Local Government and Communities Committee
Planning (Scotland) Bill
Submission from David Pedley

Section 4 of the Bill - Supplementary Guidance

The Policy Memorandum says:

“57. Clarity can also be improved by removing the existing provisions for supplementary guidance, so that each local authority has a plan that can be found in a single document rather than across an extensive and often complex series of technical statutory documents.

“58. There will still be scope for non-statutory guidance or advice to be a material consideration in the determination of planning applications.

“59. The only alternative option was to make no change to the existing provisions.”

This is totally illogical. There will still be supplementary guidance, just non-statutory; and these proposals are not 'the only alternative option' – you could abolish all supplementary guidance. What is the point of continuing to allow this system simply under a different name? No-one would benefit except council officials, who like supplementary guidance because they can change the approved plan secretly and unilaterally. Examples of a planning department in this respect are given in para (1) of the submission (referred to as 'the Spotlight memo') of the group 'Spotlight on Dumfries and Galloway' (see the listing in the Committee's records, but an extract is provided in Appendix 1 below).

Section 16 of the Bill - Local Review Body

The Policy Memorandum says:

“104. The 2006 Act .... introduced new requirements, under section 43A of the 1997 Act, for the delegation of certain decisions of planning authorities to officers of the authority. Section 43A also introduced a related local review procedure to replace the applicant's right of appeal to the Scottish Minsters in cases so delegated. The body conducting the review ('the local review body') is a committee of the planning authority.

“105. The Bill will keep more decisions at the local level through further delegation of decision-making and further movement of appeal decision-making responsibilities from the Scottish Ministers over to local review bodies ... Section 16 of the Bill will add further types of application to the scope of the section 43A schemes of delegation, for officer decision, and consequently to be subject to local review where appropriate. Those additional application types are for: (i) display of advertisements; (ii) certificates of lawful use or development; and (iii) prior approval under a development order ....”
As set out in para (4) of the Spotlight memo these provisions contravene Article 6 of the European Convention on Human Rights (ECHR) - “Right to a fair trial ... In the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal ...” You only have to recite the words in para 104 above 'delegation of certain decisions of planning authorities to officers of the authority. The body conducting the review ('the local review body') is a committee of the planning authority’ for it to be clear that there is to be no 'independent and impartial tribunal'. As for 'a fair and public hearing' see para (4) and Sch 2 of the Spotlight memo but an extract is provided in Appendix 2 below. These details alone would take the LRB proceedings out of compliance with Article 6.

Para (4) of the Spotlight memo also deals with the more complicated issue of Article 13 of the ECHR("Right to an effective remedy Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority...."). Suffice it to say that the words in paragraph 104 above “local review procedure to replace the applicant's right of appeal to the Scottish Ministers in cases so delegated.” “The body conducting the review ('the local review body') is a committee of the planning authority” show a clear breach of this Article.

Under the terms of the Scotland Act 1998, Scottish legislation which breaches Article 6 of the ECHR could be declared invalid by the courts (see para (4) of the Spotlight memo, but an extract is provided in Appendix 3 below). To date no-one has challenged the validity of the 2006 Act, because by the nature of the applications involved the value of the proposals is too small to justify risking the expense, even if the applicants had the available funds. Adding new types of application to the system, as proposed in this Bill, increases the possibility that big business could become involved and challenge the Act in the courts. If successful it would not be just the relevant type of application concerned which would be affected but the whole system, and unrelated decisions back to 2010, when the Act was brought into force, could be revisited by disgruntled applicants (and if you asked people who have been through the Local Review Body system, you would find plenty of these).

Fortuitously, an example has arisen recently in England. Moorings on the Thames in Chelsea were bought by a property developer who made a disputed claim of long-standing residential use by houseboats, so that he would be able to develop residential (as against recreational) use. If he is right, in that exclusive area he could sell seven new houseboats for £6 million each, and command massively increased annual mooring fees. The increase in value of his investment would run to tens of millions of pounds. Although that claim is now withdrawn, the legal procedure used was to apply for a ‘certificate of lawful use’, as in Scotland it is proposed in this Bill to be delegated to the officer/Local Review Body system. If an applicant like that were dissatisfied, they would soon launch a legal challenge.

If, therefore, the Scottish Parliament wishes to ensure the smooth continuation of the local courts, it would be wise to withdraw this part of the Bill.
Appendix 1

Extract from para (1) of the Spotlight memo, relating to supplementary guidance.

“Supplementary guidance at present provides an opportunity for council officials to bypass councillor approval for policies. One such policy, of refusing permission in any circumstances for backland development [i.e. development behind an existing building line], was first implemented in Dumfries and Galloway in 2012, totally outside the statutory plan (and the existence of such a policy was at that time formally denied). In 2014 the policy was still omitted from the newly-produced Local Development Plan” but subsequently incorporated in an obscure ‘supplementary guidance’.

Appendix 2

Extract from para(4) and Sch 2 of the Spotlight memo, relating to Local Review Body procedure.

“The LRB can undertake a site inspection for the purposes of any review hearing, and the application forms provided ask if you want this to take place. As the LRB is supposed to be considering the whole case afresh, and not simply scanning the original officer’s decision for apparent flaws, you would expect this to be almost automatic but analysis shows it is not.

“You are specifically asked if you would like to submit ‘further written submissions’. Obviously, if queries arose whilst the committee was considering the case, you might want to do this. The application form also asks if you would like an oral hearing, but the standard letter sent to appellants simply tells them they may not speak at the first meeting. It is rarely therefore worth anyone’s while to attend in person......

“The procedure at meetings is that the chairman recites the documents listed in the published agenda. A cursory listen to the recordings will suggest that not all members have digested these documents, if they have read them at all. At almost every meeting, however there is a record made that ‘having considered the options available to the Review Body on further procedures, that the Review Body had sufficient information before it to enable it to determine the review’ and ‘having considered the terms of the Notice of Review, the representation made, and the observations of the Appointed Officer...’ they agree to make the decision there and then.

“The applicants therefore generally discover that what they thought was a routine, preliminary meeting has been a final hearing. Their requests to be allowed their ‘day in court’, to produce rebuttal evidence, or to have the property inspected by those who need to know about it in order to make an informed decision, have all been summarily rejected at the meeting and the matter decided in their absence. Not unnaturally, applicants feel not only aggrieved but cheated and misled.”

“There is routine production at Local Review Body hearings of photographs not previously disclosed to applicants, along with commentary and implication given by a council officer (in the guise of an ‘independent adviser’).”
Appendix 3

Extract from para (4) of the Spotlight memo, relating to the European Convention on Human Rights.

“We can provide detailed analysis to suggest that the High Court would declare this whole system unlawful (in Ruddy v. Chief Constable of Strathclyde [2013] CSIH73, the Court of Session accepted the principle of the overriding nature of the ECHR, even without taking account of the Scotland Act).”