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SCOTTISH PARLIAMENT - PUBLIC PETITION NO. PE01534

Equal Rights of appeal in the planning system

Submission by Homes for Scotland

Background

The SPICe briefing on Petition PE01534 (September 2014) sets out the arguments advanced in 2006 for and against the introduction of a third party right of appeal against a planning decision. It notes the Government of the day's clear decision not to introduce such a right, favouring instead comprehensive reforms to the planning system seeking to make planning faster, more responsive, but also fairer and more balanced by creating a number of opportunities within the process for all parties to have their positions considered and taken into account in decisions.

The Government's proposals when introducing the 2006 Planning etc (Scotland) Act were very clearly stated:

"Our proposals aim to achieve a new balance in the system, with more equality, new rights for local people to be consulted and the requirement for their views to be recognised and properly taken into account. We want developers and planning authorities to involve local people in more meaningful engagement than has been the case in the past and for future developments only to take place once local people have had their say.

Our proposals are guided by a number of clear principles:

- ***There should be greater balance and equality in the planning system***
- ***That the provision of information at the right time and in the right way is essential – everyone has a right to be involved and all opportunities should be provided to enable them to contribute their views***
- ***People need to know that their views will be taken fully into account***
- ***Decisions need to be taken openly and transparently and should be explained to the people they affect. They should be fair and seen to be fair"***

The 2006 Act and associated Regulations, Circulars and policy has sought to implement those aims and principles. Homes for Scotland is clear that the planning

system now contains ample opportunities for competing viewpoints to be heard, debated and balanced in coming to planning decisions.

It is noted in the SPICe briefing that the Scottish Government is not considering the introduction of a third party right of appeal, and this is confirmed in its letter of 17 December. Homes for Scotland supports the Government's position and is entirely opposed to the introduction of a third party right of appeal..

Response to the Petition

The petitioners recognise the fundamental impact of planning on land and property owners. It restricts their legal rights to develop their assets in any way they choose, and hence balances that restriction with a legal right of appeal. Third parties, by definition, have no legal rights in the land or property, though they may have related legal rights, such as rights of access, which are fully considered in any event.

It is clear from the language throughout the petition that the arguments for a third party right are based on third party *"interests"*, *"perceived conflicts of interest"*, *"feelings"* of not having sufficient say. The petition talks in terms of a right to appeal against *"inappropriate and damaging"* development. The question is in whose terms are developments inappropriate and damaging? If the planning system is charged with promoting development which is appropriate, sustainable and which avoids or minimises impacts then what additional evidence not already considered might be advanced in any appeal to show that impacts have been wrongly assessed?

The current system of appeals is therefore designed, rightly, to allow those whose legal rights in property may be constrained to have their case fully considered on appeal if necessary. Those with interests or points of view have a number of opportunities to present these for consideration throughout the entire planning process.

The Scottish Government considered a wide range of issues before drafting the 2006 Act. In 2005, it published its views on the outcome of an extensive consultation on "Modernising the Planning System". It weighed carefully the benefits of various proposed changes to the planning system, including third party rights of appeal, and settled on changes which would ensure that at *"each level of the system, there are clear mechanisms for plan-making, decision-making, involvement of local people, and ensuring development is sustainable"*.

Crucially, it recognised that while planning is founded on simple principles it had become complex and poorly focussed, including becoming *"a mechanism for solving local disputes which should not have a place in the planning system"*. The clear dangers of any form of third party rights of appeal are firstly the re-emergence of local disputes over matters already debated and decided earlier in the planning process, and secondly the introduction of arguments not relevant to planning. Those

represent the kind of risks rejected by the Government in 2005/2006 – delays, added costs, increased uncertainty and the scope for vexatious or trivial appeals.

Scope within planning for consultation and input of views

The planning system now has ample opportunities for communities and individuals to be heard and have their views weighed against other factors. A simple weight of numbers is not a basis for favouring some views over others, as many communities seem to think. Whether a petition or submission has three signatures or three thousand is irrelevant – it is the quality of the arguments and evidence that are weighed in planning decisions. The Government in 2005 in “Modernising the Planning System” rightly noted that ***“local opinion is... a material factor, though not necessarily an overriding one”***.

The key principle in planning is the plan-led system and the primacy of the development plan. The petitioners argue that plans should be up-to-date and have an enhanced status, but they already have that status in law. The primacy of the plan means that proposals in the Plan and/or in accordance with the plan should be deemed to be acceptable in principle. Too many third parties still consider that they have unlimited scope to challenge principles long after the time for doing so has passed. A third party right of appeal would no doubt be seen by some as yet another opportunity to re-open matters of principle.

Planning Authorities are required to ensure public engagement in the plan-making process, and this is a continuous process from Main Issues preparation through to Proposed Local Plan. The Authority must submit with its Proposed Plan a statement showing how public participation has been undertaken, and this statement forms part of the Plan and is subject to scrutiny and approval by Reporters. Homes for Scotland is unaware of any development plans which have been rejected on the basis of inadequate public participation.

Planning authorities are required to take into account a wide range of often conflicting aims, views and proposals and to formulate a Plan which conforms to principles of sustainable development, sustainable economic growth, public good and fairness. They take into account a wide range of impact studies in order to identify and deal with impacts on the environment, infrastructure, amenities and communities. Inevitably, there will be differing views on these matters. Planning Authorities therefore employ a range of professional skills to carry out these assessments. Democratically elected local politicians make the ultimate decisions, operating to a code of practice and ethics which is open to scrutiny. The Government through Reporters holds a mandatory Examination where there are unresolved objections in order to ensure that all views are fairly and equally considered. Scottish Ministers have reserve powers to call in a Plan in exceptional circumstances.

That set of processes offers individuals and communities an extensive range of opportunities, over a period of around 2 years on average, to make their views

known. Where an area is covered by a Strategic Development Plan, then there are two opportunities over a period of 4 – 5 years to influence broad principles. If they do not take these opportunities, then there is no reason to introduce another procedure which might lead to them attempting to re-open matters of principle.

Planning applications are subject to a range of consultative processes, checks and balances. Major applications require an extensive pre-application process of community engagement, with the planning authority required to approve the applicant's public engagement process and the applicant required to show how public responses have been considered and reflected. In relation to public consultation associated with Major Planning Applications, it is worthy of note that many of our Members go above and beyond the statutory minimum level of consultation and regularly hold public exhibitions for several days and at the weekends in order to attempt to canvas the local community as widely and comprehensively as possible. Indeed, many of our Members see this element of the process as particularly important in not only shaping their designs ideas for the site in question, but also in obtaining relevant and useful local information from the community who clearly can be more familiar with an area than the applicant.

Third parties may then object in the usual way and have their views weighed by officers and decision-makers. In the event of an appeal against refusal, Reporters will also have before them all the original objections. Where a proposal is considered contrary to the development plan, all interested parties have the scope to attend a hearing held by the Planning Authority as part of an enhanced scrutiny of non-conforming proposals. It is impossible to see how a third party right of appeal could bring any additional relevant information to the process.

Major applications currently take on average over 40 weeks to determine, close to three times the statutory time requirement. In a context of slow recovery from recession and a need to stimulate investment, those timescales need to shorten, not be threatened by another step in the approval process.

Local developments may be appealed to a Local Review Body, which again will have before it all the material submitted in relation to the application for fresh consideration.

In relation to Local Authority interests, it is hard to understand why these should be treated differently, when there are already procedures in place by which Planning Authorities must disclose Local Authority interests, for instance in sites allocated in Plans. Scrutiny procedures already exist via Scottish Ministers, the Local Government Ombudsman and ultimately Judicial Review to call Planning Authority decisions on its own interests into account.

A number of improvements to the development management process have been made to make it simpler, more standardised, more on-line and so on, all with the objective of improving access to information and decision-making.

The Courts remain as a final route of appeal where legal or procedural matters remain in dispute. While the costs of going to a Court process have been capped, the Courts still have the power to award costs against any party found to have raised a frivolous or vexatious action. However, is it likely that the Government would extend the power to award costs against individuals or community groups where a third party appeal was found to be similarly frivolous or vexatious?

Conclusions

The Planning etc (Scotland) Act 2006 introduced wide-ranging changes designed to improve the speed, efficiency, fairness and openness of the planning system. In large measure its objectives have been achieved, though good practice is still evolving. A third party right of appeal was considered unnecessary given all the other opportunities built in to ensure engagement. The petitioners perhaps do not acknowledge that:

- Individuals and communities are only two players amongst many in planning decisions
- Planning decisions require to be based on a careful weighing of facts and evidence, not assertions and views
- If individuals and communities fail to take advantage of the range of opportunities available to advance their positions, then why should they be granted yet another opportunity; it is not the planning system that is at fault
- More, not less, speed is needed in decision-making