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Text size: [A](#) [A](#) [A](#) [A](#)

You are here: | [Publications](#) | [1990](#) | [March](#) | [Circular 6/1990](#) |

Circular 6/1990

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The Chief Executive
Regional and Islands Councils

The Chief Executive
District Councils (except in Highland, Borders and Dumfries and Galloway Regions)

Our ref: PGG/1/5
22 March 1990

Dear Sir

AWARDS AND EXPENSES IN APPEALS AND OTHER PLANNING PROCEEDINGS AND IN COMPULSORY PURCHASE ORDER INQUIRIES

Introduction

1. This Circular provides advice on the manner in which the Secretary of State's power to order one party to certain proceedings to meet the expenses of another party is exercised. It applies to planning appeals and other planning proceedings under Parts III, IV, V, IX, X of the Town and Country Planning (Scotland) Act 1972 and also to inquiries into compulsory purchase orders. A copy is enclosed for your Director of Planning.
2. This Circular also explains the conditions which require to be met before an award of expenses will be made. It sets out examples of some of the situations in which an award of expenses may be made either against a planning authority or against an appellant or other party. It also covers the award of expenses in respect of compulsory purchase orders and analogous orders and gives guidance on partial awards and making an application for expenses.

Background

3. Section 267(7) of the Town and Country Planning (Scotland) Act 1972 (the 1972 Act) empowers the Secretary of State to make an order as to the expenses of the parties to an inquiry. Section 267A of the 1972 Act enables the Secretary of State to make an award of expenses in relation to proceedings which do not give rise to an inquiry, in particular in cases determined by written submissions. Paragraph 5 of Schedule 7 to the 1972 Act also enables Reporters to exercise the Secretary of State's power to award expenses in specified cases. These provisions were inserted into the 1972 Act by the Housing and Planning Act 1986 and come into force on 31 March 1990.
4. In planning proceedings the parties are normally expected to meet their own expenses and expenses are only awarded on grounds of unreasonable behaviour. Awards of expenses do not necessarily follow the decision on planning merits. An appellant is not awarded expenses simply because his appeal has succeeded, nor is the planning authority awarded expenses simply because the appeal is dismissed. In the case of compulsory purchase and analogous orders, however, where an inquiry has been held, the Secretary of State will normally make an award of expenses as a matter of course to a successful statutory objector against the authority which made the order. This represents no change in the Secretary of State's policy on the awarding of expenses in compulsory purchase order inquiries.

EXPENSES IN RESPECT OF APPEALS AND OTHER PLANNING PROCEEDINGS

5. Before an award of expenses is made, the following conditions will normally need to have been met:-

- 5.1 One of the parties has applied for an award at the appropriate stage of the proceedings. In the case of a public local inquiry this will normally be before the inquiry is concluded. In the case of written submissions procedure, the claim for expenses should normally accompany the party's final written submissions.
- 5.2 The party against whom the claim is made has acted unreasonably.
- 5.3 This unreasonable conduct has caused the party making the application to incur unnecessary expense, either because it should not have been necessary for the case to come before the Secretary of State for determination or because of the manner in which the party against whom the claim is made has conducted his part of the proceedings.

6. Listed below are examples of unreasonable behaviour which may give rise to an award of expenses. It should be emphasised that this list is illustrative, not exhaustive, and claims for expenses which fulfil the conditions outlined in paragraph 5 will be considered, even though they do not come within any of the examples listed. What is unreasonable remains a matter of judgement in the circumstances of each case and each application for expenses will be decided on its merits in the circumstances of each particular case.

Examples of Unreasonable Behaviour

7. Unreasonable behaviour on the part of the planning authority may include:-

Failing to give complete, precise, and relevant reasons for refusal of an application. As stated in SDD Circular 17/1985, there is a presumption in favour of granting planning permission having regard to all material considerations, unless there are sound and clear cut reasons for refusal. The planning authority must be able to support its reasons for refusal and they will be expected to show that they have reasonable planning grounds for their decision. A partial award may be appropriate in respect of one or more reasons which were not adequately supported by the planning authority in the course of the appeal proceedings (see paragraph 13).

Reaching their decision, without reasonable planning grounds for doing so.

Refusing an application for planning permission solely on the grounds that it does not accord with the provisions of the development plan and without having had regard to other material considerations. Proper consideration should also be given to the merits of the application, the age of the development plan and to relevant changes in circumstances since the development plan was approved or adopted.

Refusing an application because of local opposition, where that opposition is not founded upon valid planning reasons. While the planning authority will need to consider the substance of any local opposition to a particular application, their duty is to decide a case on its planning merits.

Refusing an application if an earlier appeal against the refusal of a similar application in respect of the site has been dismissed, where it is clear from the decision on that appeal that no objection would be seen to a revised application in the form submitted.

Failing to take account of relevant statements of Government policy in Departmental Circulars or of relevant precedents of which the planning authority were aware.

Imposing conditions on a grant of planning permission which clearly fail to meet the criteria set out in SDD Circular 18/1986 or which so limit an appellant's freedom to dispose of his property as to amount to an unreasonable restriction.

Serving an enforcement notice without undertaking reasonable investigations to establish whether there has been a breach of planning control or without taking account of case law and of policy and advice set out in Departmental Circulars.

8. Examples of unreasonable behaviour on the part of the appellant may include:-

Pursuing an appeal in circumstances where there is no reasonable likelihood of success. It may have been clear from a decision on a previous appeal in respect of the same site and the same or similar development that the development would not be permitted. If circumstances had not changed materially in the meantime and the appellant was aware of the decision, expenses may be awarded. Alternatively, it may have been obvious from Government statements of policy or judicial authority that the appeal had no reasonable prospect of being successful.

Withdrawing the appeal without giving sufficient time for reasonable notice of the cancellation of the inquiry to be given to the parties.

Deliberately unco-operative behaviour by any appellant, whether or not professionally represented. This may include refusing to explain the grounds of appeal or refusing to discuss the appeal.

9. Unreasonable behaviour on the part of either party may include:-

Introducing a new matter (eg a new reason for refusal or new ground of appeal) at a late stage in the proceedings.

Refusing to supply adequate grounds of appeal or to co-operate in settling agreed facts or supplying relevant information which unnecessarily prolongs the proceedings.

Refusing to co-operate in setting a date for an inquiry or accompanied site inspection.

Failing to comply with the requirements of any statutory procedural rules by, for example, not providing a pre-inquiry statement when required to do so, or failing to submit written submissions within the prescribed time limits. In these circumstances account will be taken of the extent to which an appellant has the benefit of professional advice.

Failure to comply with procedural requirements to the serious prejudice of the other party and leading to the adjournment of the inquiry. In these circumstances an award may be made relating to the extra expense arising from the adjournment.

Third Parties

10. Awards of expenses either in favour of or against third parties will be made only in exceptional circumstances. In general, third parties will not be eligible to receive expenses where unreasonable behaviour by one of the main parties relates to the **substance** of that party's case (eg the grounds of appeal or the reasons for refusing planning permission are considered unreasonable). But where unreasonable conduct **at a public local inquiry** causes unnecessary expense, third parties may be awarded expenses, or have expenses awarded against them. An example would be an adjournment caused by unreasonable conduct whether of the third party or of another party.

Making an Application for Expenses

11. Where a case has been dealt with by means of public inquiry, an application for expenses should be made to the Reporter at the inquiry. Expenses are awarded because of unreasonable conduct and not on the basis of success and it is normally clear by this stage whether there are grounds for an application. An application made to the Reporter before the inquiry is over enables him to consider the arguments for and against an award. It can be dealt with simply and speedily and the Reporter's decision on the appeal will not be affected in any way by the fact that an application for expenses has been made to him. If the appeal is one which has been delegated to the Reporter for decision, the application for expenses will also be determined by him in future. If the appeal is to be decided by the Secretary of State, the Reporter will report the application and make a recommendation.

12. Where a case has been dealt with on the basis of written submissions, unreasonable behaviour which may justify an award of expenses may not become apparent until fairly late in the proceedings, for example where there has been failure to submit written submissions within the prescribed time limits, or where new evidence is produced at a late stage. In written submissions cases, therefore, an application for an award of expenses may be made at any time up to the submission of the party's final written submissions. Applications for awards of expenses should be made in writing to The Scottish Office Inquiry Reporters Unit in these cases.

13. An application for expenses made after the conclusion of a public local inquiry, or after the final written submissions have been made in a case being dealt with by written submissions procedures, will only be entertained if the party claiming expenses can show good reasons for not having submitted the application earlier. In the circumstances where such an application is entertained, the decision will in all cases be taken on the basis of an exchange of written submissions. Such late claims should be submitted at the earliest opportunity. If the Secretary of State agrees to entertain the claim, the parties involved should be concise and sparing in their exchange of submissions and observe the time limits set by the Secretary of State. If this is not done, the application may be determined on the basis of submissions already before the Secretary of State without waiting for further submissions to be received.

Amount of Award

14. Section 267(7) of the 1972 Act entitles the Secretary of State to make orders as to "the expenses incurred by the parties to the inquiry". Section 267A gives the Secretary of State the same powers in respect of cases dealt with by written submissions. The Secretary of State interprets this as enabling him to award to a party the expenses necessarily and reasonably incurred in relation to the proceedings before him. The Secretary of State does

not himself determine the amount of expenses payable. The party awarded expenses should in the first instance submit details of their expenses to the other party with a view to reaching agreement on the amount. If they are unable to reach agreement the party awarded expenses can refer the case to the Auditor of the Court of Session who will tax such accounts in a manner similar to that in which the taxes judicial accounts in the Court of Session. Submission of accounts to the Auditor will involve agreement to pay the auditor's fee but this is not likely to be more than a small proportion of the expenses in any particular case.

Partial Awards

15. Some cases do not justify a full award of expenses, and in these circumstances a partial award may be made. One example is where a planning authority have failed to substantiate only one of several reasons for refusing a planning application. In this case an award would be limited to the expenses incurred in appealing against that reason. Similarly, where an adjournment of an inquiry is caused by the unreasonable conduct of one of the parties, the award of expenses would be limited to the extra expense caused by the adjournment or delay.

EXPENSES IN RESPECT OF COMPULSORY PURCHASE AND ANALOGOUS ORDERS

General Principles

16. There is a distinction between cases where applicants take the initiative, such as in applying for planning permission or undertaking development allegedly without planning permission, and cases where objectors are defending their rights or interests which are the subject of a compulsory purchase order. If a statutory objector to a compulsory purchase order is successful, an award of expenses will be made in his favour unless there are exceptional reasons for not doing so. To enable an award to be made on grounds of success the claimant must have made formal objections to the order; the order must have been the subject of a public local inquiry; and the claimant must normally have attended (or been represented at) the inquiry and been heard as a statutory objector. In addition, the claimant must have had his objection sustained by the Secretary of State's refusal to confirm the order or by his decision to exclude the whole or part of the objector's property. The award will be made against the authority which made the order and does not of itself imply unreasonable behaviour on the part of the authority.

17. Occasionally circumstances arise in which an award of expenses may be made to an unsuccessful objector or to the order making authority because of unreasonable behaviour by the other party. In practice such an award is likely to relate to circumstances in which one party has acted unreasonably and this unreasonable conduct has caused the other party unnecessary expense.

Partly Successful Objectors

18. Where a statutory objector is partly successful in opposing a compulsory purchase order the Secretary of State will normally make an award of a proportion of the relevant expenses. Such cases arise for example where the Secretary of State excludes part of the objector's land when confirming a compulsory purchase order.

Analogous Orders and Proposals

19. The Secretary of State normally awards expenses to successful objectors to orders and proposals which are analogous to compulsory purchase orders. In general the Secretary of State will consider an order or proposal to be analogous to a compulsory purchase order if its making or confirmation takes away from the objector some right or interest in land. Some examples of orders and proposals which are considered to be analogous to compulsory purchase orders are set out in the Appendix.

Plural Objections

20. Sometimes a single inquiry is held into 2 or more proposals, only one of which is a compulsory (or analogous) order - for example an application for planning permission and an order for the compulsory acquisition of land included in the application. Where a statutory objector to both proposals appears at such an inquiry and is successful in objecting to the compulsory purchase order, he will be entitled to an award in respect of that part of his expenses which has been incurred in relation to the compulsory purchase order only. He is not however precluded from making an application for the remainder of his expenses if he considers that the authority has acted unreasonably.

Further Copies and Enquiries

21. Further copies of this Circular and a list of current planning Circulars may be obtained from Room 6/84, New St Andrew's House (031-244-4082) and any enquiries should be addressed to Mr S Farrell (031-244-4209).

Yours faithfully

J S GRAHAM

COMPULSORY PURCHASE

ANALOGOUS ORDERS

Orders under Section 3 of the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 extinguishing a public right of way over land.

Unfitness Orders under Schedule 2 to the Land Compensation (Scotland) Act 1963.

Orders under Section 14 of the Countryside (Scotland) Act 1967 ("the 1967 Act") regarding access to open country as defined by Section 10 of the Act.

Orders under Section 31 of the 1967 Act creating a public path.

Orders under Section 34 of the 1967 Act regarding the extinguishment of a public path.

Orders under Section 35 of the Countryside (Scotland) Act 1967 diverting a public path.

Orders under Section 42 of the Town and Country Planning (Scotland) Act 1972 ("the 1972 Act") revoking or modifying a planning permission.

Orders under Section 49 of the 1972 Act requiring:-

- a. Discontinuance of a use of land, or imposing conditions on the continuance of a use of land; or
- b. the removal or alteration of buildings or works; or
- c. the removal or alteration of plant or machinery used for winning or working minerals.

Orders under Section 49A of the 1972 Act prohibiting the resumption of winning and working of minerals.

Orders under Section 49B of the 1972 Act requiring that steps be taken for the protection of the environment following the suspension of winning and working of minerals.

Orders under Section 56J * of the 1972 Act revoking or modifying a hazardous substances consent.

Orders under Section 203(1)(b) of the 1972 Act extinguishing a public right of way over land.

Orders under paragraph 9 of Schedule 8 to the Housing (Scotland) Act 1987 extinguishing a public right of way over land.

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