

REPORT TO: PLANNING & TRANSPORTATION DEPARTMENT – 28 JUNE 2004

REPORT ON: SCOTTISH EXECUTIVE CONSULTATION PAPER "RIGHTS OF APPEAL IN PLANNING"

REPORT BY: DIRECTOR OF PLANNING AND TRANSPORTATION

REPORT NO: 427-2004

1 PURPOSE OF REPORT

- 1.1 To inform the Committee of the contents of the Scottish Executives Consultation Paper "Rights Of Appeal In Planning" and to set out the Council's responses to the questions set out in the paper.

2 RECOMMENDATION

- 2.1 It is recommended that the Committee notes the contents of the Consultation Paper and agrees to respond to the questions asked as set out in this report.

3 FINANCIAL IMPLICATION

- 3.1 The Consultation Paper accepts that a widening of the rights of appeal would have significant financial implications for both Local Planning Authorities and the Scottish Executive. The increased workload would involve the requirement for additional staff in every planning authority. On a wider level, the paper recognises that a widening of the rights of appeal would lead to delays which, in turn, would be a burden on business.

4 LOCAL AGENDA 21 IMPLICATIONS

- 4.1 The matters discussed in the Consultation Paper do not directly relate to environmental planning policies.
- 4.2 However, one of the areas where it is suggested that third party rights of appeal might be applied is where an Environmental Impact Assessment is required. It could be argued that this would lead to greater scrutiny of environmental matters.

5 EQUAL OPPORTUNITIES IMPLICATIONS

- 5.1 The current system only makes provision for applicant appeals. It could be argued that extending the rights of appeal to third parties gives the maximum opportunity for all sectors of the community to become involved in the planning process. Equally, restricting an applicants right of appeal to judicial review of Planning Authority decisions would also ensure fairness. However, views are canvassed in the paper as to whether charges should be made to third parties who exercise their right of appeal. Any charging system would directly impact upon opportunities for all members of the public to be involved in the planning process.

6 BACKGROUND

- 6.1 The Scottish Executive in its White Paper on public involvement in planning "Your Place, Your Plan", published in March 2003 announced its intention to carry out full consultation on third party appeals in planning. Following the Scottish Parliament

elections in May 2003, the subject of this consultation was defined further in the publication "A Partnership for a Better Scotland: Partnership Agreement", which said that the Executive would consult on new rights of appeal in planning cases in 4 areas. These were where the local authority involved had an interest, where the application was contrary to the Local Plan, where planning officers had recommended a rejection or where an Environmental Impact Assessment was needed.

- 6.2 The Consultation Paper "Rights of Appeal in Planning" sets out the arguments for and against introducing third party rights of appeal in planning and the direct and indirect implications of any changes to the current arrangements. It does not recommend any course of action and simply seeks the views of the Council on the various matters relating to third party rights of appeal.
- 6.3 At present, only an applicant has a right of appeal to the Scottish Ministers against a planning decision. The Consultation Paper considers whether this status quo should be retained or whether the rights currently conferred on applicants should also be conferred on third parties but within the four areas described in paragraph 6.1 above.
- 6.4 The consultation paper recognises the fundamental dilemma between encouraging public participation in the land use planning system, but also in growing the economy and speeding up the planning process. It also states that the consultation must be seen in the context of the Executive's wide ranging programme of changes to the land use planning system. These include the reforms in hand following the "Review of Strategic Planning", the public consultation on "Making Development Plans", and the proposals in "Your Place, Your Plan" to strengthen and enhance public involvement in all stages of the planning system and finally, the consultation on modernising Public Local Inquiries, aimed at improving the experience of inquiry participants.
- 6.5 A copy of the consultation document is available in the members lounges or on the Executive's website at www.scotland.gov.uk/planning.
- 6.6 The paper summarises the arguments in favour of third party rights of appeal which include creating a level playing field between applicants and third parties; making planning authorities more accountable; encouraging applicants to engage with communities; concerns about decisions made out of accord with the development plan; concerns about environmental issues and finally concerns about compliance with human rights.
- 6.7 The paper summarises the arguments against third party rights of appeal, these being concerns about delay and uncertainty in the planning system, which might result in Scotland being a less attractive business location, the possible abuse of the system through an unjustified objection to development proposals; the fact that third parties might not be representative of the majority of the community; local democracy may be undermined; communities would be allowed to challenge decisions made on their behalf by the Council's they elected and finally that the tax payer would have to bear the costs of funding the additional case work required.
- 6.8 Looking at the 4 areas where views are sought on extending third party rights of appeal, the paper estimates that this would result in potentially 1,000 extra appeals (double the current number). The paper looks at third party rights of appeal in other

jurisdictions, the question as to who would have the right of appeal and the resource implications for introducing a right of appeal.

- 6.9 The paper concludes with 4 possible models ranging from introducing a third party right of appeal in the circumstances described in the "Partnership Agreement" to maintaining the status quo.

7 THE COUNCIL'S POSITION

- 7.1 Members will be aware that it is the position of this Council that the current arrangements for appeals by applicants do not properly reflect or respect the status of the planning authority's decisions. The Council have already written to the Executive expressing their concerns that the Reporter can determine the appeal as if the application has been made to him in the first instance. He is not constrained in any way from interfering with the decision locally made by the elected planning authority and can change that decision where he simply disagrees with the Council on balance on a planning judgement. In contrast, the Planning Authority can only challenge the Reporter's decision based on a point of law and not on planning merits. The Council considers that this effectively gives an unelected civil servant the last bite of the cherry in the planning case and this cannot be legitimate as it amounts to a clear case of "democratic deficit" in the system.
- 7.2 Although the Consultation Paper is titled "Rights of Appeal in Planning" it does not in any way consider or challenge the status quo. It simply considers whether additional rights of appeal should be conferred upon third parties. It is considered that in this respect the consultation exercise is flawed and in considering rights of appeal in planning the entire system should have been examined.
- 7.3 The Council clearly accepts the argument that it is unfair that an applicant should have a much more extensive right of appeal than a third party. However, it is considered that this matter could be redressed not only by extending third party rights to cover similar rights as those currently enjoyed by an applicant, but also by giving both applicants and objectors the opportunity to dispute the democratic decisions of the Council if it has erred in law. It is important that whichever process is adopted, appeals can be conducted simply and at minimum cost to all parties.
- 7.4 Therefore, there appear to be two basic options available to change the current rights of appeal, plus an option to retain the status quo, and guidance is sought on members' views on these. With regard to the questions raised in the Consultation Paper draft responses are set out in Annexe 1 attached to this report. Responses to questions about arrangements for third party rights of appeal are without prejudice to the overall stance set out by the Council.

8 CONSULTATIONS

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

9 BACKGROUND PAPERS

- 9.1 "Your Place, Your Plan" – a white paper on public involvement in planning, March 2003.

- 9.2 "Rights of Appeal in Planning" – Scottish Executive Consultation Paper 2004.
- 9.3 Letter from Dundee City Council dated 19 December 2002 to discuss with the Executive the determination of appeals.

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APPENDIX 1Consultation QuestionsDundee City Council Consultation Response

- Q1 Paragraphs 3.3.1 to 3.4.9 have identified arguments made previously both for and against third party right of appeal. Do you think they accurately reflect the arrangements? Are there other arguments not covered here that you wish to raise?
- Paragraph 3.3.1 correctly states that a “level playing field” would be provided if third parties were given the same right of appeal as applicants. However, a level playing field would also be provided if applicants and third parties were given the same right to challenge the decisions of the Council in the Court of Session on a point of law.
- Paragraph 3.3.2 suggests that if there is a possibility of an appeal, irrespective of the decision they reach, Councils will consider applications more carefully to ensure that they reach what they believe to be the right and defensible decision. However, there is a counter argument that in the case of significant developments where an appeal of some form is almost inevitable, Councils may not wish to dedicate substantial resources to a decision making process which will not, at the end of the day, determine the application. With regard to decisions contrary to the Development Plan, the current procedures for advertising these applications coupled with Dundee City Council's provisions for deputations to Committee ensure that these matters are fully debated.
- Q2 Do paragraphs 3.5 to 3.14 accurately reflect what supporters of the third party right of appeal are seeking from the new process?
- The City Council is in general agreement and notes that paragraph 3.6 recognises that the current unbalanced and unfair system could be resolved by removing the applicants right to appeal. The Council is disappointed however that this point is not developed further.
- Q3 If the right of appeal were to be extended to third parties, do you think that it should be restricted to all or some of the 4 categories identified in the “Partnership Agreement”?
- In cases where the Local Authority has an interest (paragraph 4.5.1) there are already procedures in existence for scrutiny of these decisions. It is therefore not considered appropriate to extend third party rights of appeal in this area. In cases where the application is contrary to the Local Plan (paragraph 4.5.2) it is previously mentioned that this Council has arrangements in place for deputations to be heard at Committee so that matters can be fully discussed. In cases where a planning officer recommends rejection (paragraph 4.5.3), concerns are developed in the paper regarding the impact of this on the relationship between officers and Members, which are very pertinent. Finally, in cases where an Environmental Impact Assessment is needed (paragraph 4.5.4) the Council considers that the EIA process is a very transparent one involving extensive consultation with relevant consultees and the public.
- Q4 Which planning decisions do you think should be capable of appeal to the Scottish Ministers?
- The Council is not in favour of a right of appeal on the planning merits of a case to the Scottish Ministers. In terms of the details of paragraph 4.11 there is no justification as to why decisions made under the control of advertisements regulations should not be the subject of a third party right of appeal.

Consultation QuestionsDundee City Council Consultation Response

- Q5 If the Right of Appeal were to be extended, which third parties should be able to appeal and in what circumstances?
- If the right was offered to all members of the public, it is considered that this would be too wide and could lead to spurious appeals (eg business competitors). It is considered that it might be more appropriate to restrict the right to those who are notified in connection with the original application, those who made representations on the original application and relevant statutory consultees.
- Q6 Do you support in principle the introduction of a wider right of appeal in the planning system?
- The Council does not support the introduction of a wider right of appeal in the planning system. Rather, it considers that the democratic decisions of the local planning authority should not be subject to scrutiny by an unelected appeal body. It does not agree that the weight placed by the Reporter on planning matters should be given greater credence than that of the local planning authority. The Council accepts that there should be judicial scrutiny of its decisions and therefore that both applicants and third parties should have a right of appeal to the courts on this matter. This decision would create a level playing field for both applicants and third parties. If the Executive is not prepared to reconsider the position of an applicants rights of appeal, then the Council still would not wish to support wider rights of appeal. This is because such a system would further erode local democracy and allow unelected civil servants to overturn the decisions of the planning authority at the behest of either the applicant or an objector. In addition to the above, there are practical reasons in terms of resource implications as to why the planning system would struggle to cope with a doubling of the current number of appeals. The net result would be serious delays in the planning system and a consequent impact upon business and the economy.
- Q7 How do you feel the planning service of both planning authorities and the Scottish Executive would be placed to manage the likely increases in workload?
- The Council considers that there will be significant adverse impacts at both planning authority and Scottish Executive level. These impacts will be felt throughout the planning system and not just in development control. Even if resources were made available for additional staff, it would be some period of time before the system could catch up with the inevitable backlogs which would occur whilst waiting for fully trained up new staff to be made available.
- Q8 Do you think that there would be any implications for the attractiveness of planning as a career if there were to be a significant increase in the appeal case load?
- If the increase in case load was matched by adequate resources then there is no reason to believe that there would be any implications with the attractiveness of planning as a career in the long term. However, in the short term there are likely to be severe difficulties. This is because even with the allocation of significant resources it will take some time to build up a team of adequately trained staff.

Consultation QuestionsDundee City Council Consultation Response

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| Q9 | Should a fee be payable to object to a planning application and/or to lodge an appeal against a planning decision? If so, what do you think would be an appropriate level of fee? | The Council does not consider that it would be appropriate to charge a fee for objecting to a planning application or for lodging an appeal. Having such a charge would run directly contrary to attempts to increase public participation in planning. It would also further marginalise the less well off in society who already participate in the planning system to an extremely limited extent. |
| Q10 | Should the Scottish Ministers retain their role in deciding particular planning appeals or should SEIRU decide all appeals? | Given the concerns of the Council regarding unelected officials deciding applications as if the application had been submitted to them in the first instance, the Council considers that it is only in those cases where Scottish Ministers decide appeals that it can be argued that decisions are democratically based. |
| Q11 | Would the introduction of mandatory public hearings in defined circumstances increase public confidence in planning authority decisions? | The Council considers that such hearings would result in increased public confidence. Dundee City Council does make provision for applicants and objectors to make deputations to its Development Quality Committee. |
| Q12 | Would extending the circumstances in which the Scottish Ministers are notified, to include all Development Plan departures, sufficiently address concerns about the decision being made by planning authorities against the terms of Development Plans? | The Council is not aware of significant levels of public concerns regarding decisions made contrary to the terms of the Development Plan. In addition, there are many cases where the departure from the plan may be trivial or where the nature of the policy is such that there is a value judgement as to whether a departure has taken place or not. |
| Q13 | Would it be appropriate to introduce a screening process for planning appeals? | The Council considers that screening would be appropriate. |
| Q14 | Are there circumstances in which any right to appeal against clients should be withdrawn? | If third party rights of appeal were introduced, it would not seem appropriate to restrict the right to appeal unless matters of exceptional national security were involved. |
| Q15 | a Please give us your views on each of the models outlined in Section 6. | For reasons already set out, the Council does not support extending rights of appeal. Of all the 4 models suggested, therefore, model 2, which is to continue with the ongoing programme of modernisation of the planning system without introducing a new appeals system would be that most favoured by the Council. In terms of model 3, the Council already permits deputations to the Development Quality Committee both from applicants and objectors and agrees that this does serve to increase public confidence in planning authority's decision. |

Consultation QuestionsDundee City Council Consultation Response

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| b | Can you think of any alternative package of changes to the planning system to ensure a system which is both fair and effective? | The Council has already suggested that there should be no right of appeal to either applicants or third parties based on the merits of the case. There should just be judicial scrutiny of the decisions of the planning authority. It is considered that this package would ensure fairness. In terms of effectiveness, the current provisions for consultation and advertisement of applications and the City Councils provision for deputations to committee ensure a fair and effective system. |
| c | How would each of these models (and any other package you suggest) impact on the resources of your organisation? | The Councils proposal would not have any significant resource implications. |
| Q16 | Please let us have any additional comments you wish to make, if any, on relevant matters not addressed in this paper. | The Council has already pointed out that the paper, although briefly mentioning that removal of current rights of appeal enjoyed by applicants would ensure fairness, does not go on to give serious consideration to this matter. |