

## PROCEDURES FOR THE LOCAL REVIEW BODY

Report by Ian Johnson Head of Communities and Economy

### 1 Purpose of Report

- 1.1 The purpose of this report is to advise the Local Review Body (LRB) of the arrangements for the determination of local reviews by the LRB.

### 2 Background

- 2.1 Where an application for planning permission falling within the Council's scheme of delegation has been:
- refused by an appointed officer;
  - granted permission subject to conditions; or
  - has not been determined within the prescribed period (almost invariably two months) but is of a class of application that falls within the scope of the scheme of delegation,

the applicant may submit a 'notice of review' requiring the planning authority's Local Review Body (LRB) to review the application. The LRB comprises a panel of elected members.

- 2.2 The role of the LRB is to consider applications adopting 'a de novo approach'. This means the LRB should apply its collective mind afresh to materials which were before the appointed officer, together with any further information properly before it. Its role is not just to review whether the initial decision referred to it was a reasonable one; it must consider all the relevant materials and arguments afresh. This is the position as outlined by the Scottish Government and reinforced in a challenge to the courts in 2015 regarding *Sally Carroll v Scottish Borders Council*.
- 2.3 The previous administrative and procedural arrangements for the LRB were approved at its meeting of November 2013.
- 2.4 The Town and Country Planning (Schemes of Delegation and Local Review Procedures) (Scotland) Regulations 2013 and Scottish Government guidance in Circular 5/2013: Schemes of Delegation and Local Reviews provides the legislative and regulatory framework for the relevant administrative procedures in determining a notice of review.

### 3 Procedures

- 3.1 The LRB process shall comprise the following stages:
1. Submission of **Notice of Review** by the applicant;
  2. The **Registration and Acknowledgement** of the Notice of Review;
  3. Carrying out **Notification and Consultation**;

4. The LRB carry out a **Site Visit**;
5. The **meeting of the LRB** to determine the review; and
6. The **Issuing of the Decision Notice**.

### **Role of the Planning Adviser**

3.2 The following procedures refer in places to the input of the “planning adviser”. It is important that the role of the planning adviser is clearly defined and well understood by all parties to the process, and therefore is included within these procedures. In conducting reviews it is essential that the LRB acts in an impartial, open and transparent manner. To ensure that its decisions are sound it is vital that in conducting a review the LRB has before it all relevant information and, when required, can seek impartial advice on planning matters. Accordingly, meetings of the LRB (including site visits) will be attended by a planning adviser. The role of the advisor shall be strictly prescribed in the following terms:-

- a) he/she shall have had no participatory role in the assessment and/or determination of the planning application which is the subject of review;
- b) he/she will only speak if invited to do so by the Chair of the LRB;
- c) he/she will be restricted to advising the LRB on procedural matters, planning law and practice, and the facts of the case; and
- d) on no account shall the planning adviser offer views on the merits of the proposals under review.

### **Stage 1: Notice of Review**

3.3 An applicant can request the LRB to review an application for planning permission (this does not include applications for listed building or advertisement consent), or for consent, agreement or approval of a proposal in the category of ‘local developments’ falling within the scheme of delegation which has been:

- Refused by an appointed officer;
- Granted subject to conditions; or
- Has not been determined within the prescribed period (two months) but is of a class of application that falls within the scope of the scheme of delegation

3.4 To initiate this process the applicant submits a formal ‘Notice of Review’, using forms which are available via the Council’s website or directly from the Council’s planning office. The details of how to submit a notice of review are provided as an advisory note on the decision notice issued following determination of an application and in the acknowledgement letter sent to applicants following the submission of a planning application. Advice and guidance on this process is also available online via [www.eplanning.scotland.gov.uk](http://www.eplanning.scotland.gov.uk) or by contacting the Planning duty officer.

3.5 The notice of review must include the following information:

- The name and address of the applicant;

- The date and reference number of the application subject of the review;
  - The name and address of the applicant's agent (where applicable); and
  - A written statement outlining the applicant's reasons for requiring a review and their preferred procedures of review (written submissions or hearing).
- 3.6 Section 9(4) of the LRB regulations state that "(a) all matters which the applicant intends to raise in the review must be set out in the notice of review or in the documents which accompany the notice of review; and (b) all documents, materials and evidence which the applicant intends to rely on in the review must accompany the notice of review". The consequence of the LRB regulations is that 'new' material can only be submitted as part of the review process if it forms part of the review submission. An exception can be made if the LRB request further information to assist them with their determination.
- 3.7 For a 'Notice of Review' to be valid it must be received by the Planning Authority within the period of three months beginning with the date of the decision notice for those applications determined or the expiry of the period allowed for determination of an application which has not been determined.

### **Stage 2: Registration and Acknowledgement**

- 3.8 A notice of review will be registered (recorded in the Council's back office database) and the submitted notice of review forms and supporting documentation will be scanned (only required if the notice of review is submitted in a paper format) and indexed into the Council's e-planning document management system. This information can then be viewed online as part of the host application file in the usual way. Following registration of the review the appointed officer will notify the Chair of the LRB and the Council's Secretariat of the notice of review and advise which meeting of the LRB it will be reported to.
- 3.9 As part of the registration process a notice of review will be acknowledged in writing either by post or electronic means. The acknowledgement will be issued by the Council's Planning Service and will advise the applicant of the LRB procedures and inform them of the date of the next available LRB meeting.

### **Stage 3: Notification and Consultation**

- 3.10 Within 14 days of receiving the notice of review the local planning authority will notify interested parties of the review.
- 3.11 As part of the review process those parties who have made representations on the original application are notified of the review in accordance with the LRB regulations and any further submissions are considered by the LRB. The interested parties will be given a further 14 days to make any further representations. The regulations do not state whether new representations received from parties who did not make comment on the original application shall or shall not be

considered and as such it is for the decision maker to decide what weight is given to such representations. Comments already made on the application are considered by the LRB as part of the review. Any third party representations will be made available for inspection via the Council's website.

#### **Stage 4: Site Visit**

- 3.12 The LRB site visit can, at the discretion of the LRB, be undertaken accompanied or unaccompanied. An accompanied site visit would involve giving the applicant, a representative of the local authority's professional planning staff and interested parties, as defined in this report, the opportunity to attend. The purpose of the visit is to enable the LRB to understand the context of the proposed development.
- 3.13 Any debate and discussion on the merits of the case shall take place in the public meeting of the LRB and not on the site visit. This is the case whether the site visit is accompanied or unaccompanied. During an accompanied site visit the LRB can ask for clarification on points already raised in the review process from those parties in attendance. However, it is not permitted for the applicant, the representative of the local authority professional planning staff or interested parties to make oral representation or to introduce new evidence during the site visit. Oral representation can only be given to the LRB if the review is determined by way of a hearing.
- 3.14 The LRB planning advisor will accompany the LRB on both accompanied and unaccompanied site visits. The role of the advisor during the site visit shall be limited to advising the LRB on clarification/assistance on matters relating to the facts of the case, planning law and practice, and procedural matters.
- 3.15 Applicants and interested parties will be notified of the LRB's intention to visit the site and advise whether the site visit will be undertaken accompanied or unaccompanied. This notification will include guidance on site visit procedures.
- 3.16 The site visit is an integral component of the review and as such only those Members attending the site visit would thereafter be able to participate in consideration of the review. A site visit will be scheduled for the Monday afternoon preceding the meeting of the LRB at which the review is determined. The site visit will be unaccompanied if the review is to be determined by way of written submissions and accompanied if the review is to be determined by way of a hearing. The LRB will be notified in advance of any changes to this timetable

#### **Stage 5: Meeting of the LRB**

- 3.17 The format of the meeting of the LRB in relation to a case will depend on the procedure used to determine the review. The review can be determined by either written submissions or by way of a hearing.

- 3.18 Where a review is to be determined by way of written submissions the LRB will not hear any oral representations from the applicant, local authority planning staff or any third party.
- 3.19 In determining the review, either by written submissions or a hearing, the LRB shall consider the following:
- 3.20 The LRB will determine the review by way of written submissions unless the applicant requests a hearing in their notice of review submission.

#### Assessment of the Review

- 3.21 **Legislation requires decisions on planning applications to be made in accordance with the development plan unless material considerations indicate otherwise.**
- 3.22 The following approach shall be taken in undertaking a review:
- Identify any provisions of the development plan which are relevant to the decision;
  - Interpret them carefully, looking at the aims and objectives of the plan as well as detailed wording of policies;
  - Consider whether or not the proposal accords with the development plan;
  - Identify and consider relevant material considerations for and against the proposal;
  - Assess whether these considerations warrant a departure from the development plan; and
  - State the reason/s for the decision and state any conditions required if planning permission is granted.
- 3.23 Having determined its decision on the case the LRB can then ask the planning adviser to advise on appropriate wording to properly reflect the terms of its decision.

#### Development Plan Policy

- 3.24 The LRB shall identify the relevant development plan policies, which shall be considered when determining the review. The case officer's report will normally be the appropriate starting point for this consideration unless challenged by the applicant. A dispute over the interpretation of policy shall be considered when assessing the planning merits of the case, not in identifying the relevant policies.

#### Material Considerations

- 3.25 The LRB shall identify any material considerations, which shall be considered in the determination of the review. There are two main tests in deciding whether a consideration is material and relevant:
- It should serve or be related to the purpose of planning and it should thereby relate to the development and use of land; and
  - It should fairly and reasonably relate to the particular application.

- 3.26 It is for the LRB to decide if a consideration is material and to assess both the weight to be attached to each material consideration and whether individually or together they are sufficient to outweigh the relevant provisions of the development plan. Where development plan policies are not directly relevant to the development proposal, material considerations will be of particular importance.
- 3.27 The Council can only take into account '*material planning considerations*' when looking at comments made on an application. For example:
- The proposed land use;
  - The siting, design, scale, form and materials of the proposed development;
  - The impact the proposed development will have on the amenity or privacy of neighbouring properties;
  - The effect the proposed development will have on the setting of a listed building, conservation area or area of great landscape value;
  - Highway safety, means of access and/or parking provision;
  - The potential impact on flooding/drainage;
  - Development Briefs;
  - Supplementary Planning Guidance (SPG);
  - Scottish Government Planning Policy and Advice;
  - The individual circumstances of the applicant;
  - The individual circumstances of the application;
  - The individual circumstances of the site;
  - The planning history of the site (previous grants or refusals of planning permission); and
  - Representations submitted to the Council by third parties.
- 3.28 '*Non material planning considerations*' which cannot be considered include the following:
- Perceived loss of property value;
  - Issues covered by separate legislation;
  - Private disputes between neighbours'
  - Loss of a view;
  - Land ownership disputes;
  - Personal morals or values of the applicant/developer.
- 3.29 The planning system operates in the long term public interest. It does not exist to protect the interest of one person or business against the activities of another. In distinguishing between public and private interest, the basic question is whether the proposal would unacceptably affect the amenity and existing use of land and buildings which ought to be protected in the public interest, not whether owners or occupiers of neighbouring or other existing properties would experience financial or other loss from a particular development.

### Amending the Scheme

- 3.30 Although the LRB can agree to amend a scheme (this mirrors the powers of Scottish Ministers on appeal), any such amendment shall not be of a significant scale to change the overall description or form of the development.
- 3.31 A significant amendment would be one which would result in a development of a different description (for example amending an application for 4 dwellinghouses to 3 dwellinghouses), or one of a different character (for example an application for a front extension being amended so that a rear extension is granted planning permission). The planning adviser can offer technical advice on the significance of any amendment.

### Hearing

- 3.32 Where a review is to be determined by way of a hearing written notice will be given to the applicant and any interested party who has made representations. A person or body who intends to appear at the hearing session must within 14 days of the date of such notice inform the LRB in writing of their intention to attend. Persons who attend the hearing without giving prior notice can not participate in the proceedings or give oral representations. All those intending to attend the hearing shall be given reasonable notification of the date, time and place of the hearing.

### Statements and Documents

- 3.33 A person or body intending to appear at the hearing must submit the following by a specified date:
- a hearing statement, outlining the case relating to the specified matters which a person proposes to put forward at a hearing session;
  - a list of all documents referred to in the statement; and
  - a copy of every document (or the relevant part of) on the list which is not already available for inspection.
- 3.34 If the applicant submitted a statement with their notice of review, this can be treated as *'the statement'* and will form part of the review papers. The planning officer's report of handling also forms part of the review papers and can be treated as *'the statement'*.
- 3.35 Those parties making oral representations will be given a maximum of 5 minutes. All the hearing statements and documents will be made available for inspection online.

### Procedures

- 3.36 At the commencement of the hearing the planning advisor will outline the procedure to be followed. The procedure may vary depending upon the complexity of the case. In general terms the procedure shall be as follows:

1. The advisor will outline an overview of the procedures and the case.
  2. Oral representations by the applicant.
  3. Oral representations by any consultees.
  4. Oral representations by interested third parties.
  5. Oral representations by the appointed local authority planning officer. The appointed local authority planning officer cannot fulfil the role of “planning adviser”.
  6. The Chair of the LRB will lead a discussion on the merits of the case, which can include the LRB asking questions of those who have made oral representations.
  7. Cross-examination between those parties giving oral representation will be permitted only if the LRB considers it appropriate to ensure a thorough examination of the issues. *(It is expected that cross-examination will only be allowed on very rare occasions).*
  8. Once steps 1 to 7 have been concluded there shall be no further opportunity for the parties to make any further representations, and the LRB shall determine the review, as per the procedures outlined.
- 3.37 The LRB may appoint a person to sit with the LRB at a hearing session to advise them on such matters arising as they may specify (“an assessor”). The appointment of an assessor may be appropriate in cases which require specialist knowledge or expertise such as archaeology or biodiversity. The planning advisor can advise the Chair of the LRB on the need to appoint an assessor. If the LRB does appoint an assessor it must clearly define its remit prior to the hearing and advise the applicant and other interested parties accordingly.
- 3.38 If the LRB is unable to reach a decision without additional information it is within its remit to defer consideration of the review to a later meeting.

### **Stage 6: Issuing the Decision Notice**

- 3.39 Following the decision of the LRB on the review the planning adviser can be asked to draft a decision notice to properly reflect the decision of the LRB. The decision notice shall comprise the following:
- confirmation of the development details, site location and applicant details;
  - a statement outlining the procedure the LRB followed in the assessment of the case;
  - a statement confirming which development plan policies the LRB considered to be relevant in the determination of the review;
  - a statement confirming which material considerations the LRB considered to be relevant in the determination of the review;
  - the decision of the LRB and the reason/s for the decision;
  - any planning conditions attached to the decision if planning permission is granted; and
  - the applicants statutory rights to challenge the validity of the decision
- 3.40 Once the advisor has prepared the decision notice it will be issued on behalf of the Chair of the LRB. A copy of the decision notice will be



reported to the next LRB for noting and all those interested parties that have made representations will be advised of the outcome.

- 3.41 A copy of the LRB decision will be placed on the planning authority planning register and made available for inspection online.

#### **4 Electronic Communication**

- 4.1 Wherever possible communication will be undertaken electronically. All documents connected to the LRB will be made available online and can be accessible by viewing the host planning file. All members of the LRB will receive a paper copy of the agenda and reports.

#### **5 Challenging the Validity of the Decision**

- 5.1 If the applicant is aggrieved by the decision of the planning authority (LRB) to refuse permission for the proposed development, or to grant permission or approval subject to conditions, the applicant may question the validity of that decision by making an application to the Court of Session. An application to the Court of Session must be made within 6 weeks of the date of the decision, the grounds for which require being on the basis of procedure, and cannot be on the planning merits of the case.

#### **6 Recommendations**

- 6.1 It is recommended that the Local Review Body (LRB) agrees:
- (i) the LRB administrative and procedural arrangements set out in this report; and
  - (ii) that a copy of these arrangements be placed on the Council's website, and be made otherwise readily available on request.

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