

THE HIGHLAND COUNCIL

PLANNING, ENVIRONMENT & DEVELOPMENT COMMITTEE

15 MAY 2013

Agenda Item	12
Report No	PED 37/13

PLANNING APPEALS

Report by Director of Planning & Development

SUMMARY

This report provides Members with a summary of appeal decisions from 1 April 2012 to 31 March 2013. In addition, it seeks Member approval of the revised Planning Appeals Protocol to be followed in cases where an appeal is lodged in respect of an application that has been refused by a Planning Applications Committee contrary to officer recommendation.

1. Introduction

- 1.1 This report is to advise the Planning, Environment and Development Committee of the decisions on planning appeals issued by the Directorate of Planning and Environmental Appeals (DPEA) and the Scottish Ministers during the period 1 April 2012 to 31 March 2013 ie financial year 2012/13.
- 1.2 The planning appeals that have been determined are listed in Appendix 1 of this report.
- 1.3 Appendix 2 to this report is the revised Planning Appeals Protocol which takes account of current practice in responding to appeals where the decision overturns officer recommendation.

2. Appeals Determined

- 2.1 The table of appeal decisions at Appendix 1 indicates both the officer recommendation and the PAC decision. Members will be aware that from August 2009, refusals of local scale applications by planning officers are the subject of the Notice of Review procedure rather than the appeals procedure. The table also makes clear the Reporter/Minister decision and decision on any expenses claim lodged.
- 2.2 It is important for Members to note that planning applications must be determined according to the statutory test contained in section 25 of the Town and Country Planning (Scotland) Act 1997, namely applications should be determined in accordance with the development plan unless material considerations indicate otherwise. If a PAC intends to overturn an officer recommendation then the minuted decision must clearly identify the reasons for the decision i.e. the determining issues. If a PAC is of the view that an application is in breach of policy then the policy should be identified and the reason for the breach indicated. Vague reasons for refusal of a planning application are not defensible on appeal.

- 2.3 If material considerations are considered to be the determining issues (perhaps because there is no policy relevant to the planning application contained in the development plan) then these too should be identified in the Committee's decision. It must be borne in mind that where the Committee does not accept the advice of a statutory consultee on a particular material consideration, there will need to be well founded reasons for overturning that advice otherwise this will not be a defensible reason on appeal.
- 2.4 It is vital that in each case defensible reasons for refusal of a planning application are minuted. Reporters are able to grant expenses against a Council when an applicant has been put to unnecessary expense due to a Council's unreasonable behaviour. The financial implications of an adverse decision on expenses is particularly severe in appeals that are subject to the public local inquiry procedure as this can result in the Council paying the appellant's fees as well as those of its own consultants. As Members will note, over the last year claims for expenses have been upheld in 3 out of the 20 appeals, with decisions on a further 2 claims awaited.

3. The Planning Appeals Protocol

- 3.1 The revised Protocol takes account of current practice and the role of the eplanning system, and is attached as Appendix 2 to this report.
- 3.2 In appeals against decisions taken by PAC that overturn officer recommendation, the Council's Legal Service, not the planning case officer, works with the PAC members who took the lead in the Committee's decision to prepare the response to the appeal.
- 3.3 Upon receiving the Council's response to the appeal lodged, the Reporter decides which appeal procedure is appropriate, namely:
- Public inquiry
 - Hearing
 - Site visit
 - Further written submissions

If the Reporter decides that the appeal should be determined following a hearing/inquiry then consultants will be appointed to defend the PAC's decision as the Royal Town Planning Institute Code of Practice precludes the original planning officer supporting a PAC decision that contradicts his/her recommendation. If it can be established that another member of the Council's Planning and Development Service agrees with the PAC decision, that officer will be approached to ascertain if he/she will represent the Council at the hearing/inquiry.

- 3.4 The Protocol recognises that the formulation of the Council's appeal submission follows a structured approach to ensure that timescales are met and the best case possible is put to the Reporter.

4. Legal Implications

- 4.1 The revised Protocol provides a framework within which statutory appeals can be

responded to timeously and on the strongest grounds possible.

5.0 Risk Implications

- 5.1 If unsound or indefensible reasons are relied upon for refusing an application, there is a risk that costs will be awarded against the Council for “unreasonable” behaviour.

6. RECOMMENDATION

It is recommended that the Committee notes the decisions on the appeals determined in 2012/13 and approves the revised Planning Appeals Protocol.

Designation: Director of Planning & Development

Date: 2 May 2013

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Background Papers:

APPENDIX 1 – PLANNING APPEAL DECISIONS 2012/13

Appellant	Site	Officer Recommendation	Committee Decision	Appeal Decision	Expenses Claim
Combined Power and Heat (Highland) Ltd	Combined Heat & Power Plant, Invergordon	Approve	Refuse	Upheld – planning permission granted (2 nd appeal)	N/A for 2 nd appeal
Spittalhill Wind Farm Ltd (s36 application)	Spittal Windfarm	No objection	Object	S36 application refused	N/A
Nanclach Ltd	Tom Nan Clach Windfarm	Refuse	Refuse	Awaited	N/A
Dunbeath WF Ltd (s36 application)	Dunbeath WF	No objection	No objection	Awaited	Awaited (claim by 3 rd party)
Eurus Energy (s36 application)	Glenkirk WF	Object	Object	Awaited	N/A
DBSE	Druim Ba Windfarm	Object	Object	Awaited	Awaited (claim by 3 rd party)
Inverness Estates Limited	Inverness Retail Park	Approve	Refuse	Dismissed – planning permission refused	N/A
RWE Npower Ltd	Allt Duine Windfarm	No objection	Object	Awaited	N/A
Galliford Try	Evelix Cottage, Lamington	Approve	Deemed refusal	Upheld – planning permission granted	Claim upheld
Craggie Wind Farm Energy Ltd	Daviot WF	Refused under delegated powers	N/A	Dismissed – planning permission refused	N/A
Bright Spark Energy Ltd	Land at Davidston Farm	Approve	Refuse	Awaited	N/A
G&M Properties	1 Castle Street Dingwall	Approve	Refuse	Awaited	N/A

Scottish Salmon Company	Sgeir Dughall, Loch Torridon	Refuse	Refuse	Applicant withdrew following THC response.	N/A
Mr & Mrs Wilson	Millbank, 1 Mill Lane, Nethy Bridge	Approve	Refuse	Upheld – planning permission granted	N/A
Mr C D MacNeil	Land 70m NE of Tigh An Lis, Tulloch Dingwall	Approve	Refuse	Dismiss – planning permission refused	Claim upheld
Mr D MacKellaig	75m South West Of Fasgadh, Morar	Refuse	Refuse	Dismiss – planning permission refused	N/A
Ness Castle Lodges Limited	Fishing Lodge, Ness Castle , Inverness		Appeal against non-determination following deferral	Upheld – planning permission granted	Claim Upheld
Mr and Mrs MacNaughton	Lochview, Alligin, Achnasheen, Iv22 2hb	Refuse	Refuse	Upheld – planning permission granted	N/A
Mr Bird	Land To South West Of Craigmore, Upper Ardelve, Ardelve, Kyle	Approve	Refusal	Upheld – planning permission granted	N/A
Inverness Estates Limited	Land West Of Inverness Retail And Business Park, Highlander Way, Inverness	Refuse	Refuse	Dismiss – planning permission refused	N/A

PLANNING APPEALS PROTOCOL – DECISIONS CONTRARY TO OFFICER RECOMMENDATION

1. Introduction

1.1 The RTPI Code prevents planning officers giving evidence in planning appeals when their recommendation has been overturned at Committee. In such cases a protocol for responding to the appeal is required.

1.2 This is a revised version of the original protocol which was noted by PED on 26 May 2010 and takes on board experience to date. The protocol identifies who does what and when. The protocol will remain under review to address issues that arise following implementation and amendments will be made as and when necessary.

2. On receipt of an appeal

2.1 Appeals can be lodged either by post or electronically via eplanning. The appellant must notify the planning authority that an appeal has been lodged with the DPEA. It is imperative that notification of the appeal is shared with Legal Services immediately it is received as the appeal clock starts ticking upon notification, not when it arrives with Legal Services. The DPEA issues (to one of the generic planning email in-boxes) a standard email indicating that the planning authority has 14 days to notify all interested parties of the appeal and 21 days to respond to the appeal.

2.2 The following procedure **MUST** be followed without delay:

- The planning officer notifies Karen Lyons/Paul Adams (KL/PA) of Legal Services of the appeal and sends KL/PA a link to the appeal documentation (as held on eplanning or paper copy if received by post), together with a link to the committee report and minute.
- KL/PA contact, by email, the Members that proposed and seconded the successful motion to overturn the officer recommendation (and the PAC chair for info). The email to include links to the committee report and minute and the appeal lodged. Members are asked to provide their comments on the appeal which will inform the completion of the Planning Authority Response Form (PARF).
- The planning officer issues standard appeal notification letter (held on Uniform) to all consultees and persons lodging comments (support/opposition) on the application that is the subject of the appeal (**Within 14 days of notification of appeal**).
- Upon receipt of member comments, KL/PA complete PARF in draft and send to members for comment/revision.
- Once finalised KL/PA send PARF to the planning officer.

- Planning officer collates any additional documents to be submitted and copies of the consultee/third party responses and sends these together with the PARF to the DPEA (either electronically or by post to 4, The Courtyard, Callendar Business Park, Callendar Road, Falkirk, FK1 1XR) and to the appellant. **(Within 21 days of notification of appeal).**

3. Next steps

3.1 Following submission of the PARF to DPEA all correspondence from DPEA/appellant shall be sent direct to the Council contact (KL/PA). If any correspondence related to the appeal arrives at the planning office this must be re-directed to KL/PA asap. The DPEA will intimate which appeal procedure the Reporter has decided upon. If this is inquiry procedure, details of any pre-inquiry meeting together with the Reporter's agenda will be sent to KL/PA.

3.2 If the Reporter has decided upon hearing session(s), the DPEA will intimate who has to lodge a written statement (usually Council and appellant) and identify when this requires to be lodged. Details (if known at this stage) of the date/venue of the hearing will also be circulated (sometimes the Council is asked to suggest venues – NB these require to be DDA compliant. Usually PAC venue within the vicinity of the appeal site will be suitable).

3.3 If the Reporter has decided to rest on the appeal submission/PARF or further written submissions this will be confirmed to parties and deadlines for lodging additional written submissions intimated.

3.4 In the case of an Inquiry it is likely that a planning consultant will be required to assist in the preparation of the Council's case. The alternative to this is that an in-house planning officer that agrees with the Members' decision is appointed to assist in the preparation of the Council's case. The Area Planning Manager of the area in which the appeal site is located should discuss this with Area Office staff to establish if there is a suitable in-house witness. If there is to be such a "volunteer", this should be intimated to KL/PA asap.

3.5 If an external consultant(s) is/are to be appointed, consideration should be given to whether the work will be under the contracts threshold. If not, the work will require to go out to tender (contact Procurement Service) and a tender assessment panel appointed. The decision as to whether external consultants will be appointed rests with the budget holder.

3.6 If the appeal is subject to inquiry procedure, consideration should also be given to the level of representation (solicitor/advocate) at the Inquiry. This will depend, at least in part, on the level of representation that the appellant has. The decision as to whether external legal representation will be appointed rests with the budget holder.

4. Conclusion

4.1 Appeals need to follow a structured approach in order that: submission deadlines are met; the Council's case is presented to its best advantage; and there is full disclosure; all in accordance with the Appeals Regulations.

M Macleod
Planning and Development Service
02.04.13

And K Lyons
Legal Services

Annex 1

Appeals Procedure

The different types of appeals procedure are as follows:

- Determine appeal based on appeal submitted and PARF (together with documents lodged in support)
- Site visit
- Written submissions
- Hearing session
- Inquiry session

The Reporter will decide on which type of procedure the appeal will follow after consideration of the appellant and Council suggestions. It is likely that an appeal procedure that is proportionate to the type of application being determined will be chosen.

As the different types of appeal procedure require different levels of commitment in terms of Member and staff time dedicated to defending the appeal, Members should be made aware of what the various types of appeals procedure will involve, as follows:

- PARF only or PARF with written submissions requires Member involvement to ensure that the Committee's decision is accurately reflected. This may involve face-to-face and telephone meetings between Members/Legal Services to ensure that the appeal submission deadline(s) is/are met.
- Hearing sessions allow the Reporter to lead a structured discussion during which the committee decision will be examined. The Reporter will ask questions of the Members (and any other representatives present). A hearing statement will need to be prepared in advance of the hearing and this will need Member involvement to ensure the accuracy of the submission.
- Inquiry session is the most formal of the options. A statement of case, inquiry documents and witnesses' precognitions all need to be circulated in advance of the Inquiry. There are strict timescales to be adhered to. Consideration will have to be given to the level of legal representation at the Inquiry (advocate or solicitor). It is usual to try and achieve an "equality of arms" depending on the level of representation that the appellant has chosen.
- Site visits can be accompanied or unaccompanied. Once the Reporter has decided on the type of site visit, KL/PA will intimate these to the Members concerned. Members are expected to attend the site visit although it should be noted that this is not an opportunity to give evidence.