



**FOR CONSIDERATION BY HOUSING AND
COMMUNITY OVERVIEW AND SCRUTINY
COMMITTEE
18 MARCH 2015**

Report for:	Cabinet
Date of meeting:	24th March 2015
Part:	2
If Part II, reason:	The report contains information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

Title of report:	Homelessness Review Procedure
Contact:	Cllr Neil Harden, Portfolio Holder for Residents and Regulatory Services Author/Responsible Officer: Steve Baker, Assistant Director (Chief Executive's Unit)
Purpose of report:	To inform members of counsel's advice on the lawfulness of the use by the Council (presently suspended) of the Appeals Committee to determine statutory homelessness reviews pursuant to section 202 of the Housing Act 1996.
Recommendations	<ol style="list-style-type: none"> 1. That Cabinet notes the advice of counsel on the use of the Appeals Committee to determine homelessness reviews pursuant to section 202 of the Housing Act 1996 ("section 202 reviews"). 2. That Cabinet decides whether to recommend Council: <ol style="list-style-type: none"> (a) to reinstate responsibility for determining section 202 reviews (currently suspended) to the Appeals Committee, or (b) to make permanent the interim delegation to the Assistant Director (Housing), or the Group Manager (Strategic Housing), or the Strategic Housing Team Leader to determine section 202 reviews. 3. In the event that Cabinet decides to recommend option (a) to Council, it should:

	<p>(i) recommend to Council that the terms of reference of the Appeals Committee be amended as set out in paragraph 7 of the report, and that the name be changed to the 'Appeals and Reviews' Committee, and</p> <p>(ii) instruct the Assistant Director (Chief Executive's Unit) to prepare a draft revised procedure to be used by the Appeals Committee when determining section 202 reviews as advised by counsel and arrange for the draft revised procedure to be reviewed by counsel before submitting it to Council for adoption.</p> <p>4. That Cabinet also considers whether the Assistant Director (Chief Executive's Unit) should be instructed to review the use of the revised procedure after 12 months of operation and report back to Cabinet.</p>
Corporate Objectives:	No specific links
Implications: 'Value For Money Implications'	<p><u>Financial</u></p> <p>If the Appeals Committee process for dealing with section 202 reviews is reinstated, counsel has advised that there is a risk that this will lead to further appeals to the county court based on procedural grounds. Even where the Council is successful in such proceedings it is unlikely to be able to recover its legal costs. These could be in the region of £10,000 per case. If the Council is unsuccessful it could also be faced with a claim for the appellant's costs of up to £30,000 per case (as evidenced by a recent county court appeal case).</p> <p><u>Value for Money</u></p> <p>As above</p>
Risk Implications	See financial implications above.
Community Impact Assessment	To be reviewed after the revised procedure has been drawn up.
Health And Safety Implications	None
Monitoring Officer/S.151	<p>Monitoring Officer:</p> <p>This is a Monitoring Officer report</p>

Officer Comments	S.151 Officer
Consultees:	<p>Portfolio Holders</p> <p>Chief Executive</p> <p>Corporate Director (Housing and Regeneration)</p> <p>Assistant Director (Housing)</p> <p>Group Manager (Strategic Housing)</p> <p>Housing and Community Overview and Scrutiny Committee (18th March 2015)</p>
Background papers:	<p>Counsel's opinion (previously circulated to Members)</p> <p>Cabinet report 16th December 2014.</p>
Glossary of acronyms and any other abbreviations used in this report:	None

Background

1. Under the Housing Act 1996 the Council has a duty to provide advice and assistance to anyone who is homeless. If a person make a homeless application the Council has to consider that person's individual circumstances and decide what, if any, housing duty is owed to that person by the Council. If that person disagrees with a decision made on their homeless application they may ask for a review (commonly referred to as a section 202 review). The County Court on the 10th December 2014 delivered a judgement in relation to a challenge of a section 202 review carried out by the Council's Appeals Committee on 24 September 2013.
2. Firstly, the Judge found that the decision was perverse given the evidence available to the Committee. Secondly, he found that the Committee did not have the power to deal with the section 202 review as the wording of the delegation to the Appeals Committee in the Council's Constitution did not permit the Committee to hear section 202 reviews.

The relevant part of the Constitution is Part 3 'Responsibility For Functions', paragraph 2.9.2 'Terms of Reference', which reads –

'The function of the Appeals Committee is to hear and determine all appeals against any decision made by or on behalf of the Council in relation to the following matters:

- (i) ...
- (ii) *The determination of appeals against decisions made by the Council in respect of homelessness claims where persons have been served with a notice under s.202 of the Housing Act 1996 as being either:*
 - (a) *Not homeless or threatened with homelessness*
 - (b) *Not in priority need*
 - (c) *Intentionally homeless'*
- (iii), (iv), (v) ...

The Judge indicated that the words in sub-paragraph (ii) suggested that a section 202 review must already have taken place before the matter can be determined by the Appeals Committee and therefore the Committee did not have the delegated power to hear and determine section 202 reviews.

3. The Judge did not go on to consider whether or not the Appeals Committee could lawfully be delegated to determine section 202 reviews at all. This legal point was therefore left unresolved.
4. The matter was reported to Cabinet at its meeting on 16th December 2014 when it was resolved:
 - (i) *That Cabinet recommends to Council that the delegation to the Appeals Committee to determine section 202 homelessness reviews be amended so that this power is delegated on an interim basis to the Assistant Director (Housing) or the Group Manager (Strategic Housing) or Strategic Housing Team Leader.*
 - (ii) *The interim delegation in (i) above shall continue until full Council has received Counsel's opinion regarding the lawfulness of the Appeals Committee determining section 202 reviews and the Council has made a decision as to how these reviews are to be conducted in the future.*
 - (iii) *A further report be brought back to Cabinet and Council when Counsel's opinion has been received.*

5. Counsel's advice has been received and can be summarised as follows:

"Subject to necessary constitutional amendments ... I see no legal reason why a Panel of Councillors should not make the section 202 review decisions charged to Dacorum. "

However, counsel does point out that *"there are problems inherent in such a procedure ... Those instructing me will also be well aware that firms such as ARKRights Solicitors are alive to these issues and may seek to pursue even otherwise unmeritorious county court appeals on a "procedure challenge"."*

Counsel has therefore advised that should the delegation to the Appeals Committee to conduct section 202 reviews be reinstated a constitutional amendment and a 'tightening' of the procedure will be necessary.

Constitution

6. Counsel deals with the constitutional problem as follows:

The problem to date has been the Constitution of Dacorum and more particularly the remit given to the "Appeals Committee" at Part 3, paragraph 2 of the same. As is well-known by now, the relevant subsection (sic) – (ii) – is unfortunately and inadequately worded referring as it does to (with my underling):

(a) "The determination of appeals" rather than review.

(b) Such appeals being against homelessness decisions "where persons have been served with a notice under s.202", given (sic) the clear impression the appeal is against the section 202 review decision and not the original (section 184) decision.

7. To rectify the constitutional problem it is recommended that sub-paragraph (ii) of the terms of reference to the Appeals Committee should be reworded as follows:

(ii) The determination of appeals **reviews requested under s. 202 of the Housing Act 1996 against in relation to** decisions made by the Council in respect of homelessness claims where persons have been served with a notice under s.202 **s.184** of the Housing Act 1996 as being either:

- (a) Not homeless or threatened with homelessness
- (b) Not in priority need
- (c) Intentionally homeless

The Cabinet may also wish to consider changing the name of the Appeals Committee to the 'Appeals and Reviews Committee'.

Procedure

8. If the Council chooses to reinstate responsibility for determining section 202 reviews to the Appeals Committee it will have to overcome the procedural problems inherent in the current Appeals Committee procedure as identified by counsel. As counsel points out:

"Where an officer senior to the original decision-maker makes the review decision then the availability of any credible or substantive procedural challenge is necessarily limited (and is often restricted to whether a minded-to letter should have been issued pursuant to regulation 8(2) of the Regulations)."

“The holding of a hearing to determine the review is inevitably open to greater argument as to procedural fairness (as was the case in the MacLean appeal – care must be taken as to any involvement of the original decision-maker and hearing “evidence” from her/him is a real concern and to be avoided). However, more than this three difficult issues immediately come to mind by reason of the use of this process.”

9. The three procedural issues identified by counsel are:
 - (a) How does the Appeals Committee satisfy the requirement to provide coherent reasons? A rigorous process needs to be adopted to ensure that the reasons provided in the decision letter are not only those of the Committee members but also sufficiently comprehensive.
 - (b) How does the Appeals Committee carry out an investigatory role in order to elicit further information? In practice this would be easy for the senior officer to undertake this role but how could a Committee investigate - unless, for example, there is an adjournment to allow an officer to make enquiries?
 - (c) Whatever revised procedure is adopted for use by the Appeals Committee in determining section 202 reviews it will need to allow for regulation 8(2) of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 (the regulations) to be addressed. Under regulation 8(2) if the ‘reviewer’ considers that there is a “deficiency” or “irregularity” in the original decision, or in the manner in which it was made, but is nonetheless still minded to uphold it, the reviewer shall send a “minded-to” letter notifying the applicant–
 - (a) that the reviewer is so minded and the reasons why; and
 - (b) that the applicant, or someone acting on his/her behalf, may make oral or written representations to the reviewer.
10. Counsel has emphasised that the Appeal Court have described regulation 8(2) as merely providing a “simple and relatively brief opportunity for the applicant to make oral representations to the review officer” and not a potentially elaborate and extensive hearing.

Suggested Revised Procedure

11. As an example, a revised procedure could be that the Appeals Committee conducts an initial desk top review and only considers what has been submitted in writing by the applicant and the housing officer who made the original decision under s.184 (as provided for by the regulations). The Committee can seek clarification from the officer or the applicant, or it can ask the officer to make further enquiries.
12. If the Appeals Committee believes it needs to send the applicant a “minded-to letter” under regulation 8(2) it will need to adjourn to a further date to allow the applicant the opportunity to make oral representations if he/she chooses. The Appeals Committee will then hold a simple hearing at which oral representations can be made to the Committee by the applicant. The Committee may ask the officer to respond to what the applicant has said. There will be no cross examination and no opening statements or summing up by the applicant or the officer. All questions of the applicant and the officer will be through the Committee.

13. The procedure will make clear it is a review of the original decision made by the Housing Officer under s.184 as opposed to an 'appeal' and that the Appeals Committee are not hearing the matter afresh.
14. Counsel does not say that any of these procedural problems are insurmountable but they are issues that need to be addressed and are likely to attract greater scrutiny than would otherwise be the case.
If Members do decide to reinstate responsibility for determining section 202 reviews to the Appeals Committee it is recommended that a draft procedure be drawn up by the Assistant Director (Chief Executive's Unit) and have it reviewed by counsel before it is submitted to Council for adoption.

Risks

15. The risk of reinstating responsibility for determining section 202 reviews to the Appeals Committee is that it provides lawyers acting for appellants an opportunity to appeal to the county court on procedural grounds because it is different to what most other councils do. To mitigate this risk the Council will have to adopt a procedure which as far as possible mirrors the procedure envisaged by the regulations.
16. This does not mean that such county court appeals challenges will always be successful, but even where the Council is successful it will be unlikely to recover its costs as the appellant will invariably be legally aided. The Council's legal costs will typically be in the region of £10,000. If the Council is unsuccessful it will also have to bear the appellant's legal costs as well as its own and these could be in the region of up to £30,000.
17. In view of the possible financial implications which may arise if responsibility for determining section 202 reviews is restored to the Appeals Committee, Cabinet may wish to request a review of this matter after 12 months of operation.