Scotand Against Spin response to Consultation on DPEA Guidance Note 24

8th September 2020

1. *Do you agree the principles and desired outcomes set out above which under-pin the proposed issue of this Guidance Note?*

Yes, the principles are honourable and equitable but it is patently obvious to the public, who are often the 'third parties' at Appeals that such principles are not always upheld.
There is a need for improved outcomes and improved decision making by DPEA which encompasses and addresses all factual material presented promptly by all parties.
Third parties accept that the planning process is heavily weighted in favour of commercial developers, but expect there to be more equity in the Appeals process.
Third parties believe that Reporters give **particular** latitude to Appellants for them to avoid adhering to published timetables for the submission of procedural documents.

It is clearly unreasonable for well funded and expertly represented commercial organisations to seek advantage over local authorities, privately funded third party agents or self represented third parties, by being allowed to submit procedural documents to an Appeal at a time which is convenient and advantageous to them.

It is not in DPEA's interests to allow slippage in a procedural timetable without valid and documented reason as this reflects badly not on any one party to an Appeal, but on the accountability and published statistics of DPEA.

2. *Do you agree that issuing this Note is an appropriate way to proceed to further the achieving of those principles and outcomes?*

Issuing the note is appropriate. However, it will only be effective if sanctions are applied for significant digressions and departure from stated procedure and rules.
Rules need to be upheld for three reasons:
1) So that the public understands the appeal procedure and can contribute effectively at Appeals and
2) So that there is equity for all parties and
3) So that DPEA can function efficiently and the DPEA, not the appellant, is seen to be in control of proceedings.

The outcomes will only be achieved if Reporters uphold those principles.

Material, critical amendments to previously submitted documents should be encouraged and accepted by DPEA up until the time a Decision Notice is issued, with notification and leave to comment on those amendments made available to all parties in an appeal.

The GN 24 refers to this being acceptable and indeed necessary, but such policy must be upheld by Reporters.

If third parties, (rather than appellants or Councils) commission independent expert evidence, which may include relevant policy or legislative matters, which are ignored or completely disregarded in a Decision Notice, then the creditable aspirations of the GN 24 will be compromised.
It should be incumbent upon Reporters to accept evidence for consideration on an equal basis from all parties, including third parties, and to give equal weight to any independent expert opinion commissioned by third parties.

Article 6 §8 of the Aarhus convention (which the Scottish Government has confirmed applies to all local authorities) provides an expectation that third party (public) objectors will have their concerns recorded, addressed and reasoning provided in a Decision Notice. This can only happen if any third party expert opinions are acknowledged and considered within Decision Notices on an equal footing with expert opinion from the appellant and defendant (usually local councils).

3. Is there more that can be done by DPEA or others to pursue these ends?

Yes.
Reporters must be seen to take more control of Appeal procedures and apply and enforce the Rules that already exist.

Extensions for late submission of documents should be granted only for justifiable reasons, such as certifiable illness, bereavement etc. These reasons should not be made public, but if justifiable reasons are known to the Reporter and rules otherwise enforced, then the use of valid extensions for late submission of documents will not be abused and parties will have more respect for the appeals process.

Where parties do not comply with published procedure, then this should constitute unreasonable behaviour and consideration should be given to awarding costs against that party. Unreasonable delay in the Appeals process causes frustration and increased costs for all parties and serves to reduce the efficiency of the DPEA. Sanctions for unreasonable behaviour, for failing to adhere to procedural instructions, already exist under Expense Circular 6/1990 (paragraph 8), but these sanctions are applied ineffectively.

The DPEA exists to hear Planning and Environmental Appeals.
This guidance note is concerned that not all the relevant information is before a Reporter such that they may make a reasonable and informed judgement.
If DPEA is truly interested in understanding the material, environmental facts of a case, then they should be prepared to give unrepresented or even represented third parties more consideration to present their case effectively. It will often be the local public who have the most intimate knowledge of local environmental and ecological matters.
It should not be the case that bullying of public third parties by an Appellant's experienced Agents and professional legal team has the effect of obscuring and silencing third party evidence.

An oral appeal procedure is not a criminal court. The purpose of an oral procedure is for a Reporter to hear and examine all the evidence; not to allow a public witness

to be destroyed or humiliated so that their evidence is ignored or suppressed.

Third party evidence may be presented by a member of the public with no previous experience of public speaking. To comply with the Aarhus convention, public participation should be encouraged, not discouraged and it is the responsibility of DPEA as a servant of the Scottish Government to uphold this principle. In practice, this relies on Reporters acting as an effective referee in oral proceedings.
Whilst cross examination in an Inquiry seeks to determine the truth of the presented evidence, irrelevant, destructive and demeaning cross examination techniques of members of the public should be discouraged. Moderating cross examination is in the control of the Reporter, but such control is not universally excercised.

4. Is there anything missing from the Note? Are there other examples or behaviours which this Guidance Note should address?

Reporters need to take more control of oral procedures.
It is not acceptable for third parties attending oral procedures, who may suffer significant financial losses due to lost employment, to be relegated to being allowed representation of a few minutes, having waited perhaps an entire week to present their evidence.
There are examples where appellants have attempted to 'filibuster' the time allowed for an oral procedure such that other parties are unable to present their cases effectively.

For planning appeals it is almost always the public who will suffer any adverse effects of a development; their side of the argument is important so that a Reporter can make a balanced decision. This is a fundamental principle of Aarhus, which is either ignored or given lip service by DPEA and many Reporters.

5. *Are there better ways in which we could focus the issues to further the achieving of those principles and outcomes?*

A developer may only present facts which promote their case and may omit environmental evidence deleterious to their application. This is usually underpinned by the goal of making a commercial profit.
A Council's evidence and expert opinion may be restricted by limitations of publicly funded financial resource and weighted towards their own interests.
It is frequently third party evidence which exposes the material environmental omissions in the appellant's case. For this reason, third party evidence should be given greater consideration by Reporters and if necessary, further environmental information requested from the appellant.

Counsel, solicitors and agents pursuing matters during oral procedures irrelevant to the actual Appeal should be reined in by a Reporter; at the very least, this is wasting everyone's time.
This happens repeatedly.

Routinely employing more than one Reporter to an Appeal categorised as a major

development (requiring an EIA) would be beneficial in being seen to provide more equable scrutiny of material submitted to an Appeal by all parties and provide a more balanced and informed Decision.

6. *Is the right balance struck between full provision of information throughout and the risk of undue delay as circumstances change in the course of consideration by DPEA of an appeal or application?*

No.
See 2.above.
To improve the quality of Decision Notices, material amendments to submitted documents should be accepted up until a Decision Notice is issued, with right of comment on any amendments available to all parties.
Material amendments should not constitute submitting new, previously unseen environmental assessments, new information or new reports.

If new or updated environmental information is required from the appellant, then to comply with Environmental Information Regulations, this requires comprensive re-notification to the public and sufficient time to allow further representation from the public; usually a minimum of 6 weeks.
This delay should reinforce the necessity for planning applicants and appellants to provide comprehensive and professionally qualified EIA statements from the outset, as required by The Town and Country Planning (EnvironmentalImpact Assessment) Regulations 2017 18.(5).
The failure to provide comprehensive, suitably qualified independent expert EIA for a major development will cause unnecessary delay and could be construed as unreasonable behaviour.

7. *Is there more that DPEA can do in relation to these matters to further the achieving of those principles and outcomes?*

Yes.
To encourage effective public participation in planning appeals the following has been suggested and raised at DPEA stakeholder meetings*:*

Public notification of planning applications and appeals must be effective and inclusive. Documents held at post offices and public institutions may not be accessible for the disabled, socially deprived or rural residents (or during lockdown measures). Local newspapers may have inadequate circulation to reach all those who may be affected by a proposal.
Full access, at no cost to the public of planning proposals, environmental impact assessments, notices and related documentation to a planning application or appeal procedure is mandatory.
This is a requirement under Aarhus convention Articles 1, 3 and 6.
Specifically, Article 6 §6 provides
"6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national

law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure…"

Whilst this is most readily achieved with publication on a Council, ECU or DPEA website, the lack of access for those in rural areas with inadequate broadband or mobile phone signal requires to be addressed.

The onus should be upon the appellant to bear the costs of effective public notification and participation if an internet connection is not readily available to the public who may be affected. It is the case that members of the public are currently being charged considerable sums by some developers/appellants for CD's containing planning documents and environmental impact assessments in areas where internet is not available. Hard copy documents are being charged at hundreds of pounds.

Environmental Information Regulations provide that that information must be provided in the format requested by an applicant. Renewable energy companies are subject to FOI regulations and subject to this legislation.

The onus for demonstrating that the public have free and accessible information to an appeal procedure should be upon the appellant and that should be evidenced by a developer to an appeal and upheld by the DPEA. The DPEA, as the responsible public authority, has a responsibility to ensure that requested information is available to all parties to an Appeal, including the public.

Effective public/third party participation would be improved by providing a 'handbook' explaining appeals procedures, terminology, and requirements expected of parties to an Appeal.

The rules related to procedures should be described so that parties understand there may be penalties for unreasonable behaviour.

Examples of well structured precognitions, witness statements and closing statements would encourage more effective public participation without the need for employing expensive agents or professional representatives.

Participation in an oral Appeal procedure in particular is a daunting and unknown prospect for members of the public. The provision of a 'public advocate' at little or no cost to third parties to provide support at public inquiries, particularly in the setting of aggressive cross examination, would be of particular value. This would help address the imbalance in the system and could be funded from an increase in the planning application fee.

Whilst developers can set Appeal costs against commercial losses and tax, and local authorities are funded by the taxpayer; third parties, often the most disadvantaged, are required to self fund. The Scottish Government expenses for appeals and other planning proceedings Circular 6/1990 openly discriminates against third parties, awarding costs to third parties only in 'exceptional circumstances'.