

### Introduction

The petition seeks to ensure that a review of a complaint is always carried out within the Scottish Planning System. From experience this is presently not the case. There are 3 parties within the system who have the ability to carry out this review. They are the Planning Authority, the Scottish Public Services Ombudsman (SPSO) and the Local Review Body (LRB) with independent technical assistance.

The petition also seeks to ensure that this review is undertaken at the start of the planning process prior to Ward Councillor involvement by using the Complaints procedure.

### Comments on the Scottish Government letter of 31<sup>st</sup> July 2015.

- The Scottish Government states that ‘they are aware that SPSO guidance indicates that a complaint to the SPSO should be made after the planning process is completed’. The petitioner does not understand this as being the case. The SPSO involvement occurs as a progression of the Complaints procedure with the petitioner having been directed to the SPSO in the Aberdeenshire Councils final complaint response. The SPSO, in a planning guidance leaflet, identify that an incorrect planning committee report is a legitimate area for examination within this procedure.
- In the Scottish Government's concluding statement it states that if the applicant is dissatisfied with the LRB outcome there is an opportunity to apply to the SPSO to consider the issue further. From experience this is not the case. The SPSO made it clear in a letter to the applicant, sent post LRB review and dated 3<sup>rd</sup> February 2014, that they would not consider the issue further. Once an application is made for an LRB hearing it appears that the SPSO will not examine a complaint either before or after the hearing. As the SPSO are an autonomous body it is realised that nothing can be done to change this stance.
- The Scottish Government states that Ward Councillors are involved only by local criteria and do not take a decision on an application, which is correct. However they do take the decision on how the application is handled, with the LRB only being involved in the process by Ward Councillor determination. The involvement of the Ward Councillors is by a scheme of delegation, rather than by statute. This delegation occurs within a statutory framework and is the Aberdeenshire Councils established procedure. It is suggested that judicial advice be obtained to clarify that the Ward Councillor decision ‘event’ is an accepted part of the planning system.
- Following discussions at the preliminary hearing on the use of the ROH by Ward councillors, Jill Webster, Ward Councillor and Aberdeenshire Provost at the time of her response was contacted. Councillor Webster stated in an e-mail that a copy of the ROH is provided for consideration and she cannot recall an instance in recent years where this has not been the case. This reinforces the petitioner's point that an accurate ROH must be provided at this first stage in the planning process as a basis for Ward Councillor decision.
- A significant omission in the Scottish Government letter is an explanation of why both the Planning Authority and the Local Review Body failed to examine and respond to the ‘example complaint’ in the petition. It may be that the Petitions Committee can obtain further advice from the Scottish Government in this area. This complaint was sent formally

to the Planning Authority twice during the internal stages of the Complaint Procedure. A copy of this correspondence was attached in the application for Local Body Review. Additionally a document identifying all outstanding issues was sent to the Local Review Body after responses had been received from the Planning Authority and SPSO.

In summary, of the 3 parties with the ability to carry out a review of the 'example complaint', the SPSO ruled themselves out, and both the Planning Authority and Local Review Body did not address the issue. This situation should not be acceptable to the Scottish Government.

#### Comments on the Planning Democracy response.

- Their understanding of the system does differ from that encountered by the petitioner in some areas. For example an applicant is not given an opportunity to address the LRB which they state as being possible. A request for this was refused. The appeal to the SPSO was also unsuccessful. There is however an opportunity to apply for a judicial review. The applicant was of the opinion that the errors in the ROH were so numerous and obvious that acknowledgement could be achieved without a process that would have been costly to initiate.
- Planning Democracy suggest that a full case history is provided before making a decision to demonstrate if the issues discussed are illustrative of a wider problem. The problem is well defined in the 'Introduction' to these comments and there is a danger that widening the problem may detract from the focus of providing a procedural solution. A complete list of complaints that were not addressed is provided in the document given to the LRB, which in the event they did not examine. Some items from this document will be described in an appendix to these comments to show the 'example complaint' was part of a group of complaints that may have affected a planning decision. Only if these complaints are examined, and then found to have substance, would the Planning Democracy concerns that there are wider problems be relevant.
- Planning Democracy make the point that there is considerable scope for mistrust where appeals are heard by a separate part of the same local authority that made the original decision. In the case of the LRB this comment is particularly appropriate. A planning engineer functionally responsible to the Authority advises the LRB. The format of a LRB meeting is such that he summarises the application to Councillor members who may deal with several appeals in the meeting. He can choose, as occurred in the hearing of the example planning application, not to raise applicant concerns on the integrity of the ROH. Without being made aware of the detail of these problems the LRB are unlikely to employ independent technical assistance to examine them.

#### Comments on the PAS (Planning Aid for Scotland) response.

- The PAS response is particularly helpful in addressing concerns raised by the Chairman, John Pentland, at the preliminary hearing, that a balanced decision on actions needs to be reached in order to keep the planning system running to clear time-scales. It was pleasing to note the PAS recognition that both the Complaint and Local Review procedures provide essential safeguards within the planning system. This is contrary to the Scottish Government response, which states 'the complaints process is separate and distinct from the planning process'

- The suggestion that the ROH be published online in advance of a letter of refusal being sent out may be useful. This would achieve a similar outcome to the Design Review Meeting in giving applicant the opportunity to input corrections prior to the decision issue of the ROH. Presently a Planning Authority may not respond to the complaints because they are reluctant to make wholesale ROH content changes, particularly where they affect refusal justifications. There would then be a need to backtrack through the system by re-involving Ward Councillors, with the Authority inevitably losing some credibility. At a pre-decision stage ROH alterations could be made without this consideration.
- The possible action suggested, of the Notice of Review period being suspended on receipt of a formal complaint, is an alternative that is worthy of consideration. The petitioner is of the opinion that the frequency of an inaccurate ROH being produced is low, and even more rarely would a Planning Authority not immediately respond to complaints on the content. However the petitioner is not sufficiently experienced to assess if this would encourage delaying tactics on controversial applications. The full Complaint cycle took six months, including four months of SPSO considerations. If this time could be reduced so would be the scope for delaying tactics.
- It would be interesting to obtain the PAS views on the SPSO stance. If judicial advice is received that Ward Councillors are part of the process, and an accurate ROH should be made available to them, then the SPSO must be involved in ensuring this occurs. Acceptance of this responsibility would resolve the problem without legislation or consideration of the options noted above.

#### Comments on Heads of Planning ( Scotland) response

It is noted that Heads of Planning (Scotland) have not provided a response to the Petitions Committee in the 3 months period available since the request for their input was sent. As key participants in the planning process their feedback would be valuable and I trust after reading the other contributions together with my comments they are able to respond.

#### Appendix

Some additional examples are provided of the complaints raised. These are to indicate that the 'example complaint' was one of several that were not addressed in a systematic, rather than an isolated, failure of the planning process.

- The Planning Authority misread the drawings provided, wrongly stating in the ROH that the new dwelling was situated on an existing buildings integral garage foundation. Although this error was acknowledged other associated dimensional errors were not.
- The 'example complaint' on overshadowing was highlighted in the ROH despite calculations using Building Research Establishment formulae showing overshadowing obstructions were not present. This was stated as a reason for refusal.
- Concerns on window overlooking were also stated as a reason for refusal. A check on this using Local Authority guidance charts showed actual window distances at 4 times the minimum acceptable separation.
- Comparative density ratios with adjacent estate houses were misinterpreted by a factor of two because of incorrect floor occupation assumptions by the Authority.

- The Authority expressed concerns on the lack of sustainable building analysis by the applicant. They however overlooked correspondence informing them that an independent study had been carried out which was available for examination.
- The Authority expressed concern in the ROH on the completeness of the information provided in the submitted drawings. However at a pre-submission meeting the drawings were gone through one by one with a Senior Planning Officer. One minor change was requested and actioned.
- Information was listed as missing in the ROH, which must have appeared as a reason for an automatic application veto to Councillors. This could only be provided as part of the building warrant detailed design when proprietary information was obtained from the selected manufacturer, as per normal architectural practice.

Altogether 18 issues were raised in the submission to the LRB, which can be made available to any interested party.

The key point, raised by the petition, is not the relative merit or otherwise of the complaints noted, but the fact that the Planning System did not facilitate an examination and response on the issue content.

John Buston

20<sup>th</sup> August 2015