PE1518/G

Petitioner Letter of 18 September 2014

PUBLIC PETITION PE 1518

Dear Committee Members

Let me first if I may clarify my "sod the system" response to the question raised at committee on 17th June by John Wilson MSP on split applications. At the time I could not remember the exact wording used by the developer's agent. The file note hand written minutes of the meeting between Aberdeenshire Council and the developer's agent contained the following statement of what was actually said when told that a pre-application consultation was required as the site was in excess of 2 ha: - *Alan Forbes said they would amend red line anyway to reduce to less than 2 hectares and submit rest of site under another application. They will discuss with the community [although not strictly required] and provide details to us of what community think.* As stated bellow no such consultation was ever carried out.

Additional information received from Moray Council

Fedden farm application – 10/01732/APP.

As mentioned in my petition submission all details of this application had been removed from the Moray Council web site. Only the number remained.

Following a FOI request it transpired that this application 10/01732/APP covered an area of **43,472 square metres or 4.3472 hectares in total.**

On the 26th of January 2011 an e-mail was sent from the applicant's agent to Moray Council stating -
"Further to discussions with our client Mr Innes, and following meetings between the planning authority and our client, we would request that you withdraw planning application no. 10/01732/APP, for development at Feddan Farm."

Moray Council have confirmed that no minutes or file notes exist for these meetings. So what was said at these meetings one can only guess?

On the previous day on the 25th eight consecutive applications had been submitted with a further two applications on the 26th to cover the same development as the single application. 10/01732/APP.

This would confirm that this "regulation" can be classed as no more than a voluntary code of practice.

As a point of interest none of the application forms are available to view on line for these ten applications nor if the development was ever completed or withdrawn.

The following are my comments on the Chair of HOPS response to the above petition.

I was very careful not to use the word "collude" during my presentations be it in written submissions or verbally before the committee.

Although it is now some time since I studied Latin I assume from their reply that it is not within HOPS scope of work or indeed their place to make any comment, have an opinion on the points raised within my petition or whether or not they think a planning regulation which can be so easily ignored and avoided when it suites the developer is fit for purpose?
Am I correct in my assumption or is this a position they have adopted only in relation to my petition? I have no knowledge of this organisation and from their web site it is unclear which option is correct.

HOPS appear comfortable with a situation in planning regulations where developers can with ease ignore or avoid developments being classed as major all to the detriment of meaningful public consultation and input.

From page 2 Para 1of their reply

It is incorrect of the petitioner to interpret that in an instance where an application is not treated as a major development, "no public or community council consultation was ever subsequently carried out".

It is in fact incorrect of the HOPS to interpret this in any way a generic statement of my understanding of planning consultation or in this case lack of. By its wording alone and its position in the report it is clearly specific to statements made by the developer **promising** public and community council consultation contained within the design statement being referred to in the text. No **such consultation was ever carried out.**

Having mentioned Section 26A[2] of the Town & Country Planning [Hierarchy of Development] [Scotland] Regulations 2009 to justify the status quo it was interesting that they declined to respond to my query also covered within Section 26[A].
26A (3) *But the Scottish Ministers may, as respects a particular local development, direct that the development is to be dealt with as if (instead of being a local development) it were a major development.* **When, how and by who is this power invoked?**

<u>The following are my comments on the response from the RTPI</u>

The RTPI response to the Scottish Government Planning Directorate of the 20th March 2008 to the Draft Regulations on The Planning Hierarchy Consultation raised several issues including that of threshold avoidance by developers.

*"It will be important to have a clear and **robust** definition of the new categories; further justification and information on how these have been derived would be useful;"*

*"how to discourage phasing of developments to **avoid** thresholds;"*

As did many other respondents to the consultation the RTPI foresaw the ease by which developers would avoid the regulations if they were not robust. And robust they certainly are not.

It is irrelevant to the aim of my petition how often this practice is used but I doubt very much that this is a "rare occurrence across Scotland".

Systematic evaluation rather than anecdotal evidence is required before a true figure on how prevalent the practice is. As an example from Aberdeenshire Council:-

"The planning Authority does not hold details of the number of planning applications lodged which may fall within this category and, I am not in a position to provide you with any tangible evidence to show the number of instances when an applicant has submitted a planning application[s] to avoid exceeding the major development threshold."

With Aberdeenshire Council being unable to quantify the extent to which this Hierarchy of Developments Regulation avoidance is being used within their area of authority I would suggest that an independent audit is carried out on their behalf to determine the true figure.

The RTPI paints a rosy picture of our planning system in their response but unfortunately in my opinion it does not transfer readily from their written word into practice. The following is just another example of our planning in operation which only adds to the general public's mistrust of the system. One more case of developers in Aberdeenshire avoiding the Hierarchy of Developments Regulations by the simple manipulation of paperwork.

Westhill, although in Aberdeenshire was once pleasant, a nice desirable place to live and said to be the garden suburb of Aberdeen. Unfortunately it was decided to zone a large area of land for industrial use on its front doorstep.

On part of this industrial zone this development by Knights Property Holdings / Ryden as agents is on a site at Kingshill Park Westhill Aberdeenshire. Application APP/2013/0677 covering **1.98 hectares** for six in total 2 storey office blocks as phase 1 of a two phase project was submitted in March 2013.

Aberdeenshire Council planners were aware that this was part of a larger development. Given that East Fiddie Farmhouse was more than 20 metres from the boundary the owners did not qualify to be notified as neighbours of phase 1. There was no Community Council consultation or local Councillor involvement as conveniently it was only **1.98 hectares** in area and not deemed to be a Major Development. The application was granted via delegated powers under the Council's Scheme of Delegation on 13th May 2013. **Democracy totally bypassed.**

The developer then carried out major **unauthorised** earth moving works which eventually stopped in July 2013 by which time the owners of East Fiddie Farmhouse were left with 3 metre high earth platforms surrounding their entire west and north boundaries totalling 100 metres in length. Aberdeenshire Council decided not to carry out enforcement action but instead agreed the easy option with the developer that plans should be submitted to cover this works.

What message does this send to developers and the general public, no enforcement notice, no deterrent what so ever no retributions?

Application 2013/3560 for 5 two and three storey office blocks covering phase 2 on **1.35hectares** of Kingshill Park was submitted in November 2013. But this time the cat was

out of the bag and the owners of East Fiddie Farmhouse had the support of the Community Council and many local residents objected, which meant this second application had to go before the Garioch Area Committee.

At the Garioch Area Committee on the 24th June, Garioch Area Planning officers with no great surprise recommended acceptance of this second application but the local Councillors unanimously disagreed with the proposals. The developer appealed this decision.

I would ask that Mr McLean takes the time to study PPA-110-2222 & PPA-110-2224
Eleven 2 and 3 storey office blocks on a 3.33 hectare site classed as two local developments? Is this not a perfect example where the Scottish Ministers should have used the general power under section 26A(3) of the Act to direct that a particular local development should be dealt with as if it were a major development?

The following are my comments on the response from PAS

A positive response from PAS with constructive suggestions as solutions to resolve this self inflicted problem.

From their response:

"The problem with the situation as described in the petition is that if developers are seen to be easily able to avoid PAC, this sends out a discordant and confusing message and is likely to undermine confidence amongst key stakeholders, in particular Community Councils"
I fully agree with this statement. It just adds to the general public's mistrust of the planning system.

APP/2013/0677, APP/2013/2276, APP/2013/3019 & APP/2013/3560 viewed together are perfect examples.

The two applications APP/2011/1926 and APP/2011/1927 for an "18 home development" at Whiteford Inverurie, combined total area of 2.655 hectares went through the entire planning process being treated as one development. If it had not been for the fact that this scheme was contrary to the Local Development Plan it would have been approved by way of delegated powers.

The Reporter appointed by the **Scottish Ministers** commented in the Appeal Decision Notice reference PPA-110-2139 that "The layouts make clear that the project before me and the 3-dwellings project can in many ways be regarded as part of a single scheme"

Is this situation described by the Minister for Local Government and Planning in a letter of December 2011 as "not ideal" good enough for this regulation "at the heart of a modernised planning system"? The public deserves much better.

From their response:

"It would be useful initially for the Scottish Government to undertake further research into how widespread the practice is across Scotland of applicants deliberately avoiding PAC. This could help inform what – if any – level of action needs to be taken."

I agree that an audit by an external body would give an independent assessment as to the extent of the problem. That said as mentioned in my petition it is irrelevant how often this practice is being used. The fact that this practice can be used at will when it suits the developers renders the regulation not fit for purpose and has an adverse effect on any community effected by removing their right to meaningful consultation.

From: - Scottish Planning Series Circular 5 2009: Hierarchy of Developments.
17. Scottish Ministers have a general power under section 26A (3) of the Act to direct that a particular local development should be dealt with as if it were a major development. In the particular cases where this power is used Scottish Ministers would issue in writing a direction to the relevant planning authority.

When, how and by who is this power invoked?

PAS did not comment on this issue in their reply. Perhaps they could be asked for their understanding of its intent and use?

The following are my comments on the response from the Local Government and Communities Directorate.

I was disappointed but not actually particularly surprised at their response.
Having emphasised at the outset that the Scottish Government did not support the dividing up of proposals to avoid requirements applying to "major development", such as preapplication consultation (PAC) they followed up with their excuses as to why they will not enforce their own regulations.

This only confirms that this regulation "at the heart of the modernised planning system" can be classed as no more than a voluntary code of practice and is treated as such by developers and planners alike.

From their response:

"We are not aware that there are significant numbers of applicants who find this practice desirable, whether in terms of cost, uncertainty of outcome on multiple applications or indeed missing the opportunity to get positive public consensus around a project. We do note, however, the information provided by the petitioner in this regard (for interest there were 309 applications for major development in 2013/14)."

Applicants will use this practice when and where it suites their agenda as shown in the examples highlighted in my petition. I suspect that this practice is more prevalent than the Directorate would care to admit.

Perhaps the Directorate could expand on how many applicants they **are** aware of rather than what they are not aware of?

The cost to the developer is in fact significantly reduced, the outcome guaranteed under the dubious Schemes of Delegation and positive public consensus is not a consideration or requirement when it comes to planning.

It would be of more interest and value to ascertain how many applications were indeed raised specifically to avoid developments being classed as major.

From their response:

"As mentioned in the Committee's discussion, there is a power for Scottish Ministers to direct that a particular local development should be treated as if it were a major development. Ministers have not used this power and it is not the intention to use it routinely. I should point out that where such a direction were made after an application for local development was submitted, this would not require the applicant to withdraw the application and do PAC."

From the Scottish Planning Series Circular 5 2009: Hierarchy of Developments

17. Scottish Ministers have a general power under section 26A (3) of the Act to direct that a particular local development should be dealt with as if it were a major development. In the particular cases where this power is used Scottish Ministers would issue in writing a direction to the relevant planning authority. It would identify the development, stating that it should be dealt with as if it were a major development and citing the power which Ministers are using to make the direction. It is not intended that this power would be used to require pre-application consultation of a proposal which was already before the planning authority.

From: - EXECUTIVE NOTE - THE TOWN AND COUNTRY PLANNING (HIERARCHY OF DEVELOPMENT) (SCOTLAND) REGULATION S 2009 (SSI/2008/DRAFT)

Background

2.7 The White Paper Modernising the Planning System2 was published in June 2005. It trailed proposals for reforming the planning system including the introduction of a planning hierarchy for handling different types of development. The White Paper set the context for the 2006 Act which received Royal Assent in December 2006, representing the most significant change to the Scottish planning system in over 60 years. The Act sets out the three categories in the hierarchy of development - national, major and local - and gives Scottish Ministers powers to describe classes of major and local development in regulations. In addition, Ministers have the power within the 2006 Act to direct that a particular local development be dealt with as if it were a major development.

The question I raised and most pertinent to my petition "When, how and by whom is this power invoked?" has gone unanswered in their reply.

Should not this power be used to enforce The Town and Country [Hierarchy of Developments] [Scotland] Regulations 2009 as envisaged by SEPA as part of "checks and balances" in their response to the Scottish Government Planning Directorate of the 17th March 2008 to the Draft Regulations on The Planning Hierarchy Consultation?
During the consultation process there were many similar such warnings received and acknowledged by the Directorate as highlighted below in this Government Publication

From: - Government Publication - Planning Hierarchy: Consultation Paper: Analysis of Consultation Responses Part 3

Main Findings - Further Comments

Various other comments were received in relation to the hierarchy including:

- Technical points around the area which would be measured against the major thresholds i.e. if it would be the redline application site submitted by the applicant.
- Planning authorities expressed some concerns about whether there would be a means to prevent applicants from deliberately splitting sites or phasing development to avoid being classed as major, and having to go through the associated enhanced scrutiny procedures, and how extensions would be dealt with.
- Seeking clarification around Scottish Ministers' powers to direct that a local development be dealt with as if it were major.
- Clarification was sought on the types of applications covered by the hierarchy.
- Relating to procedural matters and the differences in how major and local developments would be processed and their appeal arrangements.

Having been made aware by various bodies of the ease by which developers would avoid the major development criteria was it a deliberate decision to leave this route open to allow such avoidance? If not why were these warnings ignored? Or was it just a case of poorly drafted legislation lacking in substance?

As an addendum I have attached several examples of these comments.

The written submission from Alison McInnes MSP contains an individual submission from Mrs Morag Beaton.

I would urge the Committee to browse through planning appeals reference PPA-110-2222 and PPA-110-2224 and to **read** the full unabridged detailed representation document name Beaton, J Fraser and Morag dated 22nd August on page 8 of 11 within PPA-110-2224.

I would doubt that if after reading this representation and the misery heaped on this family by the developers aided and abetted by the "planning system" anyone could deem this regulation at the "heart of the modernized planning system" fit for purpose?

In conclusion neither of the written submissions explained the "Ministers power to direct that a particular local development should be dealt with as if it were a major development." Is it up to the Government to decide which part of regulations they adhere to and which parts they can chose to ignore as suggested by the Directorate? Is this not up to the people?

Nor was an explanation forthcoming as to why one day a development can be classed as "major" then by the simple manipulation of paperwork the very next day it is deemed not to fit that criterion?

For whatever motive planning must be the only business where one plus one does not equal two and the examples highlighted within this petition clearly shows that the planning system is not working for the people.

Addendum – a selection of Responses to Planning Hierarchy Consultation

Aberdeen City Council

Whatever thresholds are ultimately set, the wording should be such as to prevent circumvention of the requirements of the regulations by ***artificially splitting sites*** *into more than one application. The lower the threshold for major developments, the more often that community engagement will be required by the applicant. Taken with the separate consultation on the draft DMPR and Modernising Planning Appeals, lower thresholds would make more demands upon Council officers. These demands would be by way of additional administrative and technical processes, attendance at the developers' public meetings, the servicing of public committee hearings, and a greater number of items for consideration at full Council. On the other hand, master planning guidance to be published shortly and enhanced engagement in development planning processes included in the 2006 Act should make these processes more straightforward in relevant cases.*

Angus Burnie

The Regulations and the Consultation Paper are ***'silent'*** *on the issue and impact of cumulative development. For example developers apply on a piecemeal rather than comprehensive basis for a site and as a result,* ***their smaller-sized proposals avoid being classed as 'major'*** *nor subject to pre-application consultation/discussion and processing agreement procedures, etc. This issue was raised, for example at a modernising the planning system seminar/road show in Inverness last year: one speaker acknowledged that this would be addressed but there is no mention of this in the Consultation. Why?*

Culter Community Council

Question 2
We agree with the proposed development thresholds. We are concerned however that some ***major development sites****, e.g. land for housing or business/industry could be broken down and* ***developed in 'Local Development size parcels'*** *– over a number of years and/or with different developers – yet still with the cumulative effect of a Major development but without the Major Development requirements or responsibilities. Will this be addressed in some future consultation?*

Dumfries and Galloway Council

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1.3 Where it is considered that a particular local development requires additional scrutiny this can be provided. Scottish Ministers have the power to direct that that a particular local development should be dealt with as if it were a major development.

Thirdly, there should be some provision to prevent developers from deliberately avoiding the requirements for Major Development ***by splitting their proposals into two or more*** *separate applications, each one individually falling below the threshold. There needs to be a power for planning authorities to count the aggregate of such applications towards the threshold. e.g. if the same, or an associated, developer or landowner submits an application in respect of land adjacent to a site which has been the subject of an application for planning permission for the same class of development within, say, the last 12 months, then the aggregate floor area/site area/number of units should be added together when calculating whether the*

threshold has been reached. ***Unless this issue is addressed, the effectiveness of this reform will be undermined.***

Farningham McCreadie

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While recognising that the Regulations necessarily need to establish thresholds, ***there is little clarity*** *as to how a Local Development could be 'up-graded' to Major Development status. If this decision is to be made solely by the Scottish Minsters, how will they be advised of specific proposals? Will it be possible for an applicant/agent, statutory consultee or third party to request that a Local Development be treated as a Major Development? How quickly must Ministers make their determination? Is their decision final?*

Q3 Do you agree with the proposed approach of avoiding regional variation?

In rural areas, development that is considered to be small-scale elsewhere may be deemed to be significant on the basis of its impact on the local community or environment. In such instances, it is assumed that a request could be made to the Scottish Ministers to 'up-grade' the application to Major Development Status. The question remains – ***who could make that request?***

Fife Council

Presumably if this was a threshold which was introduced developers would submit proposals ***below this threshold to avoid the classification of a major development***
e.g. applications for 99 houses or applications submitted in separate phases of say 50 houses each. In many circumstances it is not the actual number of houses which is the major impact but the details of the site which has been selected and its location and context in relation to surrounding land uses and its overall impact on the local community and community infrastructure.

North Ayrshire Council

Where it is considered that a particular local development requires additional scrutiny, ***Scottish Ministers would have the power*** *to direct that a particular local development should be dealt with as if it were a major development. Planning authorities would also be able to set more detailed arrangements in their own schemes of delegation, as to the level of developments in their area which they propose to be delegated to officers or considered by elected members.*

North Lanarkshire

(2) Housing
The council has reservations about the proposed threshold of 100 houses. This is addressed further in the council's response to the consultation on Modernising Planning Appeals. Notwithstanding, there is concern that housing developments of the size of 100 houses would require to be dealt with in 2 months. Also that whatever the thresholds developers ***may divide up larger developments*** *into phases to fit the category which best suits their purpose.*

Scottish Badgers

We have read the consultation document and whilst in the main part it appears fit for purpose we were troubled that there appears to be no scope within the thresholds for contiguous development where the single project might fall below the threshold but where in conjunction with other developments the area might be above the threshold. For example a site area may be 1.5 hectares where the applicant wants to build houses and thus falls below the Major Development threshold. However the neighbouring land, say 1.3 hectares, may also be the subject of development plans and also be below the limit but combined the two sites would exceed the proposed threshold. The two sites standing alone would not fall into the Major development band. There is already evidence from recent planning applications in Edinburgh for trams, trains, roads and building to take place at Edinburgh airport where it was shown that each development was being dealt with in its own light and there was initially little interaction between the developers. This meant that mitigation proposed for one scheme was negated by the second or third scheme. The same might also be said for the proposed development of the A96 corridor east of Inverness. Although we have illustrated our point by using housing as an example the same could happen for some of the other categories of development falling within the Major development band.

Scottish Environment Protection Agency

We suspect that there may be novel attempts to ***'play'*** *the system. For example, a speculative housing proposal below the unit threshold for a major development could identify a 2ha site to qualify as a major development, thus guaranteeing appeal to the Directorate of Planning and Environmental Appeals rather than a local review body. At the other end of the scale, a developer might limit the number of residential units to below the 'major' threshold to avoid the need for enhanced scrutiny and statutory pre-application consultation with the local community.* ***In relation to the latter, we are not entirely convinced that the hierarchy has sufficient regard to the potential for cumulative development.***

Nonetheless, as paragraph 3.6 of the RIA points out, Ministers do indeed have the power to direct that a particular local development be dealt with as if it were a major development and hence appropriate checks and balances will exist. We also note that there is scope for local authorities to reflect their local circumstances as to the level of cases which they wish to go to committee rather than delegate to officers in their scheme of delegation, and this should also ensure appropriate scrutiny.

Scottish Natural Heritage

Question 2: Do you agree with the proposed major development thresholds described in the Schedule?
Were all developments subject to EIA to be classed as major developments, this schedule would act as a "net" for significant projects not subject to EIA. Accepting that the threshold for housing developments for example will be high for many rural authorities, we have no comments on those specified. It would have been useful if the accompanying text had explained for all the proposed categories the basis on which the proposed thresholds or criteria had been chosen. It is recommended that monitoring should take place to allow an informed judgement to be made in a few years' time as to whether too few or too many developments are being categorised as major, allowing adjustment of the thresholds if necessary. ***This monitoring could also establish whether applications are consciously being***

pitched at levels just below the threshold to permit them to be handled as local rather than major developments.

Scottish Renewables

2. Classifying Developments and Processing Agreements

We agree that major applications should receive greater priority by planning authorities and consultees. However, clarification is needed on how planning authorities will make and publish their decisions on classification of developments coming before them, and we would hope that there will be target timescales for reaching their decision. The renewables industry would like to understand whether this will be part of the screening / scoping process because it will impact on how the application is approached and the level of detail provided. In addition, Scottish Ministers can direct that certain local developments be reclassified as major developments. ***It is not clear, however, on what grounds. Clarification would be welcomed.***
Clarification is also requested as to whether planning authorities will be empowered to make similar reclassification decisions.

South Lanarkshire Council

General comment

Setting thresholds for the different classes of development is always going to be, to a degree, an arbitrary process. Cases will always occur whereby some proposals in the 'Local development' category will in fact be more complex and resource consuming than some proposals within the major category. ***The inability of the hierarchy to take cognisance of the sensitivity of a site, or its urban or rural nature, will inevitably result in examples of this.***

The consultation document is quite clear in specifying that ***Scottish Ministers*** *will have the power to direct that a particular local development should be dealt with as if it were a major development. It also states that local authorities will be able to set more detailed arrangements in their own schemes of delegation, as to the level of developments in their area which they propose to be delegated to officers or considered by elected members. However, it is not clear as to whether local authorities will be able to similarly direct that a local development be dealt with as if it were a major development, subject to proper justification. While it is accepted that such a procedure could lead to inconsistencies between authorities, it would overcome problems caused by more complex* ***local developments not being dealt with as per major developments.***

Yours sincerely

George Chalmers