

## Scottish Government Consultation Paper: Modernising Planning Appeals

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Planning Committee  
15 May 2008

### 1 Purpose of report

- 1.1 To inform the Committee of the Scottish Government's consultation paper concerning new proposals for dealing with schemes of delegation, local review bodies and planning appeals along with other related matters. This report also recommends the responses which it is considered this authority should make to the various proposals.

### 2 Summary

- 2.1 The Scottish Government seeks comments on the proposed changes to the appeals system which are intended to make the process for challenging planning decisions more efficient without reducing the current high quality of determination. The consultation paper covers proposals for schemes of delegation, local review bodies and appeals. These proposals should be seen in the context of the wider agenda to modernise the planning system in Scotland, a number of the elements of which this council has already commented on in recent months.
- 2.2 The intention is that greater use should be made of delegated powers so that elected members can focus on the more complex or controversial applications. The new schemes of delegation will however be restricted to local developments as defined within the proposed hierarchy of developments.
- 2.3 As far as appeals are concerned, the main change in the process is that all local developments which have been determined under delegated powers will be subject to a local review process and will not be the subject of an appeal to Scottish Government. The other main thrust of the proposals is that the formal inquiry process should only be utilised in the case of complex issues requiring detailed examination. Other proposals should be dealt with using less formal

procedures. The final say on which process is most appropriate will be reserved to Scottish Government and appellants will no longer have the right to require that their appeal is heard by way of a public inquiry.

- 2.4 In addition, it is also intended that proposals cannot be varied after an appeal has been lodged. The Act does however provide that changes may be introduced in exceptional circumstances as long as appropriate justification is provided.

### **3 Main report**

#### **Background**

- 3.1 The Scottish Government has published the consultation paper to allow discussion of the implementation of the provisions of the 2006 Act in relation to appeals and related matters. In anticipating some of the detailed features of those processes, the 2006 Act therefore limits some of the options for detailed prescription in the new regulations.
- 3.2 The consultation paper contains 15 specific questions from the Scottish Government. Written responses are invited by 9 May 2008. A suggested response to each question is contained in Appendix 1 to this report. Some of the major implications and areas of concern are summarised as follows.

#### **Schemes of delegation**

- 3.3 Current schemes of delegation from members to officers are adopted under the provisions of the Local Government (Scotland) Act 1973 and may cover all types of applications, enforcement issues as well as other procedural matters. Whilst there is no intention of changing these provisions, the new act introduces new schemes of delegation which will require to be submitted to Scottish Ministers prior to adoption. These schemes will relate **only** to "local developments" as defined in the new hierarchy and only refusals under these schemes of delegation will be subject to the new review process.
- 3.4 Within the broad category of local development, a number of exceptions are proposed which could not be determined under delegated authority. These include matters where:
- there is an outstanding objection by a statutory consultee;
  - the application is by the local authority, or there is a local authority interest
  - the application requires Environmental Impact Assessment
  - the proposal is significantly contrary to the development plan
  - there has been a substantial body of objections
  - the application is one which is subject to enhanced scrutiny, including a pre-determination hearing.

The schemes will require to be reviewed every five years.

**Comment:**

- 3.5 The current scheme of delegation operated by this Council has a number of safeguards built in which provide a role for elected members, for the Development Management Sub-Committee and provide an audit trail of the decision making process. This scheme makes provision for both approvals and refusals under delegated powers. Over 90% of decisions are made within the terms of this scheme. It has operated in an acceptable manner for some time now, although there is always room for review with changing circumstances. Nevertheless, it is considered that this scheme had led to a high quality of decision making.
- 3.6 It therefore seems somewhat unfortunate that these current schemes of delegation under the terms of the Local Government (Scotland) Act 1973 will continue in parallel with the new schemes of delegation which will only relate to local development as defined in the hierarchy of developments. The ability to have two schemes of delegation relating to different matters will lack clarity and will only cause confusion in the minds of our customers. What rights of appeal will be relevant, will be determined by which scheme of delegation was utilised to determine the application. The example of parallel applications where dealt with under delegated powers may result in one being subject to local review and the other to an appeal to Scottish Ministers. There is a range of consents which could lead to similar outcomes where planning, listed building, conservation area and advertisement consents are involved in a variety of combinations. Whilst the extent of this problem will vary according to planning authority, this situation will not lead to a more effective and efficient appeals system. It is suggested that consideration should be given to one coherent and uniform system of delegation which is more broadly based.
- 3.7 It is also suggested that there is no real reason why determination of some of these classes could not be done under delegated powers, depending on the decision. For example, there is no reason why applications where there is an unresolved objection from a consultee, or the development is significantly contrary to the development plan, or there is a substantial body of objection, might not be so determined if the decision is to refuse the application. It should also be appropriate to refuse an application under delegated powers if the required EIA is not submitted. The draft regulations fail to recognise the delegated refusal option.
- 3.8 In addition, it should also be possible to deal with minor amendments or variations to major developments without having to go through a committee procedure with these. This is the case with this Council's current scheme of delegation. Similarly, there is no real reason that, where sites have been the subject of a master-planning exercise and/or outline consent has been granted after full consultation and publicity etc, any detailed or reserved matter submissions should need to be treated as major applications when most of the real issues will already have been dealt with. This would be unnecessarily

burdensome and time-consuming and could render such an approach less attractive to developers by potentially slowing down the development process.

- 3.9 It would seem that linking the ability to deal with an application under delegated powers which relates solely to its place in the hierarchy rather than the actual issue raised by the submission is flawed. There will be some cases in the scenario outlined above where the submission of an application for several hundred houses will raise none of the issues which could arise with a smaller application for 95 units where no such previous work has been carried out. Further thought needs to be given to the relationship of the schemes of delegation to the hierarchy.
- 3.10 As far as Council submissions and Council interest is concerned, there are already statutory provisions which require referral to Scottish Ministers and it is not clear why all such submissions, many of which are for minor items of street furniture, refuse bins etc (often required because of Article 4 Directions), require to be dealt with by Committee.
- 3.11 There is a need in this context to define more clearly what is meant by a substantial body of objection and whether that includes those standard letters or e-mails which can be generated readily in large numbers. The definition in PAN82 which refers to numbers, whether representative of the community and relevance, appears to be the best guide from Government at present but needs to be expanded to address the above. (This authority already takes the view that substantial means a total of more than 20 material submissions.) Similarly, the term "significantly contrary" also needs to be defined.

#### **Local reviews**

- 3.12 Where an applicant is dissatisfied with the decision taken, or a failure to take a decision, and the submission falls within the terms of the scheme of delegation, they will now have the right to require the planning authority to review the case. The government is concerned that this significant change should not result in a reduction in the quality of consideration of a submission.
- 3.13 The request for a review must be made within 3 months and if the appellant seeks to introduce any new material at that stage they must justify such a submission by explaining why the material could not have been submitted earlier or what exceptional circumstances apply. Where additional material is submitted, parties to the review will be given the opportunity to comment on it. Other than that it is not the intention to allow further representation as a matter of course.
- 3.14 The local review body will comprise a small number of trained elected members (3-5). Authorities are encouraged to have a larger pool of trained members available to deal with situations where conflicts of interest may arise. This specific proposal is supported and the need for training is also endorsed. The review body will also require administrative support, legal advice and

professional planning expertise which it is anticipated would be drawn from those not involved in the decision making process.

3.15 Whilst reviews will be held in public, there may be no need for further representations to be made to the body where the issues are clear. The local review body will have the right to require further information or elucidation from parties to enable them to reach a decision. The body will also have the power to hold a hearing to clarify issues and to determine whether or not a site visit is necessary. The review body has two months within which to reach its decision. Failure to do so allows an appeal to be made to Scottish Ministers.

**Comments:**

3.16 In considering the creation of local review bodies, the question arises, which has not been addressed in the consultation paper, of whether this accords with human rights legislation in terms of the independence of the review process. In addition, natural justice would require a considered view based on hearing the case from the applicant, the planning authority and other parties.

3.17 There is also a general concern that in smaller authorities, there may not be the facility to involve professional advisers who have not already been involved in the decision making process. This also raises issues of potential conflict for professional planners with their Institute's Code of Professional Conduct. This is a matter which is currently receiving attention in England and Wales where the RTPI is campaigning against the introduction of such a process there. There are also potential problems where the professional advice required goes beyond the remit of a planning professional.

3.18 In some larger authorities, like this Council, such a separation of staff resources may well be feasible but there is still the concern that this distinction will not be perceived as fair or impartial by members of the public and others parties to the process. There would be a need to set up a distinct "unit" within this Council's Planning function which would operate within the terms of a protocol established to protect its advice without interference by the Director or others in the application process. There may however be some opportunity for cross-council boundary working within the Shared Services Agenda, but this is fraught with difficulties, although these might be more readily overcome in the case of officers rather than elected members. The involvement of an organisation like Planning Aid has been mentioned, but it is considered that the resource implications for such a body would render such an approach infeasible.

3.19 As far as elected members are concerned, it is considered that the review body should only be formed of members selected from within the Planning Committee as these are the members who are the policy makers and have the training and expertise to carry out the review process in a meaningful manner.

3.20 Having regard to the number of appeals which this authority receives at present and the percentage of decision made under delegated powers, it is likely that the number of requests for review could be substantial, possible 80-100 in a year.

## **Planning Appeals**

- 3.21 The timescale for appealing to Scottish Ministers is also proposed to be reduced to three months and also as in the case of local reviews, the ability to submit additional material is also restricted.
- 3.22 At present, appeals can be heard by written submissions, by hearing or by public inquiry and the appellant has the ability to request an inquiry if they so wish. In future, Scottish Ministers will have regard to the preferred method of appeal suggested by the parties, but will have the right to decide which method or combination of methods is most appropriate.
- 3.23 A number of other minor refinements to the procedures are proposed in the interests of the clarity and effectiveness of the process.

### ***Comments:***

- 3.24 Broadly speaking, these changes are supported and raise no matters of serious concern to this authority. The ability of Scottish Ministers to refuse to agree to a hearing or public inquiry where that is unnecessary (and may be being sought as a delaying tactic) is particularly welcome. It is almost possible to go further and to suggest that some categories of appeal should only be heard on the basis of written submissions with a special case being made for consideration in any other form.

## **Crown Development**

- 3.25 Since 2006, Crown development has no longer been exempt from the planning process. Whilst there are certain caveats, in general such proposals are expected to go through the normal planning process. There are however issues around matters such as the particular nature of the Crown, sensitivity of information, national security and urgency in the national interest. Further consideration is being given to the implications of local reviews on such issues.

## **4 Financial Implications**

- 4.1 As a consultation paper, there are no immediate financial implications arising for the Council at present, but they are expected to start impacting in the latter part of the current financial year. There are resource implications involved due to the introduction of new responsibilities placed on the planning authority, particularly in respect of local review bodies. These will result in more extensive and formalised processes than those currently used in the Council. The review body will require administrative, legal and planning expertise and support and it is not known at present what the level of requests for review will be, but the potential workload might be considerable. This will affect not only the Planning service but also the functions of the Council Solicitor and the Council Secretary.

- 4.2 The consultation paper is accompanied by a partial Regulatory Impact Assessment (RIA) which outlines costs and benefits from each subject area of the consultation paper. The resource implications identified above are recognised in the RIA.
- 4.3 There are potentially significant ICT changes that will be required which may also incur additional charges.
- 4.4 In summary, there are concerns that the changes proposed, particularly in respect of local review bodies, will have significant financial implications for the operation of the planning service in this Council and for other related functions in the legal and administrative areas.

## **5 Conclusions**

- 5.1 The consultation paper provides an opportunity to consider how the 2006 Act's provisions for appeals, local reviews and schemes of delegation may be implemented. This Council has experience to share as part of these considerations to inform effective and efficient practice.
- 5.2 As comments were required by the Scottish Government by 9 May, this report has been forwarded as the Council's draft response, subject to the views of Committee.

## **6 Recommendations**

- 6.1 It is recommended that the Committee:
- a) agrees that this report and the appendix be forwarded to the Scottish Government as the Council's formal response to the consultation paper on Modernising Planning Appeals;
  - b) instructs the Director to report back on the implications of the transitional arrangements for service delivery.



**Dave Anderson**  
Director of City Development

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<b>Appendices</b>	Appendix 1: Detailed consideration of the questions in the consultation paper
<b>Contact/tel</b>	Derek Henderson 529 3522
<b>Wards affected</b>	All
<b>Background Papers</b>	Scottish Government consultation paper: 'Modernising Planning Appeals', February 2008

## **Appendix 1**

### **Detailed considerations by The City of Edinburgh Council on the Scottish Government's consultation paper "Modernising Planning Appeals", February 2008**

#### **Question 1: Do you agree with the above scope of schemes of delegation?**

No. This Council considers that the schemes of delegation should apply to the whole range of planning activities as explained above and that in the cases identified delegated refusals should be possible. Furthermore, the linking of the schemes of delegation solely to the hierarchy, rather than the substance of the proposal and issues involved is likely to lead to difficult anomalous situations. There is however real concern that a scheme of delegation may be imposed by Scottish Ministers. This would be unacceptable to this authority and contrary to the interests of local democracy.

#### **Question 2: Are there other categories of decision which should not be delegated to officers?**

Whilst this Council has no comments on this specific issue, it would reiterate the comments made above on the need for a more comprehensive scheme of delegation which includes other forms of consent, notices and procedures and the ability to refuse consent as well.

#### **Question 3: Should planning authorities be required to undertake local consultation on their proposed scheme of delegation?**

This authority already carries out consultation on draft non-statutory guidance and these arrangements could also apply to schemes of delegation. However, it is considered that this would simply lead to the submission of a range of contradictory views from community groups and developers, which would prove difficult to reconcile. The present scheme of delegation enjoys widespread support and was designed to focus resources on those items which required closest scrutiny and separate out those other items of lesser environmental significance. Such a distinction is not always clear in the minds of some local groups and it is therefore concluded that consultation should not be required. This option should be left to the discretion of the planning authority.

#### **Question 4: Do you agree with the proposed approach to preparing and adopting the scheme of delegation?**

No. This Council does not see the need for scrutiny by Scottish Ministers. If schemes are to be drawn up in accordance with guidance issued, there should be no need for this. Ministers have the power to prescribe the form and content of such schemes. Schemes should only require such scrutiny if the authority wishes to depart from the guidance issued. This approach would more closely accord with the principle of subsidiarity, with decisions being made at the appropriate level. There is also a need for clarity in transitional arrangements and the role/continuation of existing schemes of delegation made under other powers.

**Question 5: Do you agree that it is reasonable not to invite additional comments from third parties to those made during the course of considering the planning application when considering a review?**

The answer to this is linked to the issue of what new material can be submitted after the initial decision has been taken. If the intention to severely limit such submissions is adhered to, there should be no need to invite further comments from parties at this stage. (Incidentally, such an approach may encourage parties to engage more fully at the appropriate time in the process!) Such comments are only necessary if there is some new information to be considered and only then when such comment would add some value to the process: re-iteration of previous comments is not helpful. It would also open up the opportunity to neighbours and other representators to make comment on or challenge the form and content of the delegated report or comment on other issues which should more appropriately be considered as part of the review. Further comment should only be invited where it is necessary.

**Question 6: Do you consider that the proposed size of the review body is appropriate?**

It is not clear why the number should be restricted to a maximum of five. Small numbers could lead to difficulties of appropriate political representation in the make up of the review body. What is more important is to omit those who have an interest in the matter, who have not had appropriate training or who have a ward interest in the matter. It is the view of this Council that membership of the review body should also be rotated to ensure continuing experience for the wider group of trained elected members, but should remain as a sub-set of the Planning Committee who have undergone training, are the policy makers and have developed expertise within this area. A wider pool of members could lead to a situation which was perceived as being open to manipulation.

**Question 7: Are the timescales proposed for carrying out a review reasonable?**

It is considered that the two month period could well be problematic, especially if further information is required and comments sought. Furthermore it could prove difficult for elected members to visit the site within the period if that was thought necessary. It is likely that this would be the case especially where some larger scale developments at the upper end of the scale in the hierarchy are involved. It is suggested that the period should be three months. It is also suggested that the period for comment which is set at 14 days should be 21 days to align with other periods for representation in the interests of consistency and fairness.

**Question 8: Are there additional provisions to those proposed which would improve the process of reviewing the decision?**

It could be helpful if there was to be a provision which allowed for the parties to provide a statement of agreement detailing those matters which were not at issue or alternatively set out those matters which the review (or hearing) required to address. As a further alternative the review might only consider the grounds of appeal and not address other issues so that the process remains focussed on what really needs consideration.

It is also considered that there should be some review or audit of the effectiveness of this system after an initial period of operation.

Should the chair of the review body have a casting vote?

**Question 9: Do you agree that it is reasonable not to invite additional comments from third parties to those made during the course of considering the planning applications when considering the appeal?**

See response to Question 5 above.

**Question 10: Do you agree that Ministers should seek to use the method of examination that best fits the circumstances of the case, taking account of the views of the parties?**

Yes. However, there are some situations where written representations are the only reasonable way of dealing with an appeal and any other form of more detailed scrutiny is unnecessary. At present the availability of the choice of an alternative is used by some appellants as a means of delaying the eventual outcome. Advertisement appeals are an example of this approach. It would be extremely helpful if the guidance issued indicated that certain minor types of appeal would normally only be dealt with on a written submissions basis and that a case would have to be made for it being heard on any other basis.

**Question 11: Do you consider that the framework set out in the accompanying regulations reflects the more proportionate appeals regime envisaged in the White Paper?**

No comments.

**Question 12: Are there any particular issues in relation to proposals for Crown development which would require special handling in relation to schemes of delegation, local review and appeals procedures?**

The only issues here are highlighted in the consultation paper. The issue of sensitive material in relation to defence establishments and prisons for example have arisen before in the Edinburgh context. This authority will already make such material "sensitive" on its electronic systems so that certain documentation is not available for public viewing over the internet. Other documents which require to remain confidential will be retained as such.

**Question 13: Are there any potential impacts on the business or voluntary sector that we should be aware of in finalising these regulations?**

Notwithstanding the reservations expressed in some areas, it is the view of this authority that more efficient and effective review and appeals mechanisms should improve the level of service to our customers and therefore be of benefit to both the business and voluntary sectors. Some elements of the business community have issues with sensitive material (banks are an example) and the comments above in response to Q12 would apply here.

**Question 14: Are there any impacts on particular societal groups that we should be aware of in finalising these regulations?**

No comments.

**Question 15: Do you have any other comments to make on the draft regulations covering schemes of delegation, local review bodies or appeals examinations?**

No comments.