

Planning Law Clarification Report

Report by John Blair, Director, Resources

1 Purpose of Report

The purpose of this report is to bring to the Committee's attention the attached report by the Head of Communities and Economy.

2 Background

The report was considered by the Planning Committee on 30 August 2016, when it was agreed, as follows:-

- (a) To note the content of the inspection report; and
- (b) To refer the report onto the Local Review Body for noting.

3 Report Implications

These are as outlined in the attached report by the Head of Communities and Economy.

4 Recommendations

The Local Review Body is invited to note the attached report by the Head of Communities and Economy.

30 August 2016

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PLANNING LAW CLARIFICATION REPORT

Report by Head of Communities and Economy

1 PURPOSE OF REPORT

- 1.1 The purpose of this report is to provide advice to the Committee with regard a number of points of Planning Law which directly impact on the determination of planning applications and the consideration of 'Notices of Review' submitted to the Local Review Body (LRB) .

2 BACKGROUND

- 2.1 At its meeting of 26 April the LRB requested clarification on a number of points of Planning Law, in particular:
- a) Making a decision on a planning application;
 - b) Considering late representations - can you consider information submitted 'late' when determining a planning application or notice of review; and
 - c) Can you consider new material at the LRB.

3 MAKING A DECISION ON A PLANNING APPLICATION

- 3.1 Planning applications are determined in accordance with the Town and Country Planning (Scotland) Act 1997 as amended (*hereafter referred to as the Act*) and associated regulations and Scottish Government advice in particular the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013 (*hereafter referred to as the Regulations*).
- 3.2 In considering an application section 37 (2) of the Act states "the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations".
- 3.3 Section 37(4) of the Act with regard the determination of applications states that "the date of the grant or refusal" ... "shall be the date on which the planning authority's decision bears to have been signed on behalf of the authority". The issuing of the decision notice bears the signature of the authority.
- 3.4 The courts have held that a decision on a planning application is not deemed to have been formally made until the issue of a decision letter

Co-operative Retail Services Ltd v Taff-Ely BC (1978) and later *R v West Oxfordshire District council ex parte Pearce Homes Ltd (1985)*. Court judgements on points of principle and procedure transpose both Scottish and English planning systems.

- 3.5 As a Committee resolution to approve/refuse an application does not constitute a written decision notice, applications may be withdrawn, appealed against non determination or referred back to Committee for reconsideration before the issue of a decision notice.
- 3.6 In cases where an application is not subject to a legal agreement/developer contributions it is Midlothian's practice to issue the decision notice as soon as practicably possible after a Committee resolution (usually the following day). However there can be a significant period of time between a Committee resolution and the issuing of a decision notice in those cases which are subject to the conclusion of a legal agreement.
- 3.7 This issue has arisen because at its meeting of 19 January 2016 the LRB were minded to uphold a review and grant planning permission for a test piling facility at Shewington, subject to conditions and a bond/bank guarantee to secure a financial arrangement to protect local homes and businesses from any potential damage from the test piling operations and flooding (if the nearby dam was damaged). The LRB determined to consider the conditions and the details of the bond/bank guarantee prior to a decision being issued. In the subsequent negotiations between the applicant and officers the applicant advised that they were "not in a position to offer financial security" and as such on reporting back to the LRB at its meeting of 26 April 2016 the LRB were given the option of making a different resolution to the one taken at its meeting of 19 January 2016. The advisor to the LRB confirmed that this was within the scope of the LRB because the decision notice had not been issued.

4 CONSIDERING LATE REPRESENTATIONS

- 4.1 The assessment and determination of a planning application is subject to notification and consultation procedures as set out in the Act and the Regulations.
- 4.2 The Act requires the planning authority to "take into account any representations relating to that application which are received by them before the expiry of any period prescribed" by the Act and Regulations (21 days for notifications and 14 days for consultations). Furthermore, the Act states "no such application shall be determined until after the expiry of any period which may be so prescribed". (*The notification and consultation requirements vary for listed building consent applications, advertisement consent applications and applications to modify or discharge a planning obligation*).
- 4.3 It is Midlothian's practice to consider any representations received prior to the final drafting of an applications 'report of handling' which is either

the Committee report or the delegated officer's report which sets out the planning assessment of the application. This in effect means that representations received after the prescribed period are considered if the officer's assessment of the application has not been concluded. Representations received after the publication of the Committee agenda, but before the meeting of the Committee, are assessed and if appropriate the Committee are verbally updated at the meeting. The Committee (the decision maker) has the discretion to decide if they wish to consider 'late' representations received after the prescribed period. It is expected that it will wish to do so where the representation is material and could affect the planning assessment of the application. This would be consistent with the planning authority's statutory duty to take into account all considerations which are both material and relevant to the application known at the time. In exceptional circumstances, this may mean that officers recommend that an application be deferred to a future meeting pending further detailed assessment. If deadlines for the submission of late representations are strictly adhered to there is a risk that the planning authority would be failing in its duty to consider all relevant material considerations.

5 CONSIDERING NEW MATERIAL AT THE LRB

- 5.1 The Town and Country Planning (Schemes of Delegation and Local Review Procedures) (Scotland) Regulations 2013 and Scottish Government guidance in Circular 7/2009: Schemes of Delegation and Local Reviews provides the legislative and regulatory framework for the relevant administrative procedures.
- 5.2 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.
- 5.3 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 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.

6 RECOMMENDATION

- 6.1 It is recommended that the Committee:
- a) Notes the contents of the report; and
 - b) Refers the report onto the Local Review Body for noting.

Ian Johnson
Head of Communities and Economy

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Background Papers: