following provisions of the Act:-

Section 58 – planning appeals

Section 60 – appeals against failure to take planning decisions

Section 96 – listed building consent appeals

Section 97 – appeals against failure to take listed building consent decisions

Section 105(6) – appeals concerning conservation area consent

Section 115 – hazardous substances consent appeals

Section 143 – appeals against enforcement notices

Section 159 – appeals against listed building enforcement notices

Section 165 – appeals against notices enforcing replacement of trees

Section 173 – appeals concerning lawful development certificates

Schedules 2 and 3 – appeals concerning reviews of mineral planning permissions

[5] The power to make costs awards is NOT available for:-

- any appeals under the 2011 Planning Act that are not listed in Paragraph [4] above;
- any appeals under subordinate planning legislation;

- any of the Commission’s hear-and-report functions under the 2011 Planning Act (in such cases the final decision does not rest with the Commission); or
- any of the Commission’s functions under non-planning legislation.

[6] Section 205 of the 2011 Planning Act does not distinguish between appeals where an oral hearing takes place and appeals which are decided solely by exchange of written representations, with or without an accompanied site visit. The power to make a costs award does not depend on the appeal procedure. Section 206 provides for costs awards in circumstances where there is a right of hearing before the Commission and arrangements have been made for a hearing but the hearing does not take place.

[7] Sections 205 and 206 provide that costs awards may be made in favour of, and against, any party to an appeal under the relevant provisions of the Act. The word “party” is taken to mean a person or group with a distinct viewpoint on the matters in dispute in an appeal. The appellant and the planning authority are parties. There may also be a range of third parties – objectors, supporters and other interested parties. A public body which provides evidence in support of the planning authority’s case is not a separate party. It cannot make a claim for costs and is not vulnerable to a costs award. The Commission is not a party and is not empowered to recover its own expenses.

[8] The Commission, being a tribunal, bases its conclusions and decisions solely on material presented to it by the parties involved in appeal proceedings. The Commission does not propose to instigate costs awards on its own motion. It will award costs only where a claim for costs has been made by one or more of the parties to the appeal in question. However, where a hearing takes place a Commissioner may ask whether any party wishes to make a claim for costs.

The Purpose of Costs Awards

[9] The 2011 Planning Act does not prescribe the circumstances in which costs awards can be made. However, it is clear from what was said in the Northern Ireland Assembly during the debate on the Planning Bill at Consideration Stage ¹, and from the Explanatory and Financial Memorandum to the Bill as subsequently revised, that costs awards are intended to provide redress when one party to an appeal has put another party to unnecessary expense because of unreasonable behaviour. It is on that basis that the Commission proposes to assess claims for costs.

[10] The Commission sees benefit in the new provisions for costs awards. It anticipates that they will encourage all those involved in the appeals process to behave in a responsible, cost-conscious manner and to follow good practice by carefully assessing at the outset whether they have a reasonable prospect of success, reacting in a timely fashion to changing circumstances and presenting credible evidence to support their case.

[11] Disagreement is an expected feature of the appeals process and is not inherently unreasonable. Where all parties behave entirely reasonably, there can be no justification for a costs award and parties can expect to meet their own expenses, as

¹ Official Report (Hansard), Session 2010-2011, Volume 63, No. 2, Page 171 onwards

they do at present. Costs will not be awarded to a party just because the appeal has been decided in favour of that party.

Circumstances in which Costs may be Awarded

[12] The Commission will normally award costs **only** where **all four** of the following conditions are met:-

- a party has made a timely claim (time limits are set out below); **and**
- the claim relates to an appeal of a type listed at Paragraph [4] above; **and**
- the party against whom the award is sought has acted unreasonably; **and**
- the unreasonable behaviour has caused the party claiming costs to incur unnecessary or wasted expense.

Unreasonable Behaviour

[13] In deciding whether a party has acted unreasonably, the Commission will in accordance with case law ² apply the ordinary, everyday meaning of the word “unreasonable” rather than the narrower concept of perverse or irrational. Unreasonable behaviour can be substantive (relating to the essence of a party’s case) or procedural (relating to how a party pursued its case).

[14] The following are some examples of behaviours which may be found to be unreasonable:-

- Causing an unnecessary appeal. There are various situations in which an appeal may be judged to have been unnecessary. One instance is where the planning authority was unable to produce any credible evidence to substantiate its reasons for refusing permission, or in an enforcement case where it has made a fundamental error of law or fact. Another instance is where the appellant has pursued an appeal which had no reasonable prospect of success. That might be found to have occurred where the proposal was clearly contrary to planning policy and no exceptional circumstances were put forward, or where the Commission had recently dismissed another appeal proposing the same or very similar development on the same land and nothing had changed since. An appeal may also be judged to have been unnecessary where the appellant has submitted information to the Commission which if submitted to the planning authority at application stage would have resulted in a grant of permission.³
- Prolonging proceedings. Where a party fails to attend a hearing or site visit, the proceedings may have to be postponed, extended or adjourned. Where a new reason for refusal, ground of appeal or significant issue, which could have been presented earlier, is introduced late in the process, the proceedings may likewise be prolonged and the Commission may be obliged to allow an additional exchange of written evidence in order to give other parties a fair opportunity to respond.³

² *Manchester City Council v Secretary of State for the Environment and Another* [1988] JPL 774

³ Section 59 of the 2011 Planning Act prohibits the raising at appeal stage of matters that were not before the planning authority, except in specified circumstances. It goes on to say that this does not affect any requirement or entitlement to have regard to the provisions of the local development plan or any other material consideration.

- Abandoning, or not pursuing, part of the case. The withdrawal, unprompted by any change in circumstances, of a reason for refusal, ground of appeal or significant issue at any time after the parties to the appeal have been invited to start preparing their evidence may be judged to be unreasonable. Failure by a party to produce any credible evidence in support of what had earlier appeared to be an important element of its case may also be judged to be unreasonable.
- Withdrawing or conceding an appeal. The withdrawal of an appeal by the appellant or of an enforcement or similar notice by the planning authority, resulting in the entire proceedings being abandoned, may be judged to be unreasonable, unless it was prompted by a significant change in circumstances which was outside the control of the party concerned.

[15] As third parties are not decision makers and cannot cause, withdraw or concede appeals, costs are less likely to be awarded against them than against planning authorities and appellants. They may, however, in some circumstances be found to be responsible for unreasonably prolonging proceedings or unreasonably abandoning or failing to support with credible evidence a significant issue which they had raised and which no other party was pursuing.

[16] The scenarios listed above are examples of **potential** unreasonable behaviour. Whether there has actually been unreasonable behaviour in a particular case will be a matter of judgment for the Commission. It is also important to note that the examples are not exhaustive and costs may be awarded in circumstances which are not covered or anticipated in Paragraph [14]. The Commission will assess every claim for costs on its own facts and the party seeking costs will have to show that it was put to unnecessary or wasted expense.

Unnecessary or Wasted Expenses

- [17] Expenses arising in the course of the appeal process typically include:-
- the cost to the appellant of employing an agent to submit the appeal;
 - the cost to the planning authority of assembling background documents to assist the Commission and the other parties in their preparations for the appeal;
 - the cost of employing a member of staff or agent to prepare written evidence and/or appear at a hearing; and
 - the cost of using the services of professional experts (whether from public bodies or the private sector) to provide legal or technical advice, to prepare written submissions or evidence and to attend and/or give evidence at a hearing.

[18] Claiming parties will be expected to identify the nature of the expenses they are seeking to recover. It will not be necessary when making a claim to state the actual amount of the expenses being sought but the expenses must be capable of being quantified in the event that a costs award is made. Expenses unrelated to the appeal in respect of which the costs claim is made are not eligible, nor are expenses incurred in making and dealing with the related planning application. Awards cannot extend to indirect losses, such as those resulting from a delay in obtaining planning permission.

[19] Claiming parties will be expected to explain why they originally incurred the costs they are now seeking to recover and why they believe that the unreasonable behaviour of another party resulted in those particular expenses being unnecessary or wasted. They will be expected to identify the party against whom they are claiming and to give full details of the behaviour on which the claim is based.

Making a Claim for Costs

[20] A claim for costs will not be considered unless it is made by a party to the related appeal and unless it is timely. The following deadlines will be strictly applied, unless a claimant can show compelling reasons for missing a deadline:-

- In the case of an appeal proceeding by exchange of **written representations**, any costs claim must accompany the claiming party's final written submission. The final submission will normally be the party's rebuttal to the evidence submitted by the opposing party or parties. If the Commission invites further written comment on issues which emerge, or occur to the Commissioner, in the course of the appeal process, the final submission will be the party's written response to that invitation.
- In the case of an appeal proceeding by exchange of written representations with an **accompanied site visit**, any costs claim must accompany the claiming party's final written submission, unless the claim relates to behaviour which occurred at the site visit. In that case, the claim must be submitted in writing to reach the Commission no later than five working days after the site visit.
- Where a **hearing** takes place, any costs claim should be made as soon as reasonably practicable after the behaviour that triggered the claim. If, for example, it is being argued that another party was responsible for causing an unnecessary appeal, the costs claim should accompany the claiming party's statement of case. If it is being argued that another party has behaved unreasonably by abandoning, or not pursuing, part of its case, the costs claim may be submitted in writing after the statements of case have been exchanged but no later than the start of the hearing. Claimants for costs should not rely on using surprise as a tactic. All claims must be in writing unless they arise from behaviour that occurred or came to light during the hearing, in which case a claim may be made orally at the end of the hearing.
- Where an appeal is **withdrawn** or a hearing was arranged but **did not take place**, any costs claim must be submitted in writing to reach the Commission no later than 10 working days after the date on which the Commission sent notification to the claiming party that the appeal had been withdrawn or the hearing cancelled.

[21] To ensure that claims for costs submitted in writing are readily identifiable, they should not be incorporated into statements of case or rebuttal statements but should be separate, clearly labelled, documents. There is no fixed format for a written costs claim. However, every claim, regardless of how it is set out, must provide **all** the information set out in Annex 2 to this guidance. It will not be enough to submit a vaguely worded claim or merely state an intention to make a costs claim. A full explanation of the reasons for claiming must also be given when a claim is made orally. Failure to provide essential information may lead to a potentially meritorious claim being rejected.

[22] The claiming party may withdraw its costs claim at any time by notifying the Commission in writing. A claim once withdrawn cannot be reinstated.

Responding to a Claim for Costs

[23] The Commission will ensure that a party against whom a claim for costs is made is afforded a fair opportunity to respond to the claim. The following procedures will apply:-

- Claims for costs submitted in writing will be copied to the party being claimed against and that party will be invited to submit a written response to the Commission within 10 working days (five working days in the case of a claim based on behaviour at an accompanied site visit).
- If a costs claim is submitted in writing at the start of a hearing or orally at the end of a hearing, the party being claimed against will be given an opportunity to respond before the close of the hearing, either orally or in writing. A break in proceedings may be called to allow that party to formulate its response. If the Commissioner is satisfied that the party being claimed against cannot reasonably be expected to respond at the hearing, he or she will set a deadline for the submission of a written response. Normally no more than 10 working days will be allowed.

[24] The deadlines for written responses to costs claims will be strictly applied, unless it is shown that there were compelling reasons why a deadline was not met. The responding party's submission will be copied to the claiming party for information only. No further submissions will be accepted unless the Commission seeks additional information on particular aspects of the claim.

The Commission's Decision

[25] Except in cases where a claim for costs was prompted by the withdrawal of an appeal, the Commission will make separate decisions on the appeal and the related costs claim. As there is a clear distinction between the issues that arise in an appeal and in a costs claim, the outcome of the appeal will not affect the decision on costs or vice versa. The Commission will, however, normally issue both decisions at the same time. The decisions will be taken either by an individual Commissioner or else by a panel of not less than four Commissioners. The Commission's decision making procedures are explained in detail in the publications referred to in Paragraph [3] above.

[26] In dealing with a claim for costs, the Commission will consider all relevant evidence placed before it by the claiming party and the party being claimed against. If there is a dispute over facts, it will make its assessment on the balance of probability. In deciding whether a party's behaviour was unreasonable, it will take account of the level of professional advice which was available to that party. The Commission will set out its reasoning in the decision.

[27] There are three possible outcomes to a claim for costs – a full award of costs, a partial award of costs and no award of costs. A full award of costs covers the claiming party's entire expenses from the beginning to the end of the appeal process, including

the expenses incurred in making the costs claim itself. A full award may be appropriate, for example, where the Commission judges that the appeal was unnecessary.

[28] A partial award of costs may be made where the claiming party has claimed only part of its costs or where a claim for a full award is allowed only in part. The Commission will not award any costs which have not been claimed. A partial award may relate to one issue in the appeal or to the involvement of one particular person. It may also relate to one part of the appeal process. For example, where a hearing was adjourned due to the unreasonable behaviour of one party, the award of costs may be limited to the expenses caused by that adjournment. Where a partial award is made, a proportion of the expenses incurred in making the costs claim may be recoverable.

[29] A costs claim may be rejected for a variety of reasons, including the following:-

- The information to substantiate the claim was insufficient.
- The expenses being claimed were unrelated to the appeal.
- It was not reasonable to have incurred the expenses in the first place.
- The behaviour on which the claim was based was not unreasonable.
- The expenses were not unnecessary or wasted.
- The party being claimed against was not responsible for the unnecessary or wasted expenses.

After a Costs Decision

[30] The Commission has no role, statutory or otherwise, in determining the quantum of costs. A costs decision made by the Commission will not specify a precise monetary sum to be paid. On receipt of a costs order, the party in whose favour the award was made should submit details of its costs to the other party with a view to reaching agreement on the amount. If the parties are unable to agree, the party which was awarded costs can refer the matter to the Taxing Master of the High Court for a detailed assessment. A costs order can be enforced in the courts as a civil debt.

[31] The Commission cannot reconsider or alter a costs decision after it has been issued. However, anyone who was involved in the costs claim and is dissatisfied about the way the Commission handled it can make a formal complaint. Details of the Commission's complaints system are provided on its website www.pacni.gov.uk and a leaflet is available on request.

[32] A costs decision may be challenged on a point of law by applying to the High Court for a judicial review. This must be done promptly or in any event within three months of the decision. Anyone considering such a course will need legal advice.

March 2016

ANNEX 1

EXTRACT FROM THE PLANNING ACT (NORTHERN IRELAND) 2011

Power to award costs

205.—(1) The appeals commission may make an order as to the costs of the parties to an appeal under any of the provisions of this Act mentioned in subsection (2) and as to the parties by whom the costs are to be paid.

(2) The provisions are—

- (a) sections 58, 60, 96, 97, 115, 143, 159, 165 and 173;
- (b) sections 96 and 97 (as applied by section 105(6));
- (c) in Schedule 2, paragraph 6(11) and (12) and paragraph 11(1);
- (d) in Schedule 3, paragraph 9.

(3) An order made under this section shall have effect as if it had been made by the High Court.

(4) Without prejudice to the generality of subsection (3), the Master (Taxing Office) shall have the same powers and duties in relation to an order made under this section as the Master has in relation to an order made by the High Court.

(5) Proceedings before the appeals commission shall, for the purposes of the Litigants in Person (Costs and Expenses) Act 1975 (c. 47), be regarded as proceedings to which section 1(1) of that Act applies.

Orders as to costs: supplementary

206.—(1) This section applies where—

- (a) for the purpose of any proceedings under this Act—
 - (i) the appeals commission is required, before a decision is reached, to give any person an opportunity, or ask any person whether that person wishes, to appear before and be heard by it; and
 - (ii) arrangements are made for a hearing to be held;
- (b) the hearing does not take place; and
- (c) if it had taken place, the appeals commission would have had power to make an order under section 205 requiring any party to pay any costs of any other party.

(2) Where this section applies the power to make such an order may be exercised, in relation to costs incurred for the purposes of the hearing, as if the hearing had taken place.

ANNEX 2

CLAIMS FOR AWARD OF APPEAL COSTS: CHECKLIST FOR CLAIMANTS

Every claim for an award of costs submitted in writing should be comprised in a self-contained document and must provide **all** of the following information.

- A. Information to identify the appeal, including the Commission's reference number
- B. Information to identify the claiming party, including the name and contact details of any agent
- C. Status of the claiming party (whether appellant, planning authority or third party)
- D. Identity of the party being claimed against
- E. Status of the party being claimed against (whether appellant, planning authority or third party)
- F. Full details on the allegedly unreasonable behaviour which is believed to have caused the claiming party unnecessary or wasted expense in the appeal
- G. Nature of the expenses incurred by the claiming party which are believed to have been unnecessary or wasted (*it is not necessary to state the amount*)
- H. Reasons why those expenses were originally incurred

Please email the claim and any supporting documents to info@pacni.gov.uk.

Alternatively, you may post or deliver the claim to:-

Planning Appeals Commission
4th Floor
92 Ann Street
Belfast
BT1 3HH
Telephone: (028) 9024 4710