

## 7. Rights and Challenges in the Scottish Planning System

The purpose of this information sheet is to provide a basic guide to the avenues available to anyone (e.g. applicant, member of the public, community group, or other affected party) who does not agree with a planning decision. It also explains some of the limitations with regard to challenging planning decisions, and why these exist.

### Introduction

Public engagement is one of the principles on which the Scottish planning system is founded and PAS's aim is to facilitate effective public engagement in planning, ideally before decisions have been reached.

The planning system provides certain opportunities for people likely to be affected by planning decisions to make their views known and encourages them to do so. This is tempered, however, with measures to ensure that the processing of planning applications is not unduly delayed or obstructed.

Planning is, by its nature, often a contentious process. The need to apply for planning permission exists because property development by individuals to meet their own desires and needs inevitably affects the interests, to a greater or lesser extent, of neighbours or the wider community, sometimes adversely.

However, planning is not just a matter of protecting local amenity or conservation assets, but of ensuring that, strategically, the **public interest** is served with a forward supply of suitable land for housing, business and other activities and not unreasonably constraining the rights of property owners to develop their own property.

Planning authorities (i.e. your local council or National Park Authority) are therefore given the legal duty of making sometimes difficult decisions on behalf of the public. They are guided in this by the Development Plan for their area (*see our Information sheet on Development Plans*), Scottish Government guidance, and by the precedent applications and case law.

### Planning Decisions

Planning involves a great deal of seemingly bureaucratic procedure due to the many different factors and interests that must be taken into account.

Planning legislation is extensive and deals primarily with the processes leading to a planning decision, to ensure that the decision is an **informed** one and taken **legally**. (The decision itself is not covered by planning legislation, but rather by the development plans and planning policies prepared by a planning authority.)

The kind of things that legislation and legal procedures are designed to address are:

- ensuring that the application is properly lodged with required information

- notification of owners, neighbours, community councils and the wider public
- consultation with statutory bodies, special interest groups and technical experts
- securing additional special procedures for in-depth environmental, transport, design and access, and potentially other assessments
- notification of other planning authorities or Scottish Ministers where other plans for the wider region or for Scotland may be affected
- considering the relationship with other forms of permissions required
- taking into account the need for further procedures in the light of information received
- assessment of the proposed development against the provisions of the development plan and national planning policies
- seeking changes or clarification from the applicant in the light of information received and assessments made
- arranging for the decision to be taken, possibly following a hearing, by the appropriate person or committee in the authority responsible

Once these procedures have been completed, the decisions are made normally by a planning authority or, more rarely, by Scottish Ministers (when the application has been called in by them).

These decisions are subject only to a general requirement under planning legislation that they must have regard to the current Development Plan for the area and to any other Material Considerations (including all the results of the consultation procedures above and any relevant policy guidance documents).

It is a matter for the judgement of the planning authority whether the decision is made in line with the development plan or whether a material consideration points to a different decision (see our information sheet on Material Considerations).

### **Key points to note**

- There is no such thing as a right or a wrong decision in planning.
- By law, only elected members of planning authorities, Scottish Ministers or the appointed officials for either may make a decision on the merits of the proposal in the application.
- The question of impact of a proposed development on privacy or on the personal interests of a neighbour or individual is a constantly difficult area in planning.
- However, the planning system does not exist to protect personal interests unless they are consistent with those of the wider community. The planning authority should not be relied upon to negotiate between individual parties. PAS can advise on such situations, if requested.

## Rights of the Applicant

As an applicant you have the right to:

- discuss your proposals with the planning authority prior to submission
- have your application acknowledged with the name of a contact person and a reference number by which it can be tracked
- know how the application is being progressed and when it might be decided
- receive the decision in writing with reasons and be informed of your appeal rights
- take the application out of the planning authority's hands if it is not determined within a prescribed period (usually 2 or 4 months) by appeal against non-determination to Scottish Ministers or to the planning authority's Local Review body
- to appeal against refusal of planning permission. (*See information sheet 4: Planning Appeals and Local Reviews*)
- if the planning authority has a hearings policy, you may have the right to be heard prior to a decision, subject to the details of the policy

## Rights of Third Parties

As an owner or lessee of an application site, or as a neighbour within 20 metres:

- you have a right to be notified directly when an application is submitted. This is known as Neighbour Notification. **It is important to note that an applicant for planning permission does not have to be the owner of the land.**

As a member of the public:

- you may be informed of an application being made in a public press notice where an application requires to be advertised
- you may inspect the planning authority's register of applications at any time - more and more, this is done on-line through planning authority websites
- in the case of applications for National or Major developments, you have the opportunity to engage with the intending applicant at the Pre-Application Consultation stage that must be undertaken at least 12 weeks prior to application being made
- you have the right to submit any representation (objection, comment or support) within the period allowed for this on the appropriate notice or advertisement, usually 21 days; and may have the opportunity to speak at the relevant committee
- as a person who has made representations you have the right to receive an acknowledgement, to be informed of any material changes to the plans, to be informed of how the application is being progressed and when it might be decided, and to be told of the outcome
- if the planning authority has a hearings policy, you may have the right to be heard prior to a decision, subject to the details of the policy

However, you do not have the automatic right to a continuing dialogue with the planning authority over your representations and any questions you ask may not necessarily be answered.

Any representations you submit about a planning application should be Material Considerations. These should not be confused with any complaint you wish to submit about procedural matters (see section on Complaints below).

### **Key points to note**

- Any notification or advertising process is only for the purpose of alerting those who might be interested and does not provide full information.
- The onus is on the interested party to inspect the details of the plans and application documents themselves.
- Receiving direct neighbour notification does not give you any special rights with regard to the status of any views you may submit.

## **Challenging Planning Decisions**

### **What rights are available to applicants to have planning decisions changed?**

Under planning law an applicant can appeal if s/he is aggrieved at any aspect of a decision by a planning authority:

- to refuse the application;
- to attach a particular condition; or
- to fail to make a decision within the prescribed period

This means the decision will be re-considered on its merits by a Local Review Body or by Scottish Ministers (usually delegated to a Reporter from the Scottish Government's [Directorate of Planning and Environmental Appeals](#)).

In the planning system, the term Appeal refers to a process that may lead to a change in the decision. After the above process there is no further right of appeal. The **only** recourse is to challenge the legal basis of the decision in the courts (see below).

### **What rights are available to third parties to have planning decisions changed?**

A third party (i.e. an objector or anyone who is not the applicant) has no right of appeal on the merits of a planning decision. Their **only** recourse is through the courts (see below).

### **Can a planning decision be revoked?**

In the exceptional circumstances that a previous decision may appear to a planning authority to have been inappropriate (usually some time later with significantly changed circumstances) they may consider making a Revocation Order (if the original permission has not already expired and the approved development has not started). However, a revocation order can be opposed by the owner of the property, is subject to confirmation by Scottish Ministers, and may involve the payment of compensation, so is used rarely.

## Can applicants and third parties challenge a decision in court?

Court challenges against planning decisions can only be taken in the highest civil court in Scotland, the Court of Session.

If it is felt that a planning authority or Scottish Ministers have acted in any way unlawfully in coming to a decision, applicants, third parties or anyone with an interest can pursue the process of judicial review of that decision through the Court of Session. Any application must be lodged **within 6 weeks of the decision**. As judicial review is a complex legal procedure, which can be costly and time consuming, it is used rarely in the case of smaller developments. However, if you are considering applying to the court for a judicial review you can only do so through a lawyer or other professional agent who is recognised for access to the Court.

The Court of Session will not be able to change a decision that has already been made by a public body, but it can quash or reduce its effect and force the planning authority to reconsider it to make sure it's acting within the law. Even so, it is possible that it may subsequently reach the same decision.

**Judicial Review** is used to challenge the **process** by which a decision by a public body (e.g. your planning authority or Scottish Ministers) has been made, **not the rights or wrongs** of an actual planning decision.

## If I can't change it, can I complain about the way a planning decision is taken?

All public authorities have a formal complaints procedure. It is an important pre-requisite for any independent complaints procedure that you have exhausted all prior avenues with the decision making body. Complaints procedures are now regulated to national standards by the Complaints Standards Authority, a unit within the Scottish Public Services Ombudsman (see below).

In the first instance, therefore, you should take your complaint to the planning authority itself. You should consider contacting them informally first of all. Just because you may disagree with them in any way, does not mean that you cannot expect a helpful discussion with them. If there has been a procedural fault, they may agree that something needs to be done and the sooner it is addressed the better. If you have misunderstood the procedures or policies you are concerned about, the professional officers responsible should be able to explain them. If you still feel that you wish to take the matter up formally, you should ask how the complaints procedure works from the relevant person, or seek this information online.

If you feel you need this help, you might wish to employ a professional adviser such as a lawyer or planning consultant to ensure your case is put forward to best effect. PAS can help explain procedures and rights involved under the planning system, but cannot help you to represent your case to the appropriate body.

## What independent bodies are available to provide advice?

There are a number of bodies (mostly responsible to the Scottish Parliament or the Crown, to ensure political neutrality) concerned with the competence and propriety of decision making by public bodies in Scotland, but none has the power to change or revoke a planning decision.

Beyond the planning authority itself, the other independent bodies and relevant codes of conduct include:

### **Scottish Public Services Ombudsman (SPSO)**

The [Scottish Public Services Ombudsman](#) is an independent and free service, which may look into how a planning authority or any public body involved in the process has carried out its administrative functions when dealing with a case. If you feel that you have suffered injustice or hardship as a result of mal-administration by a public body you can complain to the SPSO (note - certain qualifying criteria apply with regard to the body concerned, the time lapse and the nature of the decision).

Some examples of the kind of administrative procedures that the SPSO can look into on planning cases are those listed in the section above on 'How are planning decisions made?'.

The SPSO can require an authority to remedy faulty procedure and may require an apology to be made or limited compensation in some cases, but cannot revisit the actual decision made by the planning authority, and is not an alternative to any appeal or legal action that may be available.

### **Public Standards Commissioner and the Standards Commission for Scotland**

The Public Standards Commissioner is the individual charged with enforcement of the codes, and a range of penalties may be imposed, including suspension from office.

The [Standards Commission for Scotland](#) is an independent public body which encourages high ethical standards in public life through the promotion and enforcement of Codes of Conduct for councillors and those appointed to the Boards of devolved public bodies.

The [Code of Conduct for Councillors](#) is a statutory code adopted by local authorities and public bodies and applies to the conduct of individual members of local authorities and public bodies, not to the body as a whole. One section covers conduct on planning matters.

### **Scottish Human Rights Commission**

The [Scottish Human Rights Commission](#) has a general duty to promote awareness, understanding and respect for human rights to everyone, everywhere in Scotland, and to encourage best practice in relation to human rights. Human rights are sometimes invoked by third parties in the planning system but there are few examples in this regard of them being upheld in court.

### **Scottish Parliamentary Standards Commissioner**

The [Scottish Parliamentary Standards Commissioner](#) (SPSC) is an independent investigator of complaints that Members of the Scottish Parliament (MSPs) have broken their [Code of Conduct](#).

## **Ministerial Code of Conduct**

Ministers of the Scottish Government are not subject to an independent scrutiny process as their performance is judged by their parliamentary peers who appoint them. However, they adopt a self-imposed [Scottish Ministerial Code](#) (a code of conduct and guidance on procedures for

Members of the Scottish Government and Junior Scottish Ministers) providing important criteria for meeting the high standards of service expected of them. (As with the Councillors' Code of Conduct, there is a chapter specifically on Ministers' Engagement on Planning Matters, including the Granting of Energy Consents.) Any concerns about the conduct of Ministers should be addressed to the parliamentary authorities for advice and possibly to an MSP for informal assistance.

## **Royal Town Planning Institute (RTPI)**

The [RTPI Code of Professional Conduct](#) governs the general professional conduct of individual members of the planning profession. Amongst other things it requires that they impartially exercise their independent professional judgement. Note - the Code does not apply in any way to the corporate conduct of planning authorities, of planning consultancy firms or of any other employer of professional planners.

## **How can PAS help?**

If you are still unsure or need independent advice, then PAS may be able to help. Contact our **Advice Service**, which is **free of charge** to individuals and community groups, on **0845 603 7602**.

[www.pas.org.uk](http://www.pas.org.uk)