

## Planning and Environmental Appeals Division Stakeholders' Meeting 18 July 2018

Karen Heywood	DPEA, Interim Chief Reporter
Dan Jackman	DPEA, Assistant Chief Reporter
Pauline Hendry	DPEA, Section Manager
Cherie Chrystal	DPEA, Case Officer
Euan Murray	DPEA, Digital Co-ordination and Webcasting Officer
Mandy Catterall	Scottish Property Federation
Hugh Crawford	Royal Incorporation of Architects in Scotland
Sue Hamilton	Planning Democracy
Darren Helmsley	Scottish Natural Heritage
Richard Henderson	Balerno Community Trust and South West Communities Forum
Kate Houghton	Royal Town Planning Institute
Dr Ann MacSween	Historic Environment Scotland (HES), Deputy Head of Casework
Suzanne McIntosh	Royal Incorporation of Architects in Scotland
Alison McNab	The Law Society of Scotland
David Middleton	Sustainable Communities Scotland
Nikola Miller	Homes for Scotland
Maurice O'Carroll	Scottish Planning, Local Government and Environmental Law Bar Group
Bernard Whittle	Heads of Planning Scotland

### **Apologies**

Alan Farquhar	Scottish Environment Protection Agency
Graham Lang	Scotland Against Spin
Euan Pearson	Royal Institute of Chartered Surveyors
Penny Uprichard	The Royal Burgh of St Andrew's Community Council

### **1. Welcome and introduction**

Karen welcomed everyone to the meeting and intimated apologies as above.

Round the table introductions.

### **2. Matters arising from last meeting**

Some corrections had been submitted to the previous meeting minutes by Sue Hamilton, who confirmed that these had now been corrected satisfactorily. No other issues were raised.

### **3. DPEA update**

Karen advised the Paul has been temporarily promoted to Interim Solicitor to the Scottish Government for the foreseeable future. Karen has been promoted to Interim Chief Reporter, supported by Dan Jackman and Scott Ferrie as Assistant

Chief Reporters. David Liddell has also been promoted to Principal Reporter in the period since the last meeting.

#### **4. Publication of annual report**

Dan Jackman advised that the annual report was published during July. DPEA receive, on average, 600 cases per year (last year's figure was 585). The bulk of our work is planning related appeals, and there was nothing different in this respect last year, although there was a slight increase in other case work (S36 cases, compulsory purchase orders, etc). Housing is the biggest category of cases we receive. There was a drop in the number of windfarm applications, especially single turbine applications.

The success rates of appeals over the last 3 years has been just under 50%, which is historically high across the UK (40% +/-5). This year the figure was 38%. However, Dan warned that parties shouldn't read too much into the success rates, as each case is considered on its individual merits.

Four Local Development Plan (LDP) examinations were carried out this year (East Lothian, Midlothian Dunbartonshire, Stirling and West Lothian), with a further two submitted to local authorities after the publication of the report and two more now ready for submission. DPEA have been unable to meet the targets set for LDPs. The examinations were completed in an average of 45 weeks, which is outside of the target of 9 months (39 weeks). Delays were experienced due to the complexity in the information submitted, large numbers of unresolved issues, and the need for further evidence on many of these, in particular related to the provision of land for housing and the delivery of infrastructure.

Overall performance has improved for planning related appeals. The average time taken for a case where a site inspection was carried out was 12.6 weeks from the date of receipt of an appeal, and this has improved since last year (14 weeks).

In response to a query from David Middleton about whether all targets have been met, Karen explained that DPEA have employed new reporters this year, but it takes time for them to learn the ropes and get up to speed, but it is hoped that there will be further improvements in next year's report. With regard to hearings, none of the 7 cases met the target of 26 weeks from date of receipt, and none of the 2 inquiries held met the target of 32 weeks from date of receipt (stats relate only to planning related appeals). The difficulty in meeting targets in oral process cases can often be explained by parties not being able to attend on the dates first suggested by reporters.

Sue Hamilton commented on the proportion of written submission cases versus those in which an inquiry was held and suggested that DPEA was moving away from oral sessions.

Karen advised that under previous legislation there existed a right to be heard which resulted in many relatively minor cases being dealt with via inquiry, but that since the new regime came into force in 2006, the reporter decides what, if any, further information is required and how to obtain this. This has dramatically reduced the

number of inquiries held for planning cases. In Electricity Act cases, an inquiry is held if the council objects to the proposal, but the reporter may suggest a hearing for other topics to be discussed, providing a bit more flexibility.

Mandy Catterall asked whether there was a breakdown of local and major appeals received by DPEA and advised she was asking from a commercial perspective.

Dan confirmed that we don't have that breakdown within the annual report, but most local developments are now considered by Local Review Bodies.

Karen advised that Table 3 of the annual report details the number of cases received under each characteristic.

Suzanne McIntosh asked whether reporters take into account requests for hearings or inquiries from affected parties. Dan confirmed that yes, they consider each party's position, but in the end it comes down to what the reporter feels they need. It's a decision for the appointed reporter only.

Suzanne questioned whether this was transparent or encouraged public engagement. Dan advised that the regulations were designed in that way. When parties were able to choose the method of determination, over 100 hearings/inquiries were held per year, which had considerable resource and time implications for all participating parties.

David Middleton asked whether timescales or financial pressures come into the reporter's decision at all? Dan reiterated that it all boils down to what information is required in order to make the decision. If unsure, the reporter must decide on the appropriate method to obtain the information they require, either by written submission or oral session. If it relates to a dispute of fact, it may be that an oral session would examine these issues better than written submission.

David commented that there is a feeling among some community groups of not having their day in court, therefore their views are not heard.

Richard Henderson asked whether there is a review mechanism for the reporter's decision on oral sessions. Dan confirmed that the only right of appeal that existed would be to the Court of Session after the decision had been made.

Richard asked whether there were any instances of a request for a review of a reporter's decision on method of determination? Karen confirmed that there have been instances, one related to flats in Stockbridge. The case went to the Court of Session on the grounds that an oral session was not held. The court did not agree that the reporter's decision not to hold an oral process was unreasonable.

Maurice O'Carroll commented that there is a high threshold before a decision can be deemed unlawful by the court and more transparency in relation to the method of determination would be appreciated by parties.

Suzanne agreed and confirmed that clients are asking for more input to the process and expressing a wish to influence the request for an oral session.

Karen advised that reporters are not mediators, they are there to make a decision, which is why the Act and Regulations are written the way they are.

Richard commented that it is unusual not to have a right of appeal against the method of determination decision and suggested that this may require review, but recognised that this is a justice issue.

Suzanne commented that the issue had been mentioned in the Planning Bill.

Dr Ann MacSween raised an issue that sometimes HES are asked to attend oral sessions when they have not objected to a development.

Karen advised that this can depend on what has been said within representations.

Dr MacSween advised that it was felt that this put HES at a disadvantage because they have not objected to the development and therefore have not prepared a case. They can be brought along with no evidence, no preparation and no background information, so they are on an uneven footing.

Dan confirmed that sometimes parties like HES are invited along to be asked for advice which may be helpful to the reporter at an oral session.

Nikola Miller queried the time taken to determine appeals and cited one specific case in which the target date had been February, with no decision yet and resourcing given as the reason for the delay. She asked whether there were still resourcing issues?

Karen reiterated that DPEA have employed 9 new reporters in 2 years, due to the retirement, or partial retirement, of some senior reporters. The complexity of the cases are the issue, not the number of them. We have lost seniority and experience and the new reporters take time to get up to speed. We have also had lots of LDPs coming through which has resulted in resource implications in terms of seniority and capability. However, all the new reporters are now working larger scale cases, so we are getting there.

Dan added a comment that Ministerial call-ins add time to the process, regardless of DPEA involvement.

## **5. Planning Bill update**

Some attendees at the meeting confirmed they had made representation to the Planning Bill at consultation stage.

Information has been submitted by the Planning and Architecture Division (PAD) who are leading on presenting the Bill to Parliament. Stage 1 has now completed as of 29 May. The principles have been agreed, and the report of the Committee suggests the role of communities needs to be strengthened. Stage 2 will commence in mid-September. Secondary legislation will follow from the Act. National Planning Framework (NPF) 4 will progress following completion of the Bill. Evidence sessions took place in February/March this year.

Some themes emerging are around further enhancement of community involvement in the planning process. NPF should be approved by Parliament. No strategic development plans anymore. Some amendments suggested such as stronger status of local place plans, simplified development plans, the statutory purpose of planning have already been implemented. Other amendments recommended are currently being considered.

Only the Lib Dems voted against the amendments – they are concerned with the centralisation of government. However, it is important to note that although other parties have given their agreement to Stage 2, this is not necessarily agreement with the Bill itself.

At the time of the Stakeholders' Meeting, there were some opposition amendments, but not on appeal rights. Equal rights of appeal for communities may be raised.

The Bill proposes that the intervals between LDPs should be increased from 5 years to 10 years – no issues have been raised in relation to this, and the process is continuing to evolve. A reporter, Allison Coard, has been involved, as an observer/adviser, in a pilot project undertaken by Moray Council during the preparation of their LDP . This will be the first gatecheck process.

Sue Hamilton stated that there is a feeling that there is a loss of public input by the removal of the Main Issues report. It seems that the gatecheck is at an early stage, and there needs to be community involvement at that stage.

Karen advised that the pilot project had raised a number of questions, including whether it was credible for local people to be involved in discussions regarding, for example, land supply.

Nikola Miller interjected and advised that she too was involved in the Moray Council gatecheck pilot and advised that it was open to the community council and community groups so their voice was heard, wide discussion was had and it was very useful. Under the previous system the term 'proposed plan' was used, but under the gatecheck it is referred to 'draft plan'.

Karen advised that DPEA have no involvement in promoting the Bill, and no say in what happens next. The current frustration shared by all parties surrounds how to make the LDP better at the end of the examination. The gatecheck allows a way to make amendments at the beginning of the process. PAD recognise that early engagement is important.

Sue questioned whether the decision to use Moray as the pilot related to the timing of the examination, or the size of the authority? (the sub-text being that as Moray is a relatively small authority, the issues raised may not be the same for larger authorities).

Nikola confirmed that the timing of the examination was what made Moray the ideal choice, although the smaller size of the authority was acknowledged at the time. During the pilot they tried to consider how the situation would be different to those

experienced by larger authorities. There may well need to be another pilot in a larger authority area to fully explore all the issues.

David Middleton asked about the status of Local Place Plans.

Karen advised that this is a separate process, although the councils may decide to include a Local Place Plan in the LDP.

The next steps will be to consider the amendments at Stage 2 which is expected to conclude in November. A large number of opposition amendments are expected. There are daily lists of amendments at the foot of the page on the Planning Bill website. Parliament will make the final decision on the Bill in early 2019. Assuming that the Bill is passed at Stage 3 (which turns the Bill into the Act) commencement will begin next Spring at the earliest. Some parts won't commence until the implementation of secondary legislation.

## **6. Support for community groups participating in public inquiries**

This item was placed on the agenda at the request of Sue Hamilton. She stated that the issue related mostly to S36 cases, but some larger planning appeals as well. Communities are feeling stressed by participation in public inquiries. It is a daunting experience in which communities can feel there is a David/Goliath relationship with developers. Developers can be wealthy, both in interests in the development and in resources, whereas communities have a historical and emotional connection with the site, but with fewer resources, and they are not paid for their involvement in the process. Is there a potential for support to be provided by DPEA in the form of easy read packs, FAQ, or a named community link? This may mitigate harm to community groups.

Dan advised that reporters are very aware of the nervousness of community groups, and their unfamiliarity with the process. DPEA are unfortunately unable to do too much to help while remaining impartial. A drop in session was held with MSPs last month in which a number of suggestions were made, which the DPEA are considering.

Karen added that reporters do not expect community groups to have the same resources, but their input is invaluable because they live in the area where the proposal would be sited. As reporters, they make every attempt to put these parties at ease, but their nervousness is understandable. During an appeal case she dealt with in Portobello, Suzanne McIntosh had represented 7 community groups in a supporting role, which gave communities the feeling of giving it their best shot and doing their side justice.

Maurice O'Carroll commented that the best scenario involved a professional working with community groups for a 'reduced price', otherwise they feel a bit 'lost at sea'. Park of Keir is a case in point – people wish to do justice to what they find unacceptable about the proposal. Even highly educated people can have difficulty

tackling the inquiry process and fail to address the issues properly. DPEA are seen as an independent arm of the SG, but could provide neutral advice.

Karen commented that in her experience, some of the most successful questioning is done by community groups. Webcasting could be used a resource by parties, there is a library of previous inquiries and hearings available online.

Richard commented that advice systems need to be available for groups, but perhaps not provided by DPEA. He stated that he thought the attitude of the adjudicator puts the parties at ease, and queried whether more time at inquiries ought to be dedicated to this? Could Legal Aid funds be available from the Citizen Advice Bureau that communities could access?

Sue Hamilton said that the public face of DPEA still needs some softening and observed that webcasting Inquiries had been a very positive move. It was pleasing that the DPEA had been able to respond so positively to Planning Democracy's request for webcasting of Inquiries.

## **7. Format of our reports to Scottish Ministers**

Dan asked for views on the format of our reports. 50 or so reports are submitted to Ministers every year, which has time resource implications. The current process is to summarise parties' arguments and make recommendations which can result in very lengthy documents (100+ pages). A template for reports is now available. Topic chapters are outlined, with a summary of parties' cases, then finally, the reporter's view. A summary report is always included at the beginning.

Darren Helmsley asked whether it was necessary to lay out the cases, then reporter comments afterwards? He would prefer reporter comments as a whole, laying out the cases as an appendix. It is most important to know what the reporter thinks and sometimes while reading the current reports it's difficult to determine between a statement of fact, or the appellant's argument in the case. Sue Hamilton agreed with his point. He also stated that the summary report at the beginning of the report was useful at providing a sense of the broad swing of the report.

Dan advised that the reports are laid out this specific way because the reporter is not the decision maker, and must give enough detail so that the Ministers don't need to look at the supporting documents.

Karen commented that the previous format used for reports was not to split the report into topics, but each case was outlined in full, then the reporter comments came last at the very end of the report. However, the change in regulations which created the possibility of split oral sessions (hearing/inquiry) developed a new topic based report writing process. The conclusions used to be in a single section at the end of the report, now there are 'overall' conclusions.

Sue commented that it may be useful to have a rubric at the beginning of the report to outline it's format.

Dr Ann MacSween stated that the current format works for HES and they found it useful.

Hugh Crawford commented that if an appeal failed, it was easier to explain the decision to a client if the reporter's logical procedure was clear.

Karen stated that a report's primary purpose was to be of use to Client Divisions, so they could accurately brief the Minister.

This prompted Sue to question the point of the report at all, if the Minister makes the final decision, and the report is further filtered by civil servants beforehand.

Dan advised that the report is issued and published at the same time as the Minister's decision, and if challenged, both documents are scrutinised.

## **8. Website and Twitter feed**

Euan Murray delivered a presentation to highlight the systems used by DPEA. The main DPEA website, which was released in 2013, contains all documents and case updates for each appeal.

David Middleton stated that the search facility on the DPEA website wasn't great, in that the simple search isn't always correct, and the advanced search was often too complicated. He pointed out that planning authorities' websites were much easier to navigate as they have the ability to search on the first line of an address and it would be helpful if the DPEA website followed the same format as the planning authorities' websites.

Euan explained that in the top right hand corner of the homepage of the main website is a link which says 'Register/Login' and that this is a link to the secondary CMS system, which is more intuitive, and allows parties to sign up for alerts. Parties clicking this link are prompted to create an account using their email address. Alerts can be set up for any criteria – address, characteristic, local authority area, etc. This should prove beneficial for communities with a specific interest in a specific case. The website also contains compiled lists of cases, e.g. Section 36 and Report cases, for easier access and lists of upcoming hearings, pre-examination meetings, inquiries etc. Promotion of the availability of this part of the site has not been successful, very few parties seem to be aware of it, and none of the attendees indicated that they had previously been aware of this facility.

Maurice O'Carroll asked whether the design of the website needed changed to make the link to the CMS website more obvious. Euan agreed that this would be useful, but there are cost implications, meaning that promotion of the facility via Twitter and the SG website may be more effective.

Euan advised that there is a new Scottish Government website which has replaced the previous site. The DPEA no longer has a landing page on the main Scottish Government website. The new website now operates using a search and tagging facility so searching "Planning & Environmental Appeals" will return results relating to this term (also known as smart search function). All items are tagged by key words



or terms, a short overview will be provided and there will be links to appeal forms. The layout is very simple and there are no images, videos or photographs, only documents.

More in depth explanations and guidance will be stored on the MyGov.scot website, which also uses a smart search function. This website features a thorough overview of how the planning appeals process works. The website is currently being developed with hope for an interactive help guide being available in the next few months and the casework team are working to develop some sort of flowchart, so parties can identify what stage their case is at.

The DPEA Twitter feed publishes tweets regarding recent decisions and new appeals and webcasts. Several attendees at the meeting are followers of the feed. The twitter account is unable to engage in any discussions which relate to specific cases however it is useful to keep people informed on recent updates. It could do more though and Euan asked whether weekly updates would be useful. A tweet will be sent out to encourage feedback and suggestions on the content of the feed.

DPEA have begun webcasting hearing and inquiries and these have been viewed on the Public I website over 70,000 times. Every planning inquiry and the majority of hearings were webcast in the last year. This is now a service offered by the DPEA, not just an option. The webcast features allow you to select separate topics/agendas that you may be interested in. This footage is treated similarly to any case documents we receive in that it remains published on the website for 12 weeks post decision. We have received very positive feedback on the webcasting facility and the feature may be of use in assisting the public with understanding the appeal process. Some issues have been experienced with the live broadcasts – this is generally a locational issue and down to lack of wifi, but in these instances the meeting is still recorded, then uploaded to the site as soon as possible.

The ePlanning Portal is not controlled by DPEA, but by a team within the Planning and Architecture Division (PAD), however DPEA can make suggestions regarding function and content. Attendees were advised to contact the IT team regarding any feedback and/or help required regarding this and any comments received will be passed to the relevant department.

David Middleton enquired if it would be possible to put DPEA case reference on the planning authorities' websites. Euan advised that discussions regarding this had already taken place however it was ultimately up to the planning authorities to display this on their websites.

There was some discussion regarding the confusion caused by so many different websites. Euan explained that it would be much better to have one site that does all the functions discussed, but budget and time constraints make this impossible.

Kate Houghton suggested that there could be "sign posts" with links to alternate websites on the DPEA website advising what was available and where to find this.

Euan advised that, again there are cost implications involved, but a facelift of our current site would be desirable.

## **9. Any other business**

Nikola Miller raised the issue of consistency within reports. She provided examples of Local Development Plan Examinations where reporters have disagreed with each other regarding housing targets and asked how this was determined.

Karen Heywood stated that she was not aware this was an issue but explained that reporters are dependent on what parties inform them as they rely on the evidence which has been submitted. They can't take guidance and policies into account that haven't been submitted, and in that respect, reporters must be blinkered. It could be that the reporters in these examples were provided with conflicting evidence in different appeals.

Nikola Miller clarified that the issue was specifically about an agreed methodology on housing land supply, and asked whether the issue had been raised with the SG?

Karen clarified that there is no specific guidance on the matter, but Scottish Planning Policy and other guidance refers to the issue, but there is no single recommended methodology in order to calculate housing land supply. She explained that SG are well aware of the issue and it is raised a lot with the Minister. The resourcing issues at the moment however, are being directed towards the Planning Bill.

Richard Henderson commented that the situation was unsatisfactory.

Alison McNab added that there was also an inconsistency across notices of intention. Sometimes the decision is not issued until registration of the planning obligation, but others are issued when the obligation is just signed.

Karen Heywood clarified that both parties must agree the position that allows the reporter to issue their decision.

Bernard Whittle questioned whether Listed Building report decisions relied on the listing descriptions provided and if advice from Historic Environment Scotland was sought on this matter.

Dan pointed out that the description does not give the specific characteristics of buildings and that it was the parties' responsibility to explain if they felt the listed description is misleading and what conclusions they wish the reporter to draw.

Dr Ann MacSween stated that anyone can ask Historic Environment Scotland for a review of a listed building description if they feel this is necessary.

Nikola asked whether there was any guidance for reporters on the detail to be included in the Heads of Terms for S75 cases? The lack of detail in some cases can be frustrating.

Karen responded to advise that it depends on what information is provided to the reporter – the detail comes down to the input. Dan added that in England they have

a draft of the agreement drawn up, so the notice of intention process is rendered unnecessary.