



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

LOCAL GOVERNMENT AND REGENERATION COMMITTEE

Wednesday 23 November 2011

Session 4

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LOCAL GOVERNMENT AND REGENERATION COMMITTEE
12th Meeting 2011, Session 4

CONVENER

*Joe FitzPatrick (Dundee City West) (SNP)

DEPUTY CONVENER

*Kevin Stewart (Aberdeen Central) (SNP)

COMMITTEE MEMBERS

*Kezia Dugdale (Lothian) (Lab)

*Mark Griffin (Central Scotland) (Lab)

*Margaret Mitchell (Central Scotland) (Con)

David Torrance (Kirkcaldy) (SNP)

*Bill Walker (Dunfermline) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Margaret Burgess (Cunninghame South) (SNP) (Committee Substitute)

Iain Cane (Communities Against Airfield Open Cast)

Douglas McKenzie (Communities Against Airfield Open Cast)

CLERK TO THE COMMITTEE

Eugene Windsor

LOCATION

Committee Room 5

Scottish Parliament

Local Government and Regeneration Committee

Wednesday 23 November 2011

[The Convener opened the meeting at 10:00]

Interests

The Convener (Joe FitzPatrick): Good morning. I welcome everyone to the 12th meeting in 2011 of the Local Government and Regeneration Committee. As usual, I ask everyone to ensure that they have switched off their mobile phones and so on. Margaret Mitchell is joining the committee today, replacing Ruth Davidson. We wish Ruth well in her new role and I am delighted to welcome Margaret to the committee. David Torrance has submitted his apologies and has been substituted by Margaret Burgess, whom I welcome to the committee.

Under agenda item 1, I invite Margaret Mitchell to make her declaration of interests.

Margaret Mitchell (Central Scotland) (Con): I have two relevant interests. I am a shareholder and director of Fairfield Properties Ltd and I am a lifelong member of the Educational Institute of Scotland.

The Convener: Are there any other declarations of interests?

Mark Griffin (Central Scotland) (Lab): I declare an interest as a member of North Lanarkshire Council.

Bill Walker (Dunfermline) (SNP): I declare an interest as a member of Fife Council.

Kevin Stewart (Aberdeen Central) (SNP): I declare an interest as a member of Aberdeen City Council.

Petition

Planning Circular 3/2009 (PE1320)

10:01

The Convener: Agenda item 2 is petition PE1320. Members will recall that the petition was originally lodged during session 3 and was carried over to session 4 by the Public Petitions Committee, which referred it to the Local Government and Regeneration Committee at the beginning of the session.

On 14 September, we took evidence on the petition from the Scottish Government's chief planner, the Convention of Scottish Local Authorities and the Royal Town Planning Institute in Scotland. Today, we are pleased to take evidence from the petitioners. I welcome Douglas McKenzie, chair of Communities Against Airfield Open Cast, and Iain Cane, a member of Communities Against Airfield Open Cast. Thank you for giving up your time to come along. Mr McKenzie, do you want to give us an opening statement on some of your thoughts?

Douglas McKenzie (Communities Against Airfield Open Cast): Yes. I thank the committee for inviting us to come here to explain our petition and answer questions. I know that the Scottish Parliament is committed to openness and the involvement of citizens in its operation. That has certainly been demonstrated throughout the progress of the petition.

I will give the committee a brief outline of the provenance of the petition. Most of you will be familiar with it already. It emerged from a Communities Against Airfield Open Cast campaign against an application by Scottish Coal to mine for six and a half years on Airfield farm, which is an area of great landscape value near the village of Cousland, in Midlothian. The application that was submitted by Scottish Coal was for a site situated in Midlothian, and the decision on it would be made by Midlothian Council; however, the major impacts were going to be experienced by East Lothian communities, particularly those of Ormiston and the surrounding area. East Lothian Council objected to the application, but its objection had none of the status that is accorded to Government agencies such as Scottish Natural Heritage and the Scottish Environment Protection Agency under planning circular 3/2009—I am sorry, but I will have to keep repeating that, although it is a bit of a mouthful. Under that circular, because East Lothian Council did not have the same status as Government agencies, its objection could not trigger a notification to the minister with the potential for call-in.

Over the past 18 months, our petition has progressed from councillors to MSPs, the Public Petitions Committee and, finally, this committee, which is discussing the matter for the second or even third time. Our basic contention is that circular 3/2009 should be amended so that local authority objections to major development applications that are a significant departure from the development plan and which have cross-border implications should be given the same status as the advice of national agencies such as SNH and SEPA.

We believe that that would address two major flaws in the current planning system, which has the otherwise laudable objective of localism. First, it would to some degree fill the procedural vacuum that is created by significant applications with regional implications that extend beyond the boundaries of the decision-making authority. Secondly—it could be argued that this is even more fundamental—it would address what we describe as a serious democratic deficit.

I think that everyone agrees that the basic principle of a representative democracy is that elected politicians are judged on their decisions at the ballot box. However, voters in a local authority area who are the recipients of the main impacts of a development that another local authority has decided on have no such recourse. To put it crudely, if the application had gone through, voters in East Lothian would not have had an opportunity to take revenge on the councillors who voted in favour of the application.

That, folks, is the bare bones of our case. Iain Cane and I are happy to answer any questions to the best of our ability.

The Convener: Thank you.

Bill Walker: Good morning, and welcome to the committee. Adjacent local authorities are often in competition in the sense of being for or against certain projects, especially in the economic development area. It has been put to me that what you propose could be a recipe for increased antagonism—let us put it that way—or even for people to be a bit nosy about somebody else's business, albeit that it is next door. What do you say to that argument? Mechanisms exist for referrals to ministers and so on, so why would you want to increase the possibility of a bit of aggro between adjacent local authorities?

Douglas McKenzie: During this process, we have been involved with councillors from Midlothian and East Lothian. It has been pointed out to us—I think that Jim Mackinnon made this point at the previous committee meeting—that our suggested practice would take place within a framework in Scotland in which relations between councils are generally pretty good. The head of

planning in Midlothian said to us that it had a good relationship with East Lothian. We do not think that what we propose would result in a huge number of cases that would gum up the system and lead to conflict between different councils. We feel that the current system works a lot of the time, but that where it does not work the default situation should be our suggested amendment to the planning circular.

Iain Cane (Communities Against Airfield Open Cast): Responses from local authorities that the Public Petitions Committee consulted indicated that the circumstances that we have described arise in very few situations. Most local authorities indicated that they had not encountered any such cross-border grievance. We are therefore talking about very narrow circumstances. To that extent, we do not believe that what we propose would hinder the streamlining of the planning decision process that planning circular 3/2009 sought to achieve.

Bill Walker: Thank you, gentlemen.

Kevin Stewart: I welcome the witnesses to the committee. I had the pleasure of being on the Public Petitions Committee as a substitute member when the petition was referred to this committee. I have some sympathy with the evidence that the witnesses have presented, but I will play devil's advocate, just like my colleague Bill Walker.

Currently, there seems to be more than one difficulty between councils in the Lothians area, including a retail development in Midlothian to which Edinburgh and East Lothian have objected. I believe that that is now in front of the Edinburgh and the Lothians structure plan joint liaison committee. Rather than such cases being dealt with in the way that you suggest, do you not think that liaison committees should have a greater role in trying to iron out differences? At the end of the day, the structure plans should ensure that local authorities go hand in hand. Perhaps that is the way to deal with this, rather than what you suggest. Will you comment on that?

Iain Cane: That is an interesting point, which we have considered in some detail. We discovered that the joint liaison groups, with regard to the strategic development plans, have no formal teeth in that they cannot call an application in front of them; nor indeed, having considered the application, can they enforce any notification, call-in or other process. That is rather odd. That is the case with the current structure plan joint liaison group and it will, I believe, also be the case with the SESplan liaison group. There is a slight anomaly there.

You asked whether there could be a role for the liaison groups, perhaps as an intermediary on the

way to Scottish ministers. There could be such a role whereby, in the circumstances that we have described, if a local authority approved the application, it should, let us say, for argument's sake, automatically go to a joint liaison group for consideration. If the joint liaison group subsequently decided that the application should have been declined, that could trigger an automatic notification of ministers. However, not all areas have strategic development plans. Highland Council, Stirling Council and Fife Council have local development plans; they have no strategic development plans, therefore there is, I believe, no joint liaison group. I am not an expert, but I believe that that is the case. As a result, the scenario that we have identified as a solution may fall down in that regard.

Kevin Stewart: How is the area designated at the moment in the structure plan, or the draft structure plan—I do not know which it is in your area—and in the Midlothian local development plan?

Iain Cane: We do not know. I do not think that the local development plan consultation process has commenced yet. Are you talking about the existing local plan?

Kevin Stewart: Yes.

Iain Cane: Our petition arose out of the particular planning case in point, but we are not really here to discuss the specifics of the case. However, the land is designated as agricultural land, so at the time the application was contrary to the development plan.

Margaret Mitchell: Good morning, gentlemen. It is a very interesting petition and a very interesting point.

Bill Walker described a scenario in which there might be mischief making between local authorities. May I suggest to you a scenario in which there might be collusion between local authorities, perhaps of the same political persuasion? This is all about meaningful consultation and making people feel that they have had their say and had their views taken into account. In order to narrow the democratic deficit, are you suggesting a regional interest, akin to the power of the old regional authorities? If that was a real interest with teeth—so that an objection that was made to a neighbouring authority would automatically trigger a notification—it could prevent possible cosmetic objections. For argument's sake, let us say that the councils were both of the same political persuasion and East Lothian was making a cosmetic objection to its colleagues in another authority, knowing that it would be thrown out. It would be seen to be doing something, but it would know that the application would not go any further, to the ministers. Is that

what you are trying to get at when you talk about narrowing the democratic deficit?

The Convener: Before the witnesses answer—and before all the councillors jump on my back—it is worth pointing out that planning applications across Scotland are made on a non-party-political basis.

10:15

Douglas McKenzie: In our case, the application that was presented to one council for consideration was opposed by another council. Our point is that the authorities concerned are small. I had better be careful what I say, but I think that we had a better system when we had the regions, which made planning decisions for larger areas.

The Royal Town Planning Institute wrote an interesting letter to Eric Pickles, who is a minister down south, which said that the current process, which is built on the principle of localism, has created a vacuum in that there are applications and developments that are larger than local and smaller than national. We are concerned about applications that fall between those two stools. Our view is that there must be a mechanism for assessing applications that have regional significance. The situation that Margaret Mitchell described would still not enable voters to take their revenge because of the democratic deficit; voters in one local authority area would still be denied the right to punish, if you like, representatives in another area. Our point is that there have been reasonable applications that have fallen between two stools.

Mark Griffin: The reform of the planning process was intended to streamline it and speed it up. Regarding the 28-day delay for every application that is notified to Scottish ministers, you said that local authorities have indicated that the numbers in their planning history that would fall into the new category were very small. If your proposed measures were implemented, would those numbers increase? At the moment, a local authority objection would not result in a notification.

Iain Cane: The question is whether the number of objections would increase because it would be known that they would trigger a notification to ministers.

Mark Griffin: Yes.

Iain Cane: Three criteria have been set in that regard. First, an application would have to be a major one, which is specifically defined; as such, the application would be likely to be a contentious and sensitive one that would require more detailed scrutiny. Secondly, an application would have to

depart significantly from the development plan process. That process, at strategic development plan level and, indeed, through consultation at local development plan level, has in effect been agreed and approved by local authorities. Thirdly, a formal objection would have to be made by the neighbouring local authority.

It is not simply the case that the local authority could object and that that would trigger a notification to ministers. The application would have to be major and it would have to represent a significant departure from the SDP or the LDP. So, my answer to your question is that I do not think so.

Kevin Stewart: Reference was made to assessments being made in a regional context; I am a bit bothered by that. I sympathise with the witnesses' position when the application is for something that is in close proximity to a local authority's boundary. However, a local authority could receive an application for a development that is slap-bang in the middle of its area but which could be regarded as important or detrimental for the region. I think that we would have great difficulty in defining something as regional.

I did not serve on a council in those days, but some of the worst planning applications that I have ever seen passed in my neck of the woods were dealt with by regional authorities without due account being taken of the then districts. I would be swiert to go along that route again. My great difficulty in classing something as a regional development would be in defining what has regional impact and what does not. I have sympathy with the boundary issue, but if we start allowing authorities to object to things in other authority areas where discussion has already taken place on the structure plan, citing regional significance, we might get into difficulty.

Douglas McKenzie: I think that Iain Cane answered that question in his last response. Our petition raises broader issues for discussion, which I raised when I mentioned the RTP1 comment. Our petition presents three specific criteria that could be used for notification. I will not outline them again, because Iain has done that. However, in a sense, they relate to the point that you have made. If an application had cross-border implications, it would be a major departure from the local plan.

Kevin Stewart: I am talking about the definition of "cross-border implications" in a regional context, if you like. I can see the geographical cross-border implications for East Lothian and Midlothian in your case, but other local authorities could argue—well, let us make an example. Let us say that a planning application for a new retail development comes to the City of Aberdeen Council, and Aberdeenshire Council decides that

the development would have implications for the retail trade in Aberdeenshire. Even though the development would be slap-bang in the middle of Aberdeen, should Aberdeenshire Council have the right to object to it? I think that the answer would be no. Such a case should be dealt with at the structure plan level. I could understand the objections if the development was to be right on the border between Aberdeenshire and Aberdeen; in that case, there would be a clear geographical crossover.

Anyone could argue anything about something that they see as a regional development that might have an impact on them. That is where my difficulty arises.

Iain Cane: We are not looking for the introduction of the concept of, or a definition of, regional. We have set out criteria, although I accept that we are left with cross-border impacts, so that might be a slightly grey area. However, it is not beyond the Scottish Government to provide a meaningful definition. From a balanced perspective, it would be far better to attempt to address the situation by defining cross-border impacts than to leave it without any higher authority closure when two local authorities are at loggerheads, the agreed strategic development plan has been departed from, and the local authority that is considering the application has ordained that it should be passed contrary to the strategic development plan.

I do not know of many formal processes or procedures that come to a dead end and leave the local authority that is determining the application with the final say, forgetting all the other objections. That seems to be the way that it is.

Douglas McKenzie: We are asking for something fairly simple. In cases that have such grey areas, it would be a fairly simple matter to notify the minister. Jim Mackinnon pointed out that when the national agencies have objected and the minister has been notified, the minister has fired the application straight back to the decision-making authority because he does not want to take it any further. We are not saying that our case should necessarily be called in, but it could be notified to the minister and, if he feels that it is right, it should be left to the local authority to make its decision.

Margaret Mitchell: As I introduced the regional interest and muddied the waters, perhaps I should explain. I agree with Kevin Stewart that some of the worst decisions were taken by regional authorities impacting on district councils. One reason for moving to a single tier was that that kind of problem would not occur, but as a result of that move, some of the powers that the regional authorities had—in this case, we are talking about a neighbouring authority being able to use the

power to object and the notification status to ministers—are absent. Perhaps there are not the same checks and balances in the single tier that we would have hoped to get, and perhaps that is where you are coming to.

I suppose that the crux of the matter is that COSLA is very much opposed to what has been proposed, because it thinks that there would be interference with streamlining and efficiencies. We are down to the nitty-gritty of how often the issue will come up under the three criteria that you gave. If there is some way of quantifying that, perhaps we could move a little bit closer to determining whether what you propose is the way forward.

Douglas McKenzie: We have had contradictory responses from the Government. I do not know whether you have had the chance to look at the correspondence between us and the ministers. On the one hand, they say that what has been proposed would gum up the system, slow down streamlining and interfere with the localist agenda; on the other hand, they say that the issue arises so infrequently that it is hardly worth introducing the proposals. Their positions have been a bit contradictory.

The Convener: When we took evidence from the chief planner, he explained that the local authority can notify about a planning application, but that does not mean that it will be called in. He also told us that, although there was no formal notification, informally the minister would be aware if another local authority had objected, and it would still be within his powers to call in the application. Therefore, the minister still has the ability to call in although there is no formal notification. Does that not mean that, in practice, what you are asking for can happen?

Iain Cane: In theory, yes. That is if you buy into the statement that the resources in the Scottish Government's planning team are sufficient to oversee any contentious application that falls into that category or similar categories. I am somewhat sceptical that that level of diligence can be applied on an on-going basis.

I return to the point that has been made. Given the sensitivity and profile of the circumstances that we have described, why should things be left to such an arbitrary process? Why should there not be a simple notification to ministers? As you say, that would not trigger a call-in; it simply means that the matter would be put before ministers for consideration for call-in. From a public accountability and democratic deficit perspective, that at least gives some comfort that everything is not left to the considering local authority to make the decision.

That is set against a background of the community having no right of appeal in planning,

although we will not go into that. The Scottish Government said in a letter to us:

“While there is no third party right of appeal if it is considered that the determining authority has not taken into account a material consideration, then it may be possible to seek legal challenge of the decision or in cases of alleged maladministration a complaint can be made to the Scottish Public Services Ombudsman.”

There is an inference that communities and the public in the neighbouring authority area can take the matter forward by means of judicial review. I do not want to comment on the circumstances, but we seriously considered going to a judicial review in the case that we were dealing with. I know that there was a great deal of debate in the previous committee about a system in which a judicial review can be kicked off by opposition groups and frustrate the progress of a planning decision by months—and quite often years. What we propose may alleviate what could be in some cases an inevitable process towards judicial review and the frustration of the planning system and the decision-making process.

10:30

Kevin Stewart: Or folk could wait for the ministerial decision and then go to judicial review. To be honest, I do not think that what you have just suggested comes into play.

What is the current status of the Edinburgh and Lothians structure plan? Is it in draft or has it actually been passed?

Douglas McKenzie: The SESplan proposed plan was drawn up after a period of consultation and we are now in the six-week period during which responses on the final plan can be made. I think that the plan will be published in the early part of the year and local authorities such as ours—Midlothian Council—will have to produce their main issues report for the local plan by either February or March 2012. As you can understand, we have been looking very closely at what SESplan says about access to mineral sources in the region.

The Convener: As members have no further questions, I give the witnesses a chance to make a final comment.

Douglas McKenzie: I simply draw the committee's attention again to this issue of a democratic deficit. After all, the reason we are sitting in this committee room is because of the very strong perception in the 1990s that there was a democratic deficit at national level and that decisions on Scottish issues were being taken without elected representatives having legislative control over what was happening. This is, at a micro level, an example of the same thing. It is a serious concern that residents who live outwith the

local area where a decision on an application is being made will experience the vast majority of the impacts but will have no recourse to the ballot box.

The Convener: Thank you for your helpful evidence, which will be considered at a future meeting along with evidence taken in previous sessions. I ask members to agree to consider that evidence in private. Are we agreed?

Members *indicated agreement.*

The Convener: We move into private session.

10:32

Meeting continued in private until 11:16.

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