

REPORT TO: POLICY & RESOURCES COMMITTEE - 27 APRIL 2009

REPORT ON: LOCAL REVIEW BODY

REPORT BY: DIRECTOR OF PLANNING & TRANSPORTATION

REPORT NO: 195-2009

1 PURPOSE OF REPORT

- 1.1 To make recommendations concerning the establishment, configuration and duties of the Local Review Body which the Council is required to constitute under the provisions of the Town and Country Planning (Scotland) Act 1997 as amended by Section 43A of the Planning Etc (Scotland) Act 2006.

2 RECOMMENDATION

- 2.1 It is recommended that the Committee endorses the terms of this report as a basis for consultation prior to its formal adoption at the Policy & Resources Committee on 8 June 2009 and as a basis for the constitution of the Local Review Body and the establishment of its Terms of Reference.

3 FINANCIAL IMPLICATIONS

- 3.1 The establishment, operation and servicing of the Local Review Body (LRB) will have resource implications for the Council. The main area of additional expenditure will relate to:
- a costs associated with the attendance of Members at scheduled meetings of the LRB ; preliminary meetings associated with the Review Body's work, public hearings and site meetings;
 - b additional officer costs by the Support Services and Planning and Transportation Departments in administering and advising the Review Body, including the costs of preparing and circulating reports and others papers; and
 - c the potential cost of appointing any assessor or external professionals to inform or advise the LRB; and member training (if this is to be provided externally).
- 3.2 It is not possible to predict with certainty the number of cases which will be reviewed, how often the Review Body will decide to hold hearings, nor indeed how complex each case will be.
- 3.3 Due to the timing and content of the secondary legislation which establishes this new procedure it has not been possible to include provision for this expenditure within the Council's budget for 2009-2010. However, as the Local Review Body will only become operational during the second half of the current financial year (August 2009 onwards) it is proposed that essential costs are accommodated from within the departmental revenue budgets of the Planning & Transportation and Support Services Departments through a redistribution of budget allocations or from savings.
- 3.4 The Regulations do not provide for any charges to be imposed on those requesting Reviews, and the Scottish Government has not indicated how the additional

expenditure is to be resourced, particularly if the independence and impartiality of LRBs leads to major expenditure on external consulting.

- 3.5 There are no provisions in the Regulations for Council's to impose financial penalties on appellants for unreasonable behaviour in bringing and presenting a Review request.
- 3.6 During the consultation stage in 2008 the Scottish Government indicated that a review of the planning fees was to be undertaken and that consultation with stakeholders would follow. This review has yet to be consulted on but it cannot be assumed that any increase in planning fees is inevitable or would be sufficient to cover the entire financial implications of the new legislation in respect of LRBs. Similarly the issue of the potential for the redistribution of resources away from the Directorate for Planning and Environmental Appeals and towards Councils is an issue which directly relates to the reduction of that organisation's workload and the increase in that of Councils as a result of this legislation.

4 BACKGROUND

- 4.1 Reference is made to Report 176-2008 - Modernising Planning Appeals - approved by the Development Quality Committee on 21 April 2008. The Council considered and commented on the Scottish Government's initial draft proposals for LRBs. The Council, although supportive in principle was deeply concerned at the potential resource implications and workloads.
- 4.2 Reference is also made to Report 52-2009 - Draft Regulations on The Planning Hierarchy elsewhere on this agenda. This report provides the context for the responsibilities of LRBs and how decision making will differ for different categories of application in the planning hierarchy.
- 4.3 Reference is further made to Report 200 -2009 - Schemes of Delegation elsewhere on this agenda. This report seeks to establish the categories of application which are to be decided by either officers or members and this will provide an indication of the likely nature of reviews coming before the LRB.
- 4.4 The above reports have a close association with one another and will be relevant to discussions which the Council will be required to have as a consequence of this report.

5 STATUTORY REQUIREMENTS AND GUIDANCE

- 5.1 Summarised below are the requirements of the Town & Country Planning (Schemes of Delegation and Local Review Procedures) (Scotland) Regulations 2008 (Part 3):
- a reviews are to be conducted by a Committee of the Planning Authority;
 - b at least 3 members of the Authority will comprise the LRB;
 - c meetings are to be held in public;
 - d date, time and place of the meetings are a matter for the Authority (notice to be given to parties);
 - e reviews can only be undertaken in respect of the "local" class of development which has been decided by the "appointed officer" under delegated powers;

- f however, the LRB can also be asked to review a case if the "appointed officer" has failed to reach a decision within the statutory period. Once such a request for a review has been made, the LRB has a period of 2 months in which to make a decision. Any non-determination by the LRB in this timescale may be appealed to Scottish Ministers;
- g applicants have 3 months in which to make a written request for a review from the date of the Decision Notice;
- h there are provisions for the written acknowledgement of the review request (within 14 days) and for interested parties (statutory consultees and parties who have made written representations in connection with the application) to be notified by post;
- i there is no automatic right in the legislation for the applicant or other parties to make oral representations, although the applicant can give an indication as to their *preferred* method of review; (see later);
- j the focus of the review should be on the material before the "appointed person" when the original decision was taken;
- k the LRB can request further written information from the applicant, although it is expected that sufficient information will have been supplied by the applicant at the outset and included with the Notice of Review;
- l the Regulations provide for the exchange of any additional representations by interested parties;
- m review papers are to be available for public viewing;
- n the Regulations and guidance indicate that review can be determined on the basis of the written material supplied by the applicant at the time of making the request for review; or
- o alternatively, the Local Review Body can decide to proceed using one of, or a combination of, the following:
- written submissions - the submission of further information or representations by parties;
 - one or more Hearing Sessions - governed by Hearing Session Rules specified in the Regulations; and
 - inspection of the land - either unaccompanied or accompanied by parties (subject to notification);
- p any new material received during the review process must be exchanged between relevant parties and the opportunity given for representations to be made;
- q the LRB may appoint an "assessor" to sit with it at a Hearing session to advise them on matters which may arise (this is interpreted as different and separate from any support which may be given to the LRB by the legal or planning services of the authority);
- r the LRB must give, and circulate to all parties, a written determination on the case including the matters specified in the Regulations (Regulation 21(2)(a)); and
- s the decision of the Local Review Body on any delegated decision is final, subject to the right of appeal by the applicant to the Court of Session on points of law.

- 5.2 It will be noted that the Regulations governing the activities of the LRB are fairly prescriptive and detailed, leaving little to the discretion of planning authorities. However, the following elements appear to be discretionary:
- a the size and composition of the LRB (above the prescribed minimum) and indeed the number of Local Review Bodies;
 - b where, when and how often it meets;
 - c how it is to be supported by officers; and
 - d the method(s) by which each case is to be conducted.
- 5.3 It is abundantly clear in the Regulations and in the advice accompanying them that the process should respect the principles of fairness and transparency which underpin the wider application of the modernised planning system. The operation of the LRB will fall into disrepute and may be open to legal challenge if its operations as a whole (or its component parts) do not overtly demonstrate compliance with the rules of natural justice (ie openness, fairness, impartiality, independence).
- 5.4 In drafting up the detail of the Terms of Reference of the LRB particular attention will require to be paid to:
- a compliance with statutory requirements; and
 - b explicit adherence to the rules of natural justice.
- 5.5 The remainder of this report looks at the options available to the Council in coming to important decisions in respect of the above principles.
- 6 RESPONSIBILITIES OF THE LOCAL REVIEW BODY**
- 6.1 An applicant for planning permission will be entitled to seek a review of a decision (ie a refusal or a condition attached to an approval) where the application:
- a relates to a proposal in the category of "local" developments; and
 - b has been determined by an officer under the Council's Scheme of Delegation as approved by Scottish Ministers.
- 6.2 The Local Review Body acting on behalf of the planning authority can uphold, reverse or vary a decision which is referred to it for review.
- 6.3 Where an application has not been determined by the officer within the prescribed period (2 months) and falls within the scope of the Scheme of Delegation, the applicant can ask for a review by LRB. If the LRB fails to reach a decision within 2 months, they may appeal to Scottish Ministers.
- 6.4 With the exception of the above the decision of the Local Review Body is final, although the applicant may question the validity of the decision, on matters of law only, at the Court of Session.

7 COMPOSITION AND TRAINING OF THE LOCAL REVIEW BODY

7.1 The following issues require resolution:

- a how many members should comprise Dundee City Council's LRB?;
- b how should the members of the LRB be selected and appointed?; and
- c will members of the Local Review Body require to be trained, and if so, by whom and when?

7.2 The legislation (Regulation 7) provides that a review case is to be conducted by a Committee of the Planning Authority comprising at least 3 members of the authority. No upper limit is defined. However, the Circular advises that if a small number is decided on then a larger pool of members should be available to provide cover. Theoretically, the entire membership of a Council or a planning committee, for example, could comprise an LRB.

7.3 It is proposed for discussion that 3 elected members should form Dundee's Local Review Body as opposed to a higher number and that they be drawn from a pool of 8, one identified for each multi-member Ward. The method of identification of the pool will be for each group of Ward members to appoint a nominee. The method of election adopted should ignore political affiliations as this should have no bearing on the operation or decisions taken by the LRB. This will have the added benefit of ensuring that training is targeted and that there is a pool of members available to form a quorum for each sitting of the LRB.

In the interests of impartiality and independence, the view may be taken that no Ward member for the Ward in which the review case is located should sit on that particular review panel. However, the local member would undoubtedly bring a degree of local knowledge to the review which would be helpful. On the assumption that the member concerned strictly adheres to the Councillor's Code of Conduct, members may feel that the advantages of participation outweigh the possibility of accusations of bias.

7.4 In order for each review panel to undertake, and be seen to be undertaking, its responsibilities efficiently and effectively, each member of the pool of participants should undergo a training event provided locally by the Improvement Service or other suitable provider. This training should be completed no later than 1 August 2009 in readiness for the first meeting of the Local Review Body. If for any reason this training cannot be delivered by an external agency, then it would be provided by Council Officers. Evidence of attendance and participation will be provided in the form of a Certificate. Any member not in receipt of this Certificate will not be selected for any review panel.

7.5 For each meeting of the LRB a chair requires to be selected for the membership of that particular LRB. To ensure consistency it is important that the membership of any LRB stays the same for the duration of a review case.

7.6 It is important that the LRB meets regularly. Rather than convene on an ad hoc basis when cases are submitted, it is suggested that a programme of monthly meetings be established in the Council's business calendar from 1 August 2009 onwards. If there is no business for a particular meeting then the meeting would be cancelled.

Draft Proposals

It is recommended that:

- a Dundee City Council's Local Review Body comprise of 3 members;
- b the 3 members of the Local Review Body be selected from a pool of 8 members, comprising one representative from each Council Ward, to allow for cover during instances of illness, leave, unavailability etc;
- c the Chair for each Local Review Body meeting is selected by the members sitting for that particular meeting and the membership of a Local Review Body shall remain constant for the entire duration of any case;
- d arrangements are put in hand for the training of all members comprising the pool;
- e no member sits on any Local Review Body without being in receipt of an appropriate certificate which shall require to be renewed annually;
- f the Ward member for the Ward in which any review case is located would be eligible to be a member of the Local Review Body for that particular review case; and
- g meetings of the Local Review Body be programmed into the Schedule of Council meetings to occur on a monthly basis in each month of the year, including during recess periods starting in August 2009.

8 THE CONDUCT OF THE LOCAL REVIEW BODY'S BUSINESS

- 8.1 Section 5.1 of this report outlines how a LRB is required to conduct its business, although there is scope within the Act and the Regulations for LRBs to use their discretion.
- 8.2 Appendix 1 provides a diagram representing the actions which are required to be taken by and on behalf of the LRB from the receipt of the Notice of Review to the issuing of the LRB's decision.
- 8.3 It is difficult to be precise about the potential workload of the Local Review Body or state when any LRB is likely to be overburdened with work or has no cases to review. Too many variables are involved.
- 8.4 For the calendar year 2008 and on the basis of the application of the Council's proposed new Scheme of Delegation to "local" category applications, in the order of 50 applications from a total of 794 applications determined in that year (6.3%) would have been *potential* review cases (this does not include the potential for reviews to be requested in respect of conditions).
- 8.5 To the above must added the potential for reviews to be made where the case officer failed to reach a decision within the statutory 2 month period. This is difficult to estimate but appeals to Scottish Ministers in this regard are rare as far as Dundee is concerned.

- 8.6 Another indication of potential LRB workload can be based current rates of appeal to Scottish ministers. During 2008 17 appeals to were lodged with and decided by DPEA in respect of applications for "local" developments which would have fallen within the Council's proposed new Scheme of Delegation.
- 8.7 The length of time which any one review case process will take from start to finish is determined by the complexity of the case. The most complex cases or larger developments are likely to lead to a larger amount of written material to be copied, circulated, read and discussed by LRB members, support officers, applicants/agents and third party participants.
- 8.8 The time period will also be a function of the method selected by the LRB to undertake the review (eg Hearing procedures as opposed to scrutiny of the written material or whether further information is to be sought from the parties involved).
- 8.9 Where an application has not been determined by the officer within the prescribed period (2 months) and falls within the scope of the Scheme of Delegation, the applicant can ask for a review by LRB. If the LRB fails to reach a decision within 2 months, they may appeal to Scottish Ministers.
- 8.10 The number of likely non-determination reviews cannot be predicted, but it is obviously in both the Council's and the applicant's interest to determine applications as speedily as possible.
- 8.11 It is clear that the more the LRB chooses to seek additional information or selects the Hearings option, the heavier the workload will be and the lengthier the review timescales will be. This has to be balanced against the LRB being satisfied that every case has been reviewed in a manner proportionate to the scale of the proposal and the complexity of the issues involved and in a way which explicitly demonstrates openness, independence and impartiality.
- 8.12 The nature of the duties of the LRB indicates that essential support to members must be made available from the Committee Services and legal teams of the Council. Such officers will be in a position to offer the LRB independent and impartial advice and support. In particular, there will be a relatively heavy additional workload on the Committee Services function (regarding the convening of LRB meetings, pre-meetings, hearings, correspondence with parties, copying and circulating written material, co-ordinating site visits and issuing decision letters prepared by the LRB). Legal officers will be required to provide procedural advice before, during and after meetings and to vet legal aspects of decision letters and other correspondence.
- 8.13 Less straightforward is the role which the LRB may require the Council's planning service to play in its determinations. The Regulations and guidance is silent on this important matter. It is assumed that the LRB (as a body of lay members) will require professional planning advice. In order to maintain the impartiality and independence of the decision making process this cannot come from the case officer or any other professional officer, irrespective of seniority, who has played any part in deciding the case before the LRB.

- 8.14 The options to overcome this challenge would appear to be:
- a to isolate a suitably qualified and experienced planning officer from any involvement in any applications likely to come before the LRB. This would ensure a significant degree of detachment from the cases;
 - b broker arrangements with a neighbouring Council or Councils to provide each other with professional advice to respective LRBs on an exchange basis;
 - c appoint private planning sector support on either a retainer or a case by case basis; or
 - d as for (c) but with the support being drawn from the list of free-lance Reporters attached to the Directorate for Planning and Environmental Appeals.
- 8.15 In respect of Option (b) the allocated officer would probably have little or no knowledge about the planning context or policy background and may therefore not be in a position to adequately advise the LRB. In addition, there can be no guarantee that the authority would be prepared to reciprocate on an equal basis with no remuneration as no two Local Review Body caseloads are likely to be equal.

Option (c) suffers from the disadvantage of being potentially expensive and raises issues regarding the potential for conflict of interest.

Option (d), whilst ensuring complete impartiality raises the issue of availability and expense.

Draft Proposal

It is recommended, on balance and on the basis of limited research into all the options, that Option (a) be adopted, provided that the maximum level of independence of the officer or officers from the review case can be established.

- 8.16 It is anticipated that the professional planner's role at LRB meetings will be to:
- a outline the background to the case;
 - b introduce the development plan context;
 - c summarise the other material considerations;
 - d outline the approach taken by the case officer in the respect of the handling of the case; and
 - e explain any technical terms and matters of interpretation.

It would not be for the professional advisor to offer an opinion on the credibility of the original decision or to make recommendations one way or another to the LRB. These are matters for the LRB to decide on the basis of the information before them.

- 8.17 Where the LRB wishes to take advice on technical and professional non-planning matters eg transport, land contamination, air quality, noise etc, receiving such advice from within the Council may be seen as not impartial or independent as the original advice to the case officer will have come from those teams/departments concerned. In this regard it would appear that only Options (b) and (c) relating to different disciplines would offer a satisfactory outcome.

Draft Proposal

It is recommended that the practicalities of Options (b) and (c) above be investigated in detail and evaluated with a preference indicated for an Option (b) approach.

- 8.18 The Regulations state that the LRB may, in support of a Hearing Session, appoint a person to sit with it to advise "on such matters arising as they may specify" (Regulation 20). The appointment of such an "assessor" must be notified in advance to parties and after the close of the Hearing may make a report in writing to the LRB on the matters on which he/she was appointed to advise. They are *required* to do so if directed by the LRB.
- 8.19 Circular advice indicates that assessors are used infrequently in the current system to advise on specialist or technical matters that are at issue in an appeal. It is therefore to be assumed that appointments of "assessors" will be rare and that financial and other contractual issues relating to an appointment can be decided at the time when an appointment is being considered.

Draft Proposal

It is recommended that no prescriptive policy on the appointment of "assessors" is made at this time.

- 8.20 The LRB for each case has to decide, following receipt of the Notice of Review and the notification and publication of preliminary papers, whether to:
- a determine the review on the basis of the information already to hand, without further procedure; or
 - b proceed to a decision on the basis of written submissions; or
 - c convene a Hearing Session; or
 - d make a decision by site inspection;
 - e or use a combination of b, c, and d.
- 8.21 The Regulations set out procedures relating to (a) and (b) above and in particular how further representations and information is obtained and exchanged. Hearing Session Rules attached the Regulations outline in detail the procedures for Hearings but provide broad scope for how any Hearing is to be conducted. It is for the LRB to specify the matters to be discussed at the Hearing. They must also determine who, in addition to the applicant and those who made representations on the original application, they wish to invite to make further representations or provide further information on the matters which they specify. The Hearing will be a discussion led by the Local Review Body with cross examination limited. Evidence can be called for but it must not be irrelevant or repetitive.
- 8.22 To the extent that the Hearing is to focus on certain matters only, the Council may feel that Hearings will be the exception rather than the rule and are confined to more complex applications. However, this is a decision which the LRB is required to make in public, on a case by case basis. On making decisions on this, the LRB may wish

to be mindful that Hearings provide the soundest opportunity for a detailed oral debate in public of material issues which a review on the basis of written submissions may not.

- 8.23 Balanced against this must be the time and effort which will inevitably be expended by all parties involved in convening and undertaking a Hearing, including the time taken to prepare and issue a written decision.

Draft Proposal

It is recommended that the Local Review Body reaches an informed decision as to whether or not to call a Hearing on a case by case basis as opposed to deciding at the outset of its work that *every* case is to be decided by the Hearings method.

- 8.24 The new Committee's Standing Orders will require to consider such matters as how it will reach a decision where a member or members have different views on the proposed decision.
- 8.25 Every decision by the Local Review Body will be in writing, notified to the applicant and other parties and include those matters specified in Regulation 21(2). This must include details of the provisions of the development plan and any other material considerations to which it had regard in determining the application for review.
- 8.26 A decision letter similar in content and length to those currently issued by the Department for Planning and Environmental Appeals Reporters is envisaged.
- 8.27 It is envisaged that the decision notice will be issued by the clerk to the LRB under the signature of the Convener of the particular LRB concerned.
- 8.28 The Regulations (Regulation 22) specifically mention that documents associated with the business of LRBs may be sent by electronic communications, provided certain guidelines are met.

This is an important provision as LRBs will administer a significant quantity of paperwork in the form of letters, forms, plans, reports etc and the efficiency of an LRBs administration will rely on the electronic circulation of documents, especially when the planning applications go on-line in April 2009. Nevertheless, the wording of the Regulations does indicate that the availability of paper based documentation will be necessary.

Draft Proposal

It is recommended that, in the interests of efficiency in the undertaking of the Local Review Body's business, maximum use is made of e-mail for the exchange of review documentation.

9 POLICY IMPLICATIONS

- 9.1 This Report has been screened for any policy implications in respect of Sustainability, Strategic Environmental Assessment, Anti-Poverty, Equality Impact Assessment and Risk Management. There are no major issues.

10 CONSULTATIONS

- 10.1 The Chief Executive, Depute Chief Executive (Support Services), Depute Chief Executive (Finance), Head of Finance and Assistant Chief Executive have been consulted and are in agreement with the contents of this report.

11 BACKGROUND PAPERS

- 11.1 The Planning Etc (Scotland) Act 2006 - Section 43A(8).
- 11.2 Town & Country Planning (Schemes of Delegation and Local Plans Procedure) (Scotland) Regulations 2009.
- 11.3 Draft Circular XX/2009 - Schemes of Delegation and Local Reviews (December 2009).
- 11.4 Report 176-2008 - Modernising Planning Appeals - to the Development Quality Committee on 21 April 2008.
- 11.5 Article II of the Minute of the Development Quality Committee - 21 April 2008.
- 11.6 Report 59-2008 - Draft Regulations on The Planning Hierarchy - Consultation Paper - to the Development Quality Committee on 18 February 2008.
- 11.7 Article IV of the Minute of the Development Quality Committee - 18 February 2008.
- 11.8 Report 52-2009 - The Planning Hierarchy - to the Development Quality Committee - 20 April 2009.
- 11.9 Report 200 -2009 - Schemes of Delegation- to the Development Quality Committee - 20 April 2009.

Mike Galloway
Director of Planning & Transportation

Ian Mudie
Head of Planning

IAR/KM

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Dundee City Council
Tayside House
Dundee

**APPENDIX 1
SUMMARY OF LOCAL
REVIEW PROCEDURES**

