

# grant and geoghegan

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Chief Legal Officer  
Per Mr R Ritchie (Committee Services)  
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Ref - RR/LRB/Case 004

26th March 2010

Dear Sir

**Request for Review: Planning Application 09/01611/PPP - Planning Permission in Principle for House at Roadside Croft Bracobrae, Grange, Keith**

I refer to your letter of 8th March 2010 regarding the above Request for Review.

We have received letters dated 10th March 2010 from Mrs Smith (Principal Planning Officer) and 12th March 2010 from Mr Gerring (Senior Engineer - Transport Development). Your letter of 8th March 2010 states that we have until 31st March 2010 to respond.

Mr Gerring suggests that our introduction of the new Scottish Planning Policy after the submission of Review invalidates the statement we made at the time that that no new matter was raised in the Notice of Review. This is not correct as the new Scottish Planning Policy was only introduced by the Scottish Government after the Notice of Review was submitted, which is confirmed by Mr Gerring in the first page of his letter. It was impossible to refer to it in the Notice of Review as it was not published at the time.

Mr Gerring goes on to state that our introduction of the new Scottish Planning Policy is at variance with Article 9(5) of the Town and Country Planning (Schemes of Delegation and Local Review Procedure)(Scotland) Regulations 2008. Once again this is not correct. Your letter of 8th March 2010 confirms that the LRB agreed, on the advice of its Legal and Planning Advisors, that the information we submitted would be treated as new evidence and dealt with under Article 15 of the Regulations which is the basis for handling such information under Article 9(5) of the Regulations in terms of written submissions.

Mr Gerring is also of the view that the information regarding the new Scottish Planning Policy should be precluded because it was published after the decision on the planning application by the planning authority and there are no exceptional circumstances to allow it to be considered.

The decision of the Council as planning authority is now being reviewed by the LRB. It is a fundamental requirement of Section 25 of the Planning Act that any determination under the Act which has to have regard to the Development Plan must be made in accordance with the Plan and material considerations. Scottish Planning Policy is a material consideration. Annex A of Circular 4/2009 - Development

Management Procedures - (part of the appendices to the Notice of Review), confirms this. As the decision of the LRB will have to be made under Section 25 of the Act it will have to have regard to material considerations and this includes Scottish Planning Policy as it exists at the time of the decision by the LRB on the Review.

Section 43B (1) of the Act allows for new matters to be raised where it can be demonstrated that the matter could not have been raised before that time or that its not being raised before was a consequence of exceptional circumstances. It has already been shown that the new Scottish Planning Policy could not have been raised at the time of the Notice of Review because it was not published until after both the submission of the Notice of Review and the deadline for the submission of the Review. This is accepted by the "Appointed Officer" (Mrs Smith) who states in her letter that;

*"as this policy was only issued on the 4th February 2010 it could not have been introduced earlier in the process". I am not aware of any facts or circumstances that would preclude submission of the new evidence"*

It should also be noted that Section 43B (2) of the Act makes it clear that nothing in Section 43B (1) affects any requirement or entitlement to have regard to the provisions of the Development Plan or any other material consideration. Therefore even if the tests in Section 43B (1) were not met it would still be necessary, in the determination of the Review, to have regard to the Development Plan and material considerations. Scottish Planning Policy is a material consideration.

It is also worth considering that the new Scottish Planning Policy is not actually a new "matter" in terms of Section 43 of the Act. Scottish Planning Policy was a "matter" before the "Appointed Person" at the time of the consideration of the planning application and the new Scottish Planning Policy is, in essence, a continuation and update, of this "matter".

Mr Gerring points out that the sections of the Scottish Planning Policy identified in my letter of 22nd February 2010 should be considered against the fuller context of the sections of Scottish Planning Policy they are taken from. The parts of Scottish Planning Policy referred to in my earlier letter are consistent with their context and Mr Gerring has not presented anything to suggest that this is not the case.

Mrs Smith states that there is nothing arising from the new Scottish Planning Policy which would require a change of interpretation of policy in this instance. The thrust of the points made in my letter of 22nd February is that Development Plan policy has not been applied in accordance with Scottish Planning Policy in relation to this case.

