



LOCAL GOVERNMENT AND REGENERATION COMMITTEE

AGENDA

12th Meeting, 2011 (Session 4)

Wednesday 23 November 2011

The Committee will meet at 10.00 am in Committee Room 5.

1. **Declaration of interests:** Margaret Mitchell will be invited to declare any relevant interests.
2. **Petition PE1320:** The Committee will consider a Petition by Douglas McKenzie, on behalf of Communities Against Airfield open Cast calling on the Scottish Parliament to urge the Scottish Government to amend Planning Circular 3/2009, Notification of Planning Applications to (a) provide the same status to a planning objection to a major development from a neighbouring local authority as to one from a government agency in order to trigger a notification to Scottish Ministers and (b) state that such objections by a neighbouring local authority to major developments which represent a departure from the development plan should be a significant factor in the decision to call-in.

The Committee will take evidence from—

Douglas McKenzie, Chair, and Iain Cane, Member, Communities Against Airfield Open Cast.

3. **Welfare Reform Bill 2011 (UK Parliament legislation) (in private):** The Committee will consider a draft report to the Health and Sport Committee on legislative consent memorandum LCM (S4) 5.1.

Eugene Windsor
Clerk to the Local Government and Regeneration Committee
Room T3.40
The Scottish Parliament
Edinburgh
Tel: 0131 348 5217
Email: eugene.windsor@scottish.parliament.uk

The papers for this meeting are as follows—

Agenda Item 2

CAAOC response to evidence session on PE1320

LGR/S4/11/12/1

PE1320

LGR/S4/11/12/2

PRIVATE PAPER

LGR/S4/11/12/3(P)

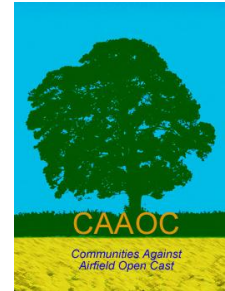
[Scottish Planning Series: Planning Circular 3/2009 - Notification of Planning Applications](#)

[SPICe briefing SB11/30: Town and Country Planning in Scotland](#)

Agenda Item 3

PRIVATE PAPER

LGR/S4/11/12/4(P)



Communities Airfield Open Cast - Response to Evidence Session on Petition 1320, Local Government and Regeneration Committee Meeting, held on 14.09.11

Introduction

On behalf of Communities Against Airfield Open Cast (CAAOC) I would like to begin by thanking both the Parliamentary Petitions Committee (PPC) and the Local Government and Regeneration Committee for the time and focus they have brought to the examination of our petition. We feel the whole exercise has been an affirmation of the Scottish Parliament's commitment to public accessibility and participation in the democratic process.

General Comments

Petition 1320 was framed by residents in a rural community recently involved in a campaign against a major planning application contrary to the Development Plan which, if approved, would have had the potential to cause seriously negative impacts on our local environment. We were therefore encouraged by the emphasis of all three professional contributors on the importance of plan-led development with its specific commitment to strategic planning, consultation and participation. We were also pleased by their general support for a transparent and efficient planning process which empowers local authorities as an important part of local democracy. It was in fact what we perceived as a flaw in this local democratic process deriving from one aspect of Circular 3/2009 which provided the impetus for this petition.

However having listened to the responses to our petition made by the Chief Planner, Jim McKinnon and George Eckton of COSLA we do not feel that the substantive points made in our petition have been adequately addressed. In particular neither seemed to offer a satisfactory rebuttal of our contention that Circular 3/2009 has, in the interests of streamlining and efficiency, created a democratic deficit with respect to major planning applications which are contrary to the Development Plan and which have cross border implications.

Specific Comments

With regards to the evidence presented we would like to make the following specific points:

- Jim McKinnon, in his contribution, placed great emphasis on the distinction between notification and call-in, that the former did not necessarily mean the latter and that notification is about whether an application "raises issues". CAAOC's petition is aware of this distinction. In fact our petition calls for a local authority which is a statutory consultee to be given the same status as a government agency in triggering notification if an objection is lodged. We then request that this objection should be considered as a criterion for call-in.

We accept that a Minister having looked at the application may decide not to call it in. In this sense we are merely requesting that objections from neighbouring local authorities, under certain clearly defined conditions, have the same status as government agencies.

- Jim McKinnon gave assurances that the Scottish Government is willing to be flexible and responsive in considering the possibility of intervening in planning applications whether by issuing a Notification Direction or ultimately by call-in. We understood from his comments that correct practice is for Government officials to monitor potentially contentious major applications whilst they are still under consideration by determining authorities. We took his comments as suggesting that the attention given by Government officials goes beyond the requirements of the Circular to the extent that no amendments to it are required. We do not suggest that this ongoing review of current applications by government is a bad thing. However, from the examples he gives, there emerged some confusion as to the criteria which his officials take into account, whether they are restricted to matters of national importance and the consistency with which they are applied. For instance he referred to the Airfield farm open cast coal proposal and suggested that had Midlothian been minded to grant consent, he may have been inclined to call it in on the grounds of landscape impact. Although this provides some comfort to CAAOC his comments are somewhat at variance with separate letters written in 2008-2009 on behalf of the Minister responsible for Planning at the time which stated the application presented no apparent grounds for intervention. The actual merits of the Airfield farm application are not relevant here but surely this emphasises the need for transparency in the criteria taken into consideration so that everyone affected by the outcome can have confidence in the planning process.
- Jim McKinnon's evidence on the issue of what constitutes "national interest" seems to be contradictory. On the one hand he implies the government is reluctant to be pinned down by a definition of national interest on the basis that national interest changes and any definition could in the course of time conflict with the Development Plan. On the other hand he relies on the three definitions of national interest in Circular 3/2009 which would trigger notification only one of which, reference by a Government agency, can convincingly be described as "national". He doesn't at any point address Craig McLaren of RTPI's point that there is scope for a new category for notification which could be loosely described as regional and which would arise with a planning application which was significantly contrary to the Development Plan and to which a neighbouring authority has objected. This role was filled formerly by Regional Authorities which had a mandate to determine applications for developments which could be described as significant. However their abolition has left a vacuum which, in our view, remains to be properly addressed by the Scottish Government. Even the present Structure Plan Authorities and emerging Strategic Development Plan Joint Committees are only able to pass comment on certain applications when requested by member authorities but have no powers of call-in or determination.
- Both Jim McKinnon and George Eckton express or imply concern that our amendment to Circular 3/2009, if adopted, would clutter up a system which was designed to be more speedy and streamlined and would empower democratically elected local authorities. As far as the latter is concerned CAAOC feels that our amendment, by narrowing the democratic deficit, would strengthen that objective. As for the former George Eckton expressed a view that the new Strategic Development Plans system with its philosophy of plan-led development, with all that implies, would negate a large number of these potentially controversial applications. This greater scope in the new Strategic Development Plan

process for consultation between Local Authorities is to be welcomed but there will be occasions when disputes between neighbouring authorities, over major applications of regional significance which are a departure from the Plan, cannot be resolved. The Midlothian Retail Development which Jim McKinnon refers to in his evidence was objected to by both Edinburgh and East Lothian Councils and is presently before the Edinburgh and Lothian Structure Plan Joint Liaison Committee (SPJLC). Should these councils objections be maintained however their responses are only for Midlothian's consideration. The SPJLC has no powers of determination or call-in. Nor is Midlothian, should it persist with its approval, despite opposing council's responses, required to notify the Minister. The new SESPLAN Joint Committee, although it has the responsibility to comment on issues involving cross border impacts, will have no more powers than the present Structure Plan committee. CAAOC believes strongly that communities on the other side of a Local Authority boundary have a right to expect that the Development Plan will be adhered to and that any departure from it, particularly where an application is statutorily defined as "Major", will be automatically referred for independent review or resolution, whether by the Scottish government or some other appointed body within the Development Plan Structure. This gap in the system was pointed out by the Royal Town Planning Institute, Scotland in its evidence to the PPC when it highlighted the need for developments of regional significance to be made subject to Minister's consideration.

- Finally at no point did we feel the issue of the democratic deficit was successfully tackled. Jim McKinnon points out the importance of the law and correct process in the integrity of the planning decisions made by local authorities. At the heart of this however must surely be that in a representative democracy elected representatives must answer to and be judged by those who have been the recipients of their decisions. There are potential circumstances, under the present planning process, where residents, outside the boundaries of the deciding authority but who will be the main recipients of any negative impacts of a proposed development, will be denied this basic democratic right. This deficit cannot be completely closed but a criterion in the Circular which would require notification with the potential to call-in would at least ensure another level of representative government would in some way try and redress this imbalance.

Conclusion

As we made clear in our opening comments CAAOC welcomes the emphasis on plan-led development. The success of our own campaign against the Airfield Farm open cast coal application was in a sense a vindication of that process which in most cases will work well. However the Airfield open cast campaign threw up a potential unintended consequence of a system which, though it has set out to democratise the process could, in the cases of major applications, contrary to the Development Plan with cross border implications, have the opposite effect.

Douglas A McKenzie
Chair – Communities Against Airfield Open Cast
29.09.11



The Scottish Parliament
Pàrlamaid na h-Alba

(For official use only)
PUBLIC PETITION NO.

PE1320

1. Name of petitioner
Douglas McKenzie, on behalf of Communities Against Airfield open Cast
2. Petition title
Amending Planning Circular 3/2009
3. Petition text
Calling on the Scottish Parliament to urge the Scottish Government to amend Planning Circular 3/2009, <i>Notification of Planning Applications</i> to (a) provide the same status to a planning objection to a major development from a neighbouring local authority as to one from a government agency in order to trigger a notification to Scottish Ministers and (b) state that such objections by a neighbouring local authority to major developments which represent a departure from the development plan should be a significant factor in the decision to call-in.
4. Action taken to resolve issues of concern before submitting the petition
<p>Letters and emails have been submitted to—</p> <ol style="list-style-type: none"> 1. Minister for Transport, Infrastructure and Climate Change (both directly and through MSPs) 2. David Hamilton MP (07.10.09) 3. Ian Gray MSP (01.09.09) 4. Rhona Brankin MSP (01.09.09.) 5. Robin Harper (01.09.09 with follow up correspondence) 6. All other Lothian MSPs (01.09.09) 7. David McLetchie MSP (11.11.09 with follow up correspondence) 8. Malcolm Chisholm MSP (25.09.09) 9. The chair and all members of the Local Government Committee (22.10.09) 10. The planning department of East Lothian Council (24.11.09) 11. The planning department of Midlothian Council (26.11.09) <p>Meetings also took place with East Lothian Planning Department on Tuesday November 24th and Midlothian Planning Department on December 7th.</p> <p>Iain Gray MSP and East Lothian Councillors have been supportive of notification and call-in by the Scottish Government since East Lothian will be the main recipient of negative impacts from the proposed development within Midlothian.</p> <p>Other MSPs such as Rhona Brankin, Robin Harper and David McLetchie have also been sympathetic and thoughtful in their responses. Other Lothian MSPs have merely noted our letters and failed to respond any further.</p>

The response from the Chair of the Scottish Parliament Local Government Committee was extremely disappointing, In a brief reply he merely commented that the *"Committee has no plans to examine this particular issue,"* thus failing to respond to the key issue of a democratic deficit.

We have approached the relevant government department and planners whose response has been to refer us to Circular 3/2009 which states that planning is a local matter and that notification will only be triggered according to specified criteria. Furthermore, once notified, we are advised that in accordance with 3/2009, Ministers will generally only call-in applications which raise matters of national significance. However this is not defined.

5. Petition background information

In August 2009 Scottish Coal submitted an application to extract two million tons of coal over a period of six and a half years from Airfield Farm close to the communities of Cousland in Midlothian and Ormiston in East Lothian. Midlothian Council is now in the process of accepting submissions from consultees and responses/objections from a wide range of interested parties both local and national. There is great concern in surrounding communities over the potential impacts of this highly unpopular proposed development. A number of issues have been raised but those which pertain to this petition can be summarised as follows.

- 1 It is categorised as a major application
- 2 It is a departure from the recently adopted Development Plan
- 3 The neighbouring Local Authority has objected
- 4 There are communities/settlements within 500 metres
- 5 East Lothian communities will be most severely affected
- 6 There appear to be no community benefits.

While we at CAAOC understand that this is a local authority matter and that the Public Petitions Committee has no power to intervene in the operational decisions of local authorities, there is an important aspect of this proposal which should be of concern to the Committee going, as it does, to the heart of democratic governance in this country.

Although Airfield farm is situated in Midlothian, where the Council will make the final planning decision, the worst impacts, in terms of dust and noise will be experienced in Ormiston and other smaller settlements and dwelling houses in East Lothian. Consequently East Lothian has lodged an objection and requested Midlothian Council refuse planning permission.

Whilst Midlothian Council has not yet formally considered the Airfield application, if it decides to approve it, residents of Midlothian can look forward to passing judgement on the Council and individual councillors at the polling stations when elections are held in 2012. East Lothian residents on the other hand will have to endure the impact of dust, noise and landscape degradation without any means of passing judgement on the councillors who made the planning decision which may have negatively affected their quality of life. In other words they are being denied the most basic of democratic rights, the right to pass judgement on the impact of decisions made by elected representatives. It is a serious democratic deficit and a complete failure of representative democracy. One would hope that at this point a higher level of

government would intervene to represent the disenfranchised voter and resolve disputes between neighbouring authorities. However the circumstances of Airfield have highlighted the absence of any such recourse in the planning process.

Scope for notification

It appears that East Lothian Council, despite being a statutory consultee, does not enjoy the same status as national government agencies such as SNH, Transport Scotland, SEPA etc in that its objection does not trigger a notification to Scottish Ministers which would raise the possibility of an application being “called in”. In this sense the planning process appears severely defective. Despite potentially serious cross border impacts, Midlothian Council, has the power to overrule East Lothian’s objection and grant planning permission without any requirement for such a dispute to be considered at a higher level of government by further examining the impact on communities situated across the local authority border. In addition objectors have no right of appeal.

Under the previous [Planning Circular 5/2007 ‘Notification of Planning Applications’](#) (replaced by Planning Circular [3/2009 ‘Notification of Planning Applications’](#) in April 2009) there were specific criteria which would have made such a outcome more likely. These included the situation where insufficient attention had been paid to legitimate planning concerns expressed by consultees or local people and where the planning authority had made an unjustified departure from the local plan. These criteria were removed by the new Circular and reduced to only three:-

- i) objections from a government agency;
- ii) the Council having a financial interest; and
- iii) an open cast mineral extraction proposal within 500 metres of a “community” or “sensitive establishment”.

It is worth noting that the East Lothian Council’s objection includes what it perceives as violations of the jointly agreed Edinburgh and Lothian Structure Plan thus undermining the concept of plan led development which the Scottish Government asserts should be guiding planning decisions at local level.

Scope for Call-in

Beyond the initial notification process, Circular 5/2007 went on to give specific examples of matters which might merit call-in, including where insufficient attention was paid to the views of consultees and local communities. These call-in criteria and examples have been removed from Circular 3/2009.

The reduced scope for call-in of planning applications to Scottish Ministers was underlined in a letter (12.08.09) in which Fiona Hepplewhite replied to us on behalf of the Minister for Transport, Infrastructure and Climate Change saying,

“The Scottish Ministers would consider intervening only in exceptional circumstances and would only become involved in cases that raise issues of genuine national as opposed to local significance.”

There is now a serious potential dissonance in Circular 3/2009 between the

three criteria for notification (only one of which can potentially be described as “national”) and the need to qualify as an issue of “*national significance*” by which an application once notified, may be called in by Scottish Ministers. It seems to CAAOC entirely inappropriate that such intervention might preclude major applications which can have significant effects across local authority boundaries and where respective local authorities may have differing opinions on the merits of such proposals.

We believe that such circumstances merit consideration for the application to be called-in to ensure a fair and impartial determination by Scottish Ministers. This could be achieved by a variation in the wording of Circular 3/2009. In particular para 6 could be amended to read:

“Ministers might choose to intervene where the possible impacts or benefits of a proposed development extend beyond the area of the local authority to the extent that they become of national importance for example where a neighbouring local authority has objected to a major development proposal.”

We would also point out an inconsistency in 3/2009 in respect of open cast coal proposals. The Circular includes such proposals which are within 500 metres of a community or sensitive establishment as one of the three circumstances meriting notification of a planning application to Ministers. The other two are where a government agency has objected to an application and where the local authority has a financial interest. However in its discussion of potential factors meriting a call-in of applications (paras 6-7) the Circular refers to the latter two factors but not to the open cast 500 metre criterion. It seems to CAAOC that if this criterion merits notification to Scottish Ministers as a matter of potential national importance then it must also merit consideration as a prospective reason for call-in on the same basis. For the avoidance of confusion it thereby merits identification as such within the Circular

We are therefore calling on the Scottish Government to

- a) give any objection by a local authority which is a statutory consultee the same status as an objection by one of the National Government Agency consultees thus triggering notification.
- b) Widen the criteria for call-in such that the definition of “national significance” includes an objection by a neighbouring authority to a major development proposal which represents a departure from the development plan.

This would not close the democratic deficit but it would at least narrow it and democratise the planning process by allowing accountable representatives at a national level to take a strategic overview of cross border developments.

(Further information on all aspects of this application can be obtained at www.cousland.net/airfieldopencast.asp)

6. Do you wish your petition to be hosted on the Parliament’s website as an e-petition?

YES

7. Closing date for e-petition

26 February 2010

8. Comments to stimulate on-line discussion

Calling on the Scottish Government to strengthen the rights of objecting local authorities negatively affected by planning applications in neighbouring authorities to have these applications notified to Ministers and to potentially merit the applications being called-in as of national importance. The present situation, in which voters in neighbouring authorities are unable to pass judgement at the polling station on decisions which may have seriously impacted on their lives, is a denial of our most fundamental democratic right.