



PLANNING INSPECTORATE GOOD PRACTICE ADVICE NOTE 09

Accepting amendments to schemes at appeal

1. Section 1.9 of the Planning Inspectorate's Procedural Guidance (PINS 01/2009) makes clear that in deciding whether to accept amendments to appeal schemes the principles of the "Wheatcroft" judgement¹ will be applied.
2. This good practice advice explains the governing principles established by Wheatcroft and how these are to be applied in the light of the core principles set out in paragraph 1.4.2 of the Procedural Guidance.
3. For all appeals, in the interests of fairness and ensuring that decisions are made locally where possible, it is important that what is considered by the Secretary of State is essentially what was considered by the local planning authority. The appeal process should not be a means to progress alternatives to a scheme that has been refused or a chance to amend a scheme so as to overcome the reasons for refusal. In the first instance materially changed schemes should be re-submitted to the local planning authority as a fresh planning application.
4. It is equally important that local planning authorities and applicants work together to ensure that a decision can be made on the application so that there is certainty and clarity about the authority's position should the case come to appeal. Where the appeal is against the failure of the local planning authority to make a decision there is a greater risk that third parties will be prejudiced by the appeal process, especially if it is used to evolve a scheme.
5. There may be occasions where amendments could be made to a scheme without prejudice to the delivery of a fair and more efficient system. Where amendments are proposed to a scheme, the Inspector will be guided in their decision making by the *Wheatcroft Principles*. In the 'Wheatcroft' judgement the High Court considered the issue of amendments in the context of conditions and established that "*the main, but not the only, criterion on which...judgment should be exercised is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation*". It has subsequently been established that the power

¹ *Bernard Wheatcroft Ltd v SSE* [JPL, 1982, P37]. This decision has since been confirmed in *Wessex Regional Health Authority v SSE* [1984] and *Wadehurst Properties v SSE & Wychavon DC* [1990] and *Breckland DC v SSE and T. Hill* [1992].

to consider amendments is not limited to cases where the effect of a proposed amendment would be to reduce the development.²

6. An integral part of the legal test is therefore the issue of fairness to third parties. This is a fact-sensitive question to be determined by the decision maker. The question of the stage in the process at which it is sought to make an amendment is likely to be relevant, together with the appellant's reasons for seeking the amendment.

7. The core principles referred to above reflect the policy objectives of the modern planning system brought into effect by the 2008 Planning Act and which include the following:

- that the planning system should be streamlined, efficient and predictable; and
- that there must be full and fair opportunities for public consultation and community engagement.³

8. The emphasis on community engagement is reinforced by the requirement in the 2004 Planning and Compulsory Purchase Act for the local planning authority to prepare a Statement of Community Involvement (SCI) which is to be "*a statement of the authority's policy as to the involvement in the exercise of the authority's functions under sections 19, 26 and 28 of this Act and Part 3 of the principal Act of persons who appear to the authority to have an interest in matters relating to development in their area.*"⁴ Part 3 of the 1990 Town and Country Planning Act (the 'principal Act') relates to the Control of Development.

9. The delivery of an efficient, customer focused appeal process which is of benefit to all depends on continuing constructive dialogue between the applicant and the local planning authority during the progress of planning applications. Where such dialogue takes place it should be possible for acceptable amendments to be agreed prior to the local planning authority's decision. Thus should there be any subsequent appeal it can be about the scheme considered by the local planning authority, including any amendments made to overcome legitimate planning concerns. This allows the local planning authority to conduct any necessary public consultation in accordance with their SCI, ensuring that any third parties who may be interested in a proposal have a fair opportunity to comment on any amendments to a scheme before it comes to appeal.

10. There may be occasions where it has not been possible for the appellant to know what amendments might be acceptable during the passage of an application. For example, in non-determination cases where the local planning authority has failed to maintain communication with an appellant, the local planning authority's objections may not be known until after submission of an appeal. Similarly, where elected members have overturned

² see *Breckland DC. v. Secretary of State for the Environment* (1992) 65 P&CR.34.

³ Planning Bill Impact Assessment page 38 Part B Town and Country Planning Considerations "What are the policy objectives and intended effects"

⁴ Section 18 (1) and (2) of the Planning and Compulsory Purchase Act 2004

officers' advice the specific points of objection to a scheme may not be identified until the decision notice is issued.

11. In such circumstances it may be possible to overcome objections by making amendments within the Wheatcroft principle. Whilst amendments to a scheme might be thought to be of little significance, in some cases even minor changes may be considered to materially alter the nature of an application and lead to possible prejudice. Examples might include detailed treatment of schemes to alter listed buildings or where any changes would move structures or windows closer to a neighbouring property. Decisions regarding the acceptance of amendments are dependant on the individual circumstances of each case. The question of the necessity for and extent of any further consultation on amendments is likely to be relevant to the exercise of discretion.

12. Given the requirements of the 2004 Act and the responsibility of the local planning authority to comply with the SCI such consultation should be undertaken by the local planning authority where at all possible. Accordingly, if consultation on an amended scheme is considered necessary the appellant should normally be expected to seek to gain permission for a revised scheme using the free service for re-submitted applications, rather than pursue such amendments through the appeal system. Local planning authorities can help with this process by being open to discussions on whether an amended scheme is likely to be viewed favourably. This will help to avoid abortive applications and unnecessary delays in the system.

13. However, where it is clear that the local planning authority are unwilling to co-operate in a constructive dialogue it may be necessary for the appellant to carry out consultation on amendments to a scheme on which it is proposed to appeal or where an appeal has been lodged. In deciding whether the amendments can be accepted in such cases it will be crucial to establish whether or not all relevant parties have had the opportunity to consider proposed amendments and make their views on them known. Where consultation has been carried out by the appellant, particular care will need to be taken to ensure that statutory bodies and local people have been made properly aware of what is proposed and have had adequate chance to comment; timescale will clearly be relevant.

14. Where the appellant feels that their only recourse is to amend the scheme at appeal they should alert the Planning Inspectorate as soon as possible of their proposed approach to such amendments, their reasons for making them and how any necessary consultation has been or is being undertaken, including reference to the relevant local planning authority's SCI. Where the consultation has taken place prior to the lodging of an appeal any representations can be submitted alongside the appeal. If it takes place after the lodging of the appeal the address to which representation should be sent should be agreed with the Planning Inspectorate.

15. It is unlikely that the Planning Inspectorate would agree to be the recipient of ad hoc comments on an amended scheme prompted by such

consultation, as there is no provision for such late representations in the Rules and experience suggests that an ad hoc arrangement like this is likely to cause confusion amongst those consulted. However, provided that arrangements are made with and confirmed by the Case Officer prior to the consultation taking place (and in the knowledge of or preferably with the agreement of the local planning authority) the Planning Inspectorate will be prepared to receive "bundled" responses to consultation sent to the local planning authority in response to proposed changes to a scheme. It should be borne in mind that any post submission consultation is likely to lead to delay and may attract a costs application.

16. Where amendments are proposed to be made all parties interested in the appeal will be invited to comment on the appropriateness of the Inspector accepting such amendments.

Consequences of not following this guidance

16. Any party contemplating submitting changes to a scheme at appeal stage should carefully consider the potential consequences. Particular consideration should be given to whether submission of such a change at this stage would be likely to be regarded as unreasonable and, if so, whether it would result in any additional costs being incurred to other parties. Examples of the types of unanticipated effects that changes to scheme at appeal may result in include the need to adjourn events to consider the need for consultation and the timescale for it to be carried out effectively leading to delay in reaching decisions.

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