GS/420/IK

Petition PE1357

Reply by the Petitioners to the Response of the Scottish Government

Background

The PPC considered this petition on 5th October. The petition, in short, sought an inquiry or other form of investigation into the s36 consenting process in Scotland, citing its imbalance as among developers, the Government and the public. The PPC continued consideration of the petition and asked three questions of the Scottish Government. The Scottish Government has replied by way of a five page letter from the Minister. The petitioners have been given the opportunity of submitting this response.

The concern and direct experience of the petitioners is that the s. 36 consenting process and the people who run it give insufficient weight to the importance of the statutory Development Plan, the views of the Planning Authority, and the opinions, interests and amenity of affected communities. It is sometimes forgotten that these developments are the largest land-based developments ever seen in Scotland, and therefore have the potential for the greatest range of effects.

The Minister's Letter

The first two and a half pages of the Minister's letter contains only a generic description of the energy sector and the consenting process. All of this is well understood by all parties and no time should have been wasted on it.

However, at the end of second paragraph on the first page the Minister uses the word "demonstrate". That is exactly the key point the petitioners have made. The decision-making process is far from demonstrably open. It is, in fact, the very

antithesis. It is actually a closed and impenetrable book, immune from the public and divorced from the interests of the people it is supposed to serve. Furthermore, its officials appear to see no need for greater openness or public accountability.

As the examples below will show, it is in reality a generally permissive and encouraging process which involves close and intimate liaisons among the industry, civil servants, and on occasion statutory consultees, to the virtually complete exclusion of community or private interests.

In the second last paragraph of the generic section of his letter the Minister mentions the Development Plan. It is of significance that he does not use the words "*in accordance with*". There does not seem to be any perception within the ECDU that there is a statutory requirement to make planning decisions according to the Plan, unless material considerations indicate otherwise[1]. One of the problems is that decisions are often taken by Ministers contrary to the terms of the Development Plan, but without clear identification of the "material considerations" which have prevailed over the Plan.

Turning to the response to the three questions from the PPC, we reply as follows:

- On questions 1 and 2, the Minister avoids the use of the word "demonstrate". Because the ECDU does not -- by choice - interact with the public in the open way that a Local Authority Planning Department does, it is impossible for any contributor to the debate to know how representations have been evaluated and weighed in the balance, especially where conflicting expert opinions are involved. Decisions are issued with wording like "*all submissions were considered*" but without any reasoning. It is a regrettable fact that the ECDU does not have expert planning, landscape or

[1] Town and Country Planning (Scotland) Act 1997, ss.25 and 37

environmental expertise in-house, and that their internal appraisals are never published for testing in an inquiry environment. The ECDU never appears at inquiries to explain, for example, how energy policy may be applied to a particular case. It has to be said too that the quality of some of the written analysis in decision letters also leaves something to be desired.

- Also, on question 1, the case examples used are revealing. Lewis could not be granted because of EU protected interests, so there was no real decision; Calliachar has actually been approved, although EU law has been broken by the SG's failure to perform an Appropriate Assessment; Clashindarroch has been resubmitted; and the decision letter on Kyle almost invited a resubmission, after the applicant has carried out significant work to resolve the radar difficulties. These are hardly typical examples, but are the sort of sleight of hand that we have come to expect from the ECDU, whose "deployment" function dominates over any other.
- On question 3, this is only a partial answer and needs to be expanded with regard to planning application wind farms (i.e. <50MW) and local and regional designations.

Differences between England and Scotland

Recent research published by the Renewables Industry, considered at a recent conference in Glasgow points to increasing differences in the performance of the consents system north and south of the border. Basically, the perception is that it is much easier to secure a consent in Scotland than in England. As the Act is a UK Act and as the tests to be applied are the same north and south of the Border, this result can **only** be brought about as a result of different applications of the Act. That differential has led to a perceived imbalance, and is patently unfair, placing far greater stress on the communities of the smaller partner within the UK.

In England the relevant Department has published a clear and readable Guide to the s. 36 Consenting Process. It is an admirable document that is utterly transparent as to the process that is to be followed by applicants, Councils and Third Parties. No such guidance has been published by the ECDU, whose processes remain shrouded in secrecy. It is therefore not possible to check their actions against prescribed procedure.

There has been a recent trend in terms of the differences in procedure which has become the cause of particular concern. Nowadays, in Scotland, when a relevant Planning Authority objects, instead of proceeding directly to a Public Inquiry as provided for in Schedule 8 of the Act, the ECDU uses the provisions of Schedule 8 to allow, enable and facilitate discussions among themselves, the applicant, consultees such as SNH or the MoD, and the Councils, *to the exclusion of the public*, with a view to "resolving" a Council's objection and thus denying the expectations of Third Parties within the affected community to be able to attend and take part in a Public Inquiry. That covert process has been followed in the cases of Fallago Rig (Scottish Borders); Wester Dod (Scottish Borders); Rowantree (Scottish Borders); and Glenkirk (Highland).

Other Material Issues

There is a range of other procedural issues, that are becoming commonplace. These add to the case for the requested investigation. These are as below:

1. The requirements for tough legal agreements governing environmental issues, as with the Gordonbush Habitat Management Plan (HMP), are being ignored; neither the ECDU nor local authorities have the staff or the skills to carry out this work; SNH are entirely passive in the face of anything labelled "renewable".
2. The implementation and monitoring process for highly complex renewable energy consents is virtually non existent; neither the Scottish Government,

nor most planning authorities, have the staff or resources to carry out effective monitoring, and on occasion (as at Dorenell) they have admitted as much in public;

3. Habitat Management Plans are not being worked up in detail until after consents are issued (if at all) and therefore their environmental effects are not being assessed at the primary point of decision;
4. Ministers have failed to carry out Habitat Regulations Assessments, as at Calliachar, but will not admit that they have done so;
5. The ECDU will not meet with or engage with the public, agents for proprietors, Community representatives or professional advisers, but they readily do so with developers. The perceived "closed shop" for the industry effectively excludes and fails to recognise the public's voice.

Conclusions

Because the ECDU chooses to operate in such a closed and oblique manner and because, more recently, it has sought to assist developers to actively avoid Public Inquiries, affected communities clearly see that the ECDU (which should be the outward facing personification of Scottish Ministers) is quite failing to act as an independent and impartial tribunal when it comes to making decisions. These are all decisions which affect the civil rights of Third Parties, who have a direct interest in the outcome.

Having regard to the above, and the particular disingenuity of the Minister's reply, the Petitioners' request that the PPC asks the Scottish Government to conduct an independent investigation into the s36 consenting process seems fully justified. To call it "robust" or "mature" is insulting to all those whose lives can be changed forever by the imposition of such disproportionately large developments bringing little benefit to communities or wider society.

Should the Scottish Government decline such a request, (a response that can perhaps already be anticipated from the Minister's letter), then with respect it is submitted that the Scottish Parliament should conduct its own investigation by the hand of an appropriate Committee, and invite the submission of evidence. It is likely to be overwhelmed.

SUBMITTED on behalf of Tessa Packard

8 November 2010 John Campbell QC