

Planning Appeals, Reviews and Judicial Reviews

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May 2009

This paper considers new planning appeal and review mechanisms brought about by legislation and regulations in Scotland.

1. New Legislation and Regulations

1.1 Part 3 of the Planning etc. (Scotland) Act 2006 makes many amendments to the Town and Country Planning (Scotland) Act 1997. There are numerous sets of new regulations which derive from the amendments. Amongst other things these make detailed provision for the management of planning applications, reviews and appeals.

1.2 The main regulations are the Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2008 ("LRP Regs"), the Town and Country Planning (Appeals)(Scotland) Regulations 2008 ("Appeals Regs"), the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 ("DMP Regs") and the Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009 ("HD Regs"). Schemes of delegation come into effect on 6th April and the review and appeal system comes into effect on 3rd August 2009. The regulations are very detailed.

2. Appeals to Ministers

2.1 The new appeal provisions apply to all non delegated applications on appeal – i.e. those cases not subject to local review mechanism. It includes deemed refusal appeals, enforcement notice appeals, call-ins etc. There will inevitably be a reduced number of cases going to appeal to Ministers. Under the Appeals Regulations a notice of appeal must be served within three months of the decision. It requires to be detailed and be accompanied by relevant documents. Similar to local reviews there is front loading of the procedure. The appointed person hearing the appeal will be a reporter. The reporter now decides whether further procedure is required for the decision. A decision may be made without further procedure. There may be a pre examination meeting. The reporter decides which issues should be dealt with by a particular procedure i.e. written submission, hearing, inquiry session or a combination of these. In inquiries precognitions require to be under 2000 words.

2.2 Variation and New Matters

Under pending amendments to the 1997 Act, there are significant restrictions on the present right to amend planning applications during the planning process, and the practice of introducing new material on appeal. Restrictions also apply to reviews. A party can only vary with agreement of the planning authority, and the authority may not agree if the amendment is substantial. An application may not be varied once there is an appeal. It can be varied in a call in if Ministers agree and there is no substantial change. New matters are not allowed unless they could not have been raised earlier, or there are exceptional circumstances for not raising the matter earlier.

2.3 Discussion

The main changes to appeals are the frontloading of the procedure and restriction on variation of applications and new matters being introduced. There may be an appeal decision without any procedure at all. Appeals no longer 'default' to public inquiry. In practice this is largely the case in straightforward appeals where parties opt voluntarily for appeal by written submission, and in other cases which are dealt partly by hearing and partly by inquiry.

2.4 Specific Issues

Summary Decisions – The thinking here is to provide a mechanism to dispose of hopeless appeals quickly. But if there is no appeal procedure (beyond the notice of appeal) to allow representations on the original decision there may be a risk of a less than thorough examination of the issues.

Hearings – At present parties agree to hearings on a case by case basis. Hearings procedure is considered to be unsuitable for complex and controversial cases, as the reporter will not have had detailed briefings from experts and parties cannot challenge evidence. It is not always possible to predict in advance whether this procedure is suitable, which can now be imposed upon unwilling parties. (One problem which has emerged in practice is where an apparently non controversial matter goes to a hearing. In consequence to line of questioning by the reporter an "agreement" between parties no longer suits one of them. A dispute emerges between parties – parties are left to argue positions on basis of evidence they have been unable to test themselves.)

Restriction on New Matters and Variation– Given the front loading of the application process, the Scottish Government believes it should not be necessary to make significant alterations to applications or to introduce new matters on appeal. The new provisions are a strong incentive to ensure applications are fully supported at the outset. But developers will have to spend more at the outset to "insure" against risk of refusal for want of information on some point which cannot now be covered on appeal. There is the possibility of procedural difficulty if the planning authority council produces "add on" reasons for refusal. There is a risk professional judgement could be compromised if one cannot have regard to all material considerations for procedural reasons.

Another scenario is that everyone might agree after scrutiny of an appeal what is an acceptable reduced scale of development. However as a "variation" there is a strong risk an amendment to make the proposal acceptable would require to be refused on technical grounds.

3. 'Local Developments' in which a scheme of delegation has been adopted by the planning authority

3.1 This is potentially the most important change to the planning appeal system in the regulations. Applications for these developments will be determined by an appointed officer of the planning authority. The appointed officer will presumably be a planning officer. There is a 'right of review' to a local review body within the planning authority. There is no right of appeal to Ministers. An 'aggrieved person' appeal to the Court of Session is maintained after a review. A notice of review is required within 3 months of the appointed officer's decision. There is machinery for deemed refusal reviews, and ultimately a deemed refusal appeal to Ministers.

3.2 'Local Developments' are those which are not 'national' or 'major' developments under the amended 1997 Act. Potentially local developments are a very wide category under the HD Regs; i.e. under 50 houses/2 hectare site, electricity generator under 20MW, business premises under 10,000 sq m gross floor area/2 hectare site or 'other development' under 5,000 sq m gfa/ 2 hectare site.

3.3 Delegation Schemes

It is up to Ministers to consider schemes put forward by planning authorities. These will relate to local developments. Under the LRP regulations a delegation scheme requires to prohibit an appointed officer from determining applications in following circumstances: where the application is by a planning authority or member or where the application relates to land belonging to the planning authority or in which it has financial interest.

A typical scheme being put forward would also prohibit the appointed officer from determining the application in the following circumstances: where the application is made by certain council officers or employees, where there is the existence of a statutory objector or a community council objection, where the application relates to an EIA development or constitutes a bad neighbour development, where the application is notifiable to Ministers for any reason, or where there is the existence of more than a certain number of objections (say 5). There may also be provision for a discretion not to delegate on a case by case basis, which implies a decision by an officer or members that the appointed officer may not decide a particular case.

It is theoretically possible for planning authorities to seek wide delegation schemes. For example, an application might be lawfully delegated even where it is contrary to the development plan. It is believed one is proposed to operate a "call in" type system: if the appointed officer in certain cases intends to *refuse*, the application *is* delegated (so an appeal to Ministers is cut off); but if he intends to *grant* the application is *not* delegated (in which case the local review body has the opportunity to refuse but an appeal to Ministers is retained). It remains to be seen whether such a scheme will be approved.

As a factor in the delegation scheme, what is "contrary to the development plan" is often a matter of opinion and thus councils may have considerable leeway in applying their own delegation schemes.

3.4 Review of appointed officer's decision by local review body

The review procedure is front loaded in terms of the notice of review and production of documents. The review body is to comprise at least three members of the authority, presumably selected from the relevant planning committee. Should there be a hearing session the body is entitled to appoint an assessor to sit with it, and in this event the assessor is required to make a report in writing. The review body may determine the review without further procedure, or by means of written submission, a site inspection, a hearing session or a combination of the foregoing. The persons entitled to appear at a hearing session are the applicant and any person who in response to a procedure notice has stated his intention to appear. They may be represented.

Under the rules in the LRP regulations the local review body determines the procedure at a hearing session. There is scope for leading evidence and unlike

"hearings" in conventional planning appeals, there is possibility of cross examining witnesses "to ensure a thorough examination of the issues." Reasons for the decision require to be given.

3.5 Background to the Reforms

The local review mechanism is seen by the Scottish Government as a more proportionate means for determining applications for local developments. It is worth pointing out that the Government's Policy Memorandum (para 147) at the time of the passing of the 2006 Act stated that schemes of delegation would be for "many small scale developments that are not controversial and are in accordance with the development plan". But with the wide definition of "local development" there is the potential for what many would term large developments to be delegated. Depending upon the attitude of Ministers to proposed delegation schemes, there is the potential for complex and controversial developments to be delegated.

It is also worth noting that the Westminster Government abandoned proposals for local review bodies in England and Wales. These had provoked strong opposition from the development industry, which had raised legal concerns.

3.6 Legal Issues

The fundamental issue is that the planning authority may be seen to be judge in its own cause. The review body is being tasked to review a decision taken by the authority's own employee. The review cannot therefore be seen as truly "independent". Another issue is that depending upon the nature of the delegation schemes approved, the procedures do not lend themselves for dealing with complex and controversial cases in the kind of scrutiny and detail which is currently expected of the appeal system.

In these circumstances there are concerns whether the right of review satisfies the right to a 'fair and public hearing' under Article 6(1) of the Human Rights Convention.

It is established that decisions which determine civil rights and obligations may be taken at first instance by the executive, provided that the decisions are subject to a fair and public review by an independent and impartial tribunal which exercises 'full jurisdiction'. In **R(Alconbury Ltd) v Environment Secretary** [2003] 2AC 295 the House of Lords held that the planning inspector was not independent of the Secretary of State. As the Secretary of State was applying his own policy, he was not a fair and impartial tribunal. However, there were procedural safeguards, such as in an inspector's inquiry with the opportunity for interested parties to be heard, (including the testing of evidence and making of findings and fact), which safeguards together with the availability of judicial review was sufficient to comply with the requirement for 'an independent and impartial tribunal' in article 6(1).

The House of Lords held it was relevant that the inspector was an experienced professional whose report provided 'an important filter before the Secretary of State takes his decision'; and, "...in deciding the questions of primary fact or fact and degree which arose in enforcement notice appeals, the inspector was no mere bureaucrat. He was an expert tribunal acting in a *quasi* judicial manner and therefore sufficiently independent to make it unnecessary that the High Court should have a broad jurisdiction to review his decisions on questions of fact.' (para 110).

The question is then whether the lack of impartiality at the first stage (i.e. prior to judicial review) has real practical content, if so it infects the whole process and cannot be cured by judicial review: **R (Wright) v. Health Secretary** [2008] 2WLR 536 (CA), [2009] 2 WLR 267 (HL).

A good example is a Strasbourg case in which a review board for housing benefit included five councillors from the local authority which was one of the parties to the dispute. The case involved a sharp issue of fact for the review board to decide. The council had a vested interest since it would have to pay the housing benefit if the applicant was successful. It was held that safeguards built in to the procedure were 'not adequate to overcome this fundamental lack of objective impartiality'- **Tsfayo v. United Kingdom** (Application Number 60860-00) 14 November 2006 referred to by Court of Appeal in **Wright**.

Another situation is where a "hearing" involved a "less than thorough examination of the issues": **Dyason v Secretary of State** [1998] JPL 778 (CA). "...A relaxed hearing is not necessarily a fair hearing. The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden upon an inspector."

In these circumstances does the new system contain sufficient safeguards that the review will be fairly conducted? Can the local review body be said to be an "expert tribunal acting in a quasi-judicial manner" like the inspector in **Alconbury**? Can the court rely upon its factual findings/ mixed factual findings?

3.7 Particular Issues

The Scottish Government is anxious that the changes do not result in reduction of the quality of examination carried out which is one of the key strengths of the existing system. It has indicated the review requires to be effective. It considers it essential the local review process is underpinned by high standards and that members of the review body must be fully trained, those requesting a review must be confident their case will be dealt with fairly; that clear reasons explaining the decision of the review body are made available; and crucially that the local review body operates in a way that demonstrates independence from the original decision maker. It has indicated that the process should respect the principles of fairness and transparency. No elected member or officer who has been involved in any way with the determination of the application under the scheme of delegation can participate as a member of the review or as an advisor in the process.

I pose the following questions as to whether the above aspirations can be achieved in practice. These highlight areas where there appears to be risk of challenge in the courts:-

-Will the review body require to decide whether to prefer factual or mixed factual evidence between one of the authority's own employees and the applicant? This raises an issue of natural justice.

- Can the planning authority ensure separation between the appointed officer and review process? Can the review be carried out without the input of another planning official? If technical input is required, is the authority large enough to ensure the new officer does not work in the same office as the appointed officer? How can separation be demonstrated?

- Will the local member be on review body? He may have the greatest interest in the case, but is therefore most likely to have been in contact with both objectors and appointed officer at time of initial decision.
- Where there has been an ad hoc decision whether or not to delegate, there may have been a preliminary view as to the merits of the case. Will those involved in that decision be disqualified from the review?
- Will the review body be selected from a cross section of members, or only from the ruling political group? In certain types of case the constitution of the review board will be seen as critical to the fate of the application.
- Does the council have a vested interest in the decision? Strictly speaking it has an interest in almost every case simply in upholding and interpreting its own policies (like the Secretary of State in **Alconbury**).
- It may have additional vested interests short of disqualifying ownership/ financial interest mentioned at 3.3 above. For example, what if there is a dispute regarding the extent of infrastructure/ planning gain required by officials? In the present economic climate there is every possibility for dispute whether these matters are proportionate and necessary for the development. What if there is a political as well as factual component – eg a high content of affordable housing is required, but this demand by the authority is based on contentious needs study? What if the council has a financial interest in promoting a rival site? In all these cases the council may have vested interests in refusing an application.
- Are the issues too complex for a summary style hearing (mentioned in the rules as a 'discussion led by the local review body') and competence of the review body? There is power to appoint an assessor. An assessor could be a retired reporter or planning consultant. It is possible and indeed advisable in certain cases to hold the review before the assessor (as well as the review body) who then prepares a report of his findings. This procedure would seem not be unlike a public inquiry, but held under the auspices of the council.
- Will the review body write its own reasons for the decision? This might be expected from an "expert tribunal acting in a quasi-judicial manner" in the **Alconbury** sense.
- Will it make findings in fact where facts are in issue?

It remains to be seen what the courts' approach will be to these questions. As the review body is likely to be fairly small it may only comprise a proportion of the relevant planning committee. If there has been unfairness, there may be greater scope for arguing the decision should be retaken by a differently constituted body. This in turn may provide greater incentive for legal challenge.

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