

FURTHER INFORMATION FOR
ARGYLL AND BUTE COUNCIL LOCAL REVIEW BODY
20/0002/LRB & 20/0003/LRB
REFUSAL OF PLANNING PERMISSION IN PRINCIPLE
19/02314/PPP & 19/02315/PPP
SITE FOR THE ERECTION OF A DWELLINGHOUSE
PLOT 1 & PLOT 2, LAND EAST OF CALA NA SITHE, KILMORE, BY OBAN
31/03/20

Further information as requested by the LRB in support of the aforementioned Reviews, namely:

1. Comments in relation to the case law that has been submitted by the applicants agent in support of the request for review; and

2. The opinion on whether the LDP 2 is considered to be the settled view of the Council.

The points raised are addressed as follows:

1. In the considered professional opinion of officers, the case law submitted by the applicant's agent in support of the request for review struggles to suggest material relevancy to the matters the subject of the current Review(s). It speaks in considerable detail about a fundamentally dissimilar proposed development to the one the subject of the current Review and the reasons for introducing it by the appellant's agent in the agenda pack document 'Response from Applicant, item 3' is somewhat unclear. Any relevancy appears to be limited to a reiteration of the 'rules of engagement' for the review process. It offers no new perspective on the way that Argyll and Bute Council currently conducts its review process and there is no substantive disagreement with its conclusions.

Nevertheless, the LRB has requested comments on the case law from officers and we, therefore, present the following summary and commentary:

The case referred to (Sally Carroll against Scottish Borders Council and another against a Decision of a Local Review Body of Scottish Borders Council Dated 21 March 2013) concerned itself with a proposal to erect two wind turbines. A first planning application for this development was refused by the planning authority and a subsequent local review was dismissed by the Local Review Body for Scottish Borders Council, on 7th March 2011, on the basis that the development was contrary to the provisions of the Development Plan.

A second planning application for the same development was submitted and this was again refused by the planning authority but this time allowed by the Local Review Body for Scottish Borders Council, on 21st March 2013, on the basis that the development was consistent with the Development Plan, the LRB having decided (in brief) that the economic benefit of the proposed development was sufficient to outweigh its harm.

The argument advanced by an objector to the development, as 'Appellant and Reclaimer' to the Court of Session, was that the LRB decision of 21st March 2013 to grant planning permission subject to conditions was fatally flawed for a multitude of reasons and that the Lord Ordinary at a previous Judicial

Review (which found for Scottish Borders Council and against the Petitioner) erred in his judgement and interpretation of relevant legislation and case law.

The matters raised by the Reclaimer and the subject of this document are lengthy and complex but, in essence, the arguments advanced include that:

- The LRB failed to properly consider all of the material planning considerations, specifically its Technical Guidance Note (the TGN) which indicated that there was no scope for medium or large scale turbines in this location;
- The LRB failed to consider the matter entirely afresh (*de novo* – ‘as new’) – specifically, the LRB did not explain its findings or give adequate reasons for all of its points of conclusion or for its reasons to grant planning permission – all of which were contrary to the previous decision by officers to refuse planning permission
- The LRB failed to allow all parties adequate participation in the Review. There was no fair hearing or opportunity to make representations, and no site visit;
- The LRB failed to demonstrate how the scale of the proposed development was proportionate to the claimed economic and renewable energy benefit of the proposal;
- The LRB failed to correctly interpret planning policy in that it did not carry out any appropriate balancing assessment exercise between the environmental and visual harm caused by the proposed development on the one hand and the economic benefit of it on the other (or, if the LRB did carry out such an assessment, it failed to adequately express and explain its findings);
- The LRB failed to properly consider and explain the impact of the proposed development upon residential amenity;
- The LRB failed to have proper regard to the question of cumulative impact and explain their reasoning on this matter. And that the LRB failed to understand the difference between landscape impact on the one hand and cumulative impact of the other ;
- The Lord Ordinary, in his prior Judicial Review judgement, failed to properly interpret many or all of the above points or to give them appropriate weighting (or both).

It was therefore argued that the multiple errors and failures by the LRB were not trivial, and that the LRB’s decision should be quashed.

The 'respondents' (Scottish Borders Council) countered these arguments with the following:

- The Court is concerned only with the legality of the LRB decision and not with its planning merits. Matters of planning judgement being solely for the Council as decision maker.
- The Reclaimer had misinterpreted the legal scope of the Local Review process as contained within the applicable legislation; that it was a matter solely for the LRB to determine how much information they needed to enable them to assess and decide upon this planning application and that this is solely a question of 'planning judgement'. The LRB was, therefore, entitled to reach the view it had.
- The TGN did not count as planning policy or supplementary guidance at the time of the LRB's decision and that it was not, at that time, a material consideration. And that this argument was accepted by the Lord Ordinary. – It was only adopted as Council policy in December 2013 and, at the time of the LRB consideration and decision, it was internal guidance and only being worked up towards being a material consideration.
- The LRB did pay adequate and appropriate regard to the matter of cumulative impact and that they had understood the difference between this and landscape impact. The LRB had taken full regard to these issues but, in their opinion, these negative impacts were outweighed by the economic benefit of the development.
- That the matter of the impact of the proposed development upon residential amenity had been properly assessed and found to be acceptable.
- That the various errors of fact alleged by the Reclaimer did not hold up to scrutiny and that the issues of proportionality raised by the Reclaimer were a matter of semantics. On this point (proportionality), the Council referred to Scottish Planning Series Circular 4/2009, and to paragraph 6 of this which states: "The planning system operates in the long term public interest. It does not exist to protect the interests of one person or business against the activities of another. In distinguishing between public and private interests, the basic question is whether the proposal would unacceptably affect the amenity and existing use of land and buildings which ought to be protected in the public interest, not whether owners or occupiers of neighbouring or other existing properties would experience financial or other loss from a particular development."

- That there was no substantive case to answer on the matters of 'natural justice' raised by the Reclaimer – That she was not the applicant in these proceedings but an objector; that whilst she did have a right to be heard, this right had been fulfilled by the LRB in accordance with all relevant legislation. – It was reasonable for the LRB not to ask for further written representations or to hold a hearing. And that a site visit is not required in every case. In any event, the LRB agreed with and adopted the findings of the planning officer on visual matters, so a site visit would have made no difference to their decision.
- That the LRB had considered the case 'as new' (*de novo*); that they had examined the facts and come to a different decision to that of their planning officers following an appropriate level of scrutiny and that they were entitled to arrive at that view.
- That the reasons given by the LRB for reaching its decision were reasonable.

The Court of Session found, in all matters of substance, for the Council and against the Reclaimer; that the LRB had properly considered the matter *de novo*, that they had given due regard to all material planning considerations, that they were entitled to arrive at the decision they had, and that the decision was wholly competent and in compliance with the relevant statutory requirements. The Court of Session found that the Lord Ordinary had not fallen into any error of law in his previous judgement.

In this judgement, the Court of Session stated, *"In the circumstances of the present case, we are persuaded that the LRB did indeed take a de novo approach to the material before it. It made its determination having had regard to the review documentation, as it was obliged to do. It identified what it considered to be the determining issues in the review, it listed the relevant policies in the Development Plan, and it listed the other material considerations which it took into account. It expressly stated that its consideration of the matter was de novo. We are satisfied that the LRB did carry out what senior counsel for the reclaimer described as a "full substantive and procedural review" and that its decision complied with the requirements of the 1997 Act and the 2008 Regulations."*

The suggestion by the applicant's agent in relation to the current Review(s) appears to be that, somehow, the LRB for Argyll and Bute Council does not conduct its 'local reviews' as a *de novo* appeal as required by relevant legislation and as discussed within the Court of Session case law as summarised above.

This suggestion is not correct. Argyll and Bute Council operates its LRB process in strict accordance with all relevant statutes and guidance and,

fundamentally, a letter from the Scottish Government's chief planner to Heads of Planning dated 29 July 2011 which concluded that "the consideration of an application by an LRB is in effect a consideration of an application by the planning authority and should be treated accordingly. The Scottish Government therefore considers that, based on the above argument, the "de novo" approach should be adopted in determining cases brought before LRBs. This approach is also consistent with the approach to appeals adopted by DPEA. Consistency of handling of cases regardless of whether they are determined by LRB or DPEA would, in our view, promote confidence in the planning process".

The applicant's agent in the agenda pack document 'Response from Applicant, item 3' states, "*When local reviews were introduced Scottish Ministers stated that they should be considered in the same way as planning appeals and should adopt the de novo approach. De novo is a Latin expression used in English to mean 'from the beginning', 'anew'. This was confirmed as the correct approach in the case of Sally Carroll v Scottish Borders Council (copy attached). This means that the decision maker must take into account all material considerations and that can include information/documents that emerge after the original delegated or committee decision. This happens all the time at appeal and the situation should be no different here. It is therefore entirely legally competent for the councillors to consider the Proposed LDP and decide what weight to give it.*"

Officers agree with this statement in its entirety. This offers nothing new and the LRB are hereby advised that the way in which they conduct their business is wholly in accordance with this statement.

However, the critical factor in this case is the material weighting that can properly be attached to the early stages of the 'Local Development Plan 2' adoption process.

This is discussed in response to the second request for information below.

2. Whilst it is, indeed, legally competent for the LRB to consider the proposed LDP2 in execution of the *de novo* approach discussed above, the fact remains that the current status of the proposed LDP2 is such that no substantive material weight can be properly afforded to it at this time.

The proposed LDP2 remains at an interim stage in its journey towards adoption. Whilst Members have agreed the 'Main Issues Report' as their 'settled will', the progress of LDP2 remains at a point only approximately mid-way towards eventual approval and adoption.

The statutory public consultation period following the publication and approval by Members of the Main Issues Report has recently closed (23rd January

2020). The Council is currently analysing a very large number of objections to the proposed LDP2, including a significant number of objections to the critical proposed Policy 02 upon which the appellant places fundamental reliance for the support of his argument.

There have also been objections to the proposed Policy 71 (Development Impact on Local Landscape Areas), which is a further key planning policy of the proposed LDP2 relevant to the development.

These objections require thorough scrutiny and assessment by officers in an attempt to resolve them.

Any remaining policies subject to unresolved objection will thereafter require to be determined through an examination by independent Reporters appointed by the Scottish Government.

The LRB are, therefore, respectfully advised that they should not afford LDP2 any material weight at this time. Substantive weight as a material planning consideration can only be afforded to policies within the proposed LDP either where those existing policies have not been the subject of objection and are unlikely to be impacted by any subsequent scrutiny by the Reporter's Unit of the Scottish Government (and proposed Policy 02 has been the subject of a significant number of objections with proposed policy 71 having been subject to a lesser, but material, number of objections) or where those policies have been determined as acceptable following independent examination by the Scottish Government. – Neither of these two circumstances currently apply in this case.

The timetable for the progress of LDP2 – the Development Plan Scheme (DPS) – was approved by Members at their Meeting on 18th March 2020. The DPS, as approved by Members, includes the following key dates which affect those critical proposed planning policies 02 and 71: Submission of LDP2 for examination by the Scottish Government – November 2020; Completion of examination by the Scottish Government – June 2021; Adoption of LDP2 – October 2021.

Therefore, and in conclusion, whilst the proposed LDP2 is a relevant consideration in the LRB's assessment of this Review, there should be no substantive material weight attached to it at this time.