19 March 2018

Dear Bob

Planning (Scotland) Bill - Equal / Third Party Rights of Appeal

I am writing regarding the matter of third party or equal rights of appeal in the planning system.

I have listened to the evidence given to the committee by stakeholders with great interest and have noted the different views on rights of appeal. As you are aware, this lies beyond the proposals set out in the Planning Bill and so we have not previously provided the Committee with extensive information on it. However, as the evidence sessions have specifically sought to explore stakeholder views on this subject, I hope that providing some more clarity on our policy position in advance of my evidence session will be helpful.

Firstly, I would like to address a specific issue that arose at the evidence session on 14 March. During the second panel session, Mr. David Leslie of the City of Edinburgh Council referred to his authority’s position on ‘community rights of appeal’. I found this evidence surprising, in light of the City of Edinburgh Council’s written submission to the Committee. I want to clarify that the Council’s commitment on this was neither discussed nor agreed with the Scottish Government prior to being adopted by the Council. For information, I recently met with the Council and the matter was briefly raised, but there have been no other discussions, and I have no plans to progress this as a joint workstream with the Council as their commitment suggests.

Throughout the debate on planning reform, we have been clear that we do not support third party or equal rights of appeal. The issues were fully explored by the independent panel. The questions that the panel used to frame their call for evidence encompassed this and other aspects of community engagement, and they took into account written and oral evidence on the subject.
The planning system and the reforms in this Bill strike a sensitive balance in encouraging early and participative engagement with an emphasis on a plan-led approach. The appeals processes are, in certain circumstances, vital and are designed to ensure that any unresolved representations on an application from all sides will be robustly examined by the Reporter. We believe that our reforms to the local development plan processes will strengthen the appeals system but that the focus should be on front loading development planning and development management to increase certainty rather than increasing conflict.

However, as the debate has continued we have considered the implications of the options that stakeholders have presented, including suggestions and options for a right of appeal for third parties, and how that might be limited. There appears to be no consensus on these options. In principle, my view is that identifying certain criteria for appeal rights – particularly where definitions may not be clear-cut – will add further complexity and frustration into the system. Taking the most frequently cited examples, an Annex to this letter provides a summary of our analysis of the key proposals.

I hope the Committee will find this information useful. I look forward to giving evidence to the Committee on Wednesday 21 March.

Kind regards

KEVIN STEWART
Annex

Summary of analysis of proposals for a limited equal or third party right of appeal.

1. Departures from the local development plan.
   - Consistency with the local development plan would be very difficult to determine. This is a matter of professional judgement in each case. For example, a proposal may accord with some policies set out in a development plan but not with others.
   - As a result, cases could be open to manipulation, or generate additional conflict where there is disagreement with the initial decision on whether or not it is a departure from the plan.
   - It is unclear how cases would be treated where officials and committee members take a different view on the matter of compliance with the plan.
   - Whilst the planning system is plan-led, each appeal location is different and material considerations relevant to the locality require to be taken into account by the decision maker. There are long established and sound reasons for this approach and many examples of developments providing employment, homes or low carbon infrastructure which have benefited from sound planning judgement being applied within the relevant context at the time of the decision.

2. Cases where an Environmental Impact Assessment (EIA) is required.
   - This could also increase the risk of legal challenge to EIA screening decisions.
   - There is already enhanced public engagement and scrutiny on these decisions.
   - There is a risk that this will incentivise different behaviours, for example applicants making multistage applications or reducing scale to fit under thresholds.
   - The proposal could inadvertently drive such behaviours or deter good practice (e.g. voluntary EIA in some circumstances) and reduce the valuable protection and engagement EIA can provide.

3. Limited to certain parties e.g. recognised community groups.
   - Unfortunately, as reported by the independent panel, it is not always the case that community groups represent the views of their community as a whole.
   - This proposal could mean that opposition to a single development dominates the agenda of some community bodies and could be divisive in some circumstances. It would be disappointing if local pressures led to people choosing not to volunteer in their communities.
   - Local place plans would be a more effective means of achieving a broader and more positive aspiration for collective engagement in the system.
4. Cases where a local authority has an interest.
   - It is reasonable and normal for a local authority to have an interest in a development and also to make a decision on a planning application for that development, reflecting the range of their roles and duties.
   - This option would apply to a limited number of cases and is therefore unlikely to satisfy supporters of ERA on its own.
   - If there is significant evidence that these cases raise issues of concern, the current notification direction, which is currently limited to only cover significant local development plan departures could instead be revisited, along with the advice in our Planning Advice Note (PAN 82) on Local Authority Interest Developments.

5. Decisions by elected members contrary to officer recommendations.
   - There are many different circumstances for these cases.
   - There may well be good reasons for elected members departing from the recommendation of the planning officers.
   - This could undermine local decision making and exacerbate concerns about local democracy being overridden centrally.

   - This has been suggested as an alternative approach, driven by views that the system favours views of one sector over another.
   - Industry representatives have highlighted the likely significant impact that removing the applicant’s right of appeal would have on development and investment in Scotland.
   - Many national policy objectives have been supported as a result of the appeals system:
     - Since 2014, around 5,500 housing units have been approved on appeal, following refusals from planning authorities.
     - Appeals have helped to deal with inequalities, minority groups and provide resources for young people. Examples in recent years include Gypsy / Traveller sites in three local authority areas, residential accommodation and a care home.
     - Around 1.4 gigawatts of renewable energy generation have been consented - we estimate that this could power the equivalent of 696,294 homes, saving 1,167,684 tonnes of CO$_2$ per annum.