

**Local Government and
Communities Committee**

5th Report, 2008 (Session 3)

**Planning Application Processes
(Menie Estate)**

Volume 1

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The Scottish Parliament

Local Government and Communities Committee

5th Report, 2008 (Session 3)

Planning Application Processes (Menie Estate)

Volume 1

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The Scottish Parliament

Local Government and Communities Committee

Remit and membership

Remit:

To consider and report on (a) the financing and delivery of local government and local services and planning; and (b) housing, regeneration, anti-poverty measures and other matters (apart from sport) falling within the responsibility of the Minister for Communities and Sport.

Membership:

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Kenneth Gibson (Deputy Convener)
Johann Lamont
David McLetchie
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The Scottish Parliament

Local Government and Communities Committee

5th Report, 2008 (Session 3)

Planning Application Processes (Menie Estate)

The Committee reports to the Parliament as follows—

INTRODUCTION

1. An application for outline planning permission for a proposed development at the Menie Estate near Balmedie was submitted to Aberdeenshire Council on behalf of Trump International Golf Links (Scotland) by their agents SMC Jenkins & Marr on 27 November 2006 (“the Trump application”).¹
2. The proposed development included two 18 hole links golf courses; a golf clubhouse; a golf academy; golf maintenance building and caddy shack; a short game area and driving range; a 450 unit resort hotel, conference centre and spa; 36 golf villas; 950 holiday homes; staff accommodation; parking areas; access roads and two future private residential housing areas for 500 houses in total.²
3. The proposed development was inconsistent with certain policies and proposals in both the Aberdeen and Aberdeenshire Structure Plan 2001-2016 and the Aberdeenshire local plan for the area. Part of the championship golf course would be built on the UK-designated³⁴ Foveran Links Site of Special Scientific Interest and the residential part of the proposal was located in an area defined as not allocated for housing.⁵
4. The application was considered first by Aberdeenshire Council’s Formartine Area Committee at its meeting of 20 November 2007, where councillors voted to support outline planning permission subject to 62 conditions. Under the Council’s Scheme of Delegation, and in accordance with its normal procedures, the application then required to be referred to the Council’s Infrastructure Services Committee.

¹ Copy of application APP/2006/4606 on Aberdeenshire Council’s website

² Aberdeenshire Council, written submission.

³ OR Col 429

⁴ OR Col 429

⁵ Aberdeenshire Council, written submission

5. Aberdeenshire Council's Scheme of Delegation (as at 17 May 2007) made provision for the delegation of the Council's statutory and other functions to Committees. Under the Scheme, the Council's Infrastructure Services Committee was empowered to exercise the Council's statutory functions under planning legislation to consider applications for planning permission where the development was in conflict with Council-wide policy and the relevant Area Committee was minded to approve the development.⁶

6. The Infrastructure Services Committee refused the grant of outline planning permission for the proposed development at its meeting of 29 November 2007, on the casting vote of the Committee Chair, following a tied vote.⁷ The Council's Standing Orders provide that where there is an equality of votes, the Chair of the meeting shall have a casting vote.⁸

7. The decision of the Committee was competent in terms of the Council's Standing Orders and, in terms of the Council's Scheme of Delegation, represented the final decision of the Council in terms of planning law.

8. On 4 December 2007 the Scottish Ministers announced that they would call in the application for their own decision, under powers granted by Section 46 of the Town and Country Planning (Scotland) Act 1997. At this point Aberdeenshire Council had not yet issued a decision letter refusing the application.

9. The decisions of Aberdeenshire Council and subsequent actions of the Scottish Government and the First Minister gave rise to considerable public interest and controversy.

10. For example, by 5.00pm on the day before the Infrastructure Services Committee meeting, the Council had received 2008 letters of representation in support of the proposal and 1115 objections.⁹ The First Minister, in his oral evidence, told the Committee that he had received 959 letters and emails on the subject.¹⁰

11. The Royal Town Planning Institute's Scottish Executive Committee wrote to the Cabinet Secretary, John Swinney, on 12 December 2007. In its letter to him, it said—

“...the handling of this case has raised a number of matters of principle. Members of the Institute have expressed concerns that the manner in which this case is handled should not appear to damage the integrity of the planning system. They stress the need to ensure that procedures are transparent, respected, and clearly understood by all those involved. Members of the Institute are concerned that the approach to scrutiny of this case should be politically impartial and according to planning law and planning policy.”

⁶ Aberdeenshire Council's written submission: Scheme of Delegation

⁷ Aberdeenshire Council's written submission: Committee Minute Extract

⁸ Aberdeenshire Council's written submission: Standing Orders

⁹ Aberdeenshire Council's written submission

¹⁰ OR Col 522

12. Questions, both oral and written, were asked in the Parliament during December and there was extensive media coverage from the date of the Infrastructure Services Committee decision onwards.

13. Against this background, the Local Government and Communities Committee, at its meeting of 19 December 2007 agreed **to take evidence on all aspects of the Scottish Government's handling of the planning application for the Menie estate in Aberdeenshire and to examine the decision-making process of ministers and officials, the legal advice relied upon and the transparency of their actions.**

14. As a consequence of the decision to call in an application once it had been refused and the reported actions of the First Minister and the Chief Planner meeting the developer after the decision to refuse was made and before the proposal was called in, some MSPs and others were concerned about the important balance of interests which need to be considered in the planning system.

15. Oral evidence was taken by the Committee at its meeting of 16 January 2008 from the Chief Executive of Aberdeenshire Council, Alan Campbell; the Scottish Government's Chief Planning Officer, Jim Mackinnon; the Cabinet Secretary for Finance and Sustainable Growth, John Swinney MSP; the First Minister, Alex Salmond MSP; and accompanying officials. The Committee took further evidence from Alex Salmond and John Swinney on 23 January.

16. On 30 January, the Committee heard from Roger Kelly, Convener, and Alistair Stark, past Convener, of the Royal Town Planning Institute in Scotland. Finally, the Committee took evidence on 6 February from George A Sorial, Managing Director of International Development and Assistant General Counsel, Trump Organisation and from Neil Hobday, Project Director in Scotland, Trump International Golf Links.

17. Aberdeenshire Council and the RTPI also made written submissions. The Committee is grateful to all those who gave written and oral evidence.

18. The Committee is of the view that the written and oral evidence which it has received, subsequent correspondence, answers to Parliamentary Questions and Ministerial statements have helped to illuminate the decision making process during the Scottish Government's handling of this application and that this has been helpful to Parliamentary scrutiny.

19. The Committee notes that additional information, in response to requests for information under the Freedom of Information Act, is still to be published by the Scottish Government at the time of publication of this report.

THE PLANNING FRAMEWORK

Legislative and administrative framework

Legislation

20. Two key pieces of legislation govern the operation of the planning system:

Town and Country Planning (Scotland) Act 1997 (c.8) (“the 1997 Act”): This Act is the basis for the planning system and sets out the roles of the Scottish Ministers and local authorities with regard to development plans, development control and enforcement.

Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (c.9): This Act is mainly concerned with the designation and protection of listed buildings and conservation areas.

21. The Planning etc. (Scotland) Act 2006 was an amending Act and the 1997 Act, although substantially amended, remains the principal piece of planning legislation. Most of the provisions of the 2006 Act are yet to be enacted, meaning that the Trump application was effectively processed under planning legislation largely unchanged since the enactment of the 1997 Act.

22. The Committee notes that at all levels the planning process should be both clearer and simpler for all participants and recognises that the implementation of the Planning etc (Scotland) Act 2006 seeks to achieve this.

23. While many of the provisions of the 2006 Act are still to be enacted, the culture change signalled by the legislation is already being developed. Critically, planning should be development plan led, the process should be transparent and the key role of early engagement with the local community in promoting a shared understanding of development proposals should already be prioritised.

Policy

24. The Scottish Government publishes a series of policy documents, known as Scottish Planning Policies (SPPs), on nationally important land use and other planning matters. Older examples of these documents are known as National Planning Policy Guidelines (NPPGs).

Circulars

25. These provide mainly procedural guidance along with interpretation of legislation.

Advice

26. The Scottish Government produces a series of Planning Advice Notes (PANs) which provide advice, principally aimed at local authority planners, on good practice and other relevant information.

Scottish Ministers and the Ministerial Code

27. Scottish Ministers approve Structure Plans and, in doing so, ensure that they are consistent with national policy. Ministers also ensure that local plans are in line with national policy during their preparation, although local plans are adopted by planning authorities.

28. The Scottish Ministerial Code sets out key information for Ministers on how they should conduct themselves in their Ministerial role. It is important to note that the Code is not a rulebook and it is up to individual Ministers to decide how best to act in any particular situation. Enforcement of the Code is a matter for the First

Minister and not the Permanent Secretary, although the Permanent Secretary can provide advice to Ministers on the application of the Code.

29. The full Scottish Ministerial Code is published on the Scottish Government's website at <http://www.scotland.gov.uk/About/14944/684>

30. The Code includes a section on ministerial involvement in planning cases, stating that—

“Ministers are free to make their electorate’s views about constituency matters known to the responsible Minister by correspondence, by leading deputations or by personal interview, provided they make clear that they are acting as their electorate's representative and not as a Minister.”¹¹

31. It goes on to say—

“It is particularly important to bear in mind that any attempt to influence the Minister taking a decision on a planning case, other than through the proper channels, could imperil the decision.”¹²

32. The Code summarises actions which Ministers can take, in representing their electorate’s views on planning cases as follows:

(a) They may write to the Minister responsible for taking a decision on a planning application arguing against/in favour of a particular course of action. But in so doing they should make it clear that they are representing their electorate or are acting at the request of a particular group or person;

(b) There is no reason why Ministers should not express agreement with the views of a particular group or person when submitting representations in connection with a planning application;

(c) Such expressions of personal opinion should, however, be restricted to those cases in which Ministers find it "unavoidable to express a view". In such cases Ministers should ensure that they follow the procedures set out at paragraph 6.8 above;

(d) Where, however, the determination of a planning application will lead to, or will implicitly involve, other decisions in which the Minister making representations is involved then that Minister should not make any comment of his or her own;

(e) Ministers may attend public meetings; they may make representations to a planning authority; they may argue a constituent's case at a public local inquiry; and they may take a personal position. But their role must be consistent with (a) to (c) above. They may not take a personal position in respect of cases under (d) above; and

¹¹ Ministerial Code Section 6.7

¹² Ministerial Code Section 6.8 (Text in bold format in the original document)

(f) Any broadcasts or contributions to press articles should be cleared with the responsible Minister (see [paragraph 8.11](#)).¹³

33. In addition the Code includes a section on planning specifically aimed at the Planning Minister, which states:

“One of the basic tenets of the planning system is that, in the interests of natural justice, decisions are based on an open and fair consideration of all relevant planning matters with the same information being available to all interested parties. Accordingly, **Ministers, and in particular the Planning Minister, must do nothing which might be seen as prejudicial to that process, particularly in advance of the decision being taken.** Action that might be viewed as being prejudicial includes (i) taking a decision, or being part of the decision-making process, in respect of an application which falls within the Minister's constituency; (ii) expressing an opinion publicly on a particular case which is, or may subsequently come, before the Minister for decision; (iii) meeting the developer or objectors to discuss the proposal, but not meeting all parties with an interest in the decision; or (iv) commenting on decisions once they have been issued, other than in terms of what has appeared in the decision letter or, in the case of structure plan approvals, any accompanying explanatory annexes.”¹⁴

Power to call-in planning applications

Legislative basis

34. Section 46 of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act) allows Scottish Ministers to direct that any planning application, or particular class of planning application, be referred to them for their decision.

Scottish Government Policy

35. The 1997 Act provides that Scottish Ministers have the power to direct a planning authority to refer any planning application to them for their decision at any point up until a decision letter is issued to the applicant. This process is known as ‘calling-in’ an application.

36. The Scottish Government has chosen to establish a clear policy framework governing the exercise of this power. Scottish Planning Policy 1, as amended by Planning Circular 5/2007, states:

In the main, local authorities are the planning authorities for their areas and, as such, it is right that they should be responsible for making decisions about the future development of their communities.

Scottish Ministers have a general power to intervene by calling in planning applications for their own determination - whether or not an application has

¹³ Ministerial Code Section 6.10

¹⁴ Ministerial Code Section 6.11 (The text in bold format is bold in the original document)

previously been notified to them. Ministers will, however, continue to respect the important role of planning authorities in making planning decisions, and will exercise this power to intervene in the process only where they consider such action necessary.

There can be a number of reasons why Ministers may choose to call in a planning application, and this will depend very much on the individual circumstances of the case. Circumstances where Scottish Ministers may intervene include:

- Where the proposal raises issues of national importance that would require a decision to be made at a national level.
- Where the planning authority proposes to grant planning permission against the advice of relevant national advisers (e.g. SNH, SEPA, HSE, Transport Scotland etc.), and where Ministers have not been convinced by the authority's justification for doing so.
- Where the proposal conflicts significantly with national planning (or other national) policy.
- Where Ministers are concerned that the planning authority's assessment and decision has not properly or fully justified a departure from the development plan.
- Where Ministers consider that there has been insufficient attention paid to legitimate planning concerns expressed by consultees and/or local people. (The existence of a substantial number of objections is not, in itself, sufficient grounds to merit call-in.)
- Where the planning authority's consideration of the proposal might be seen to have been influenced by a conflict of interests. (*Further advice is given in Planning Advice Note 82: Local Authority Interest Developments.*)

This list is not exhaustive, but is intended to give a flavour of the types of situations where Scottish Ministers may become involved in deciding planning applications. It will not necessarily follow that a proposal which might appear to fall within any of the circumstances noted above will definitely be called in by Scottish Ministers. In reaching their conclusions, Ministers will take into account other factors, such as any demonstrated need or urgency for the development, or the likely prospects for the proposal to ultimately be granted planning permission.

37. It should be noted that, with the exception of the first point, the grounds for call-in are predicated on a local authority's approval of an application. The first point could apply to a refusal but only if the application raises issues of national significance.

38. Scottish Ministers also have a quasi-judicial role in the planning system, deciding on the grant of planning permission for called-in applications and for planning appeals. When a planning authority refuses planning permission or grants planning permission subject to conditions the applicant has a right of appeal to the Scottish Ministers within six months of the issue of the decision notice.

“Issues of National Importance”

39. There is no definition, in either legislation or policy, as to what constitutes an “issue of national importance”. It is up to Ministers to decide whether a development raises issues of national importance.

“National Developments” and “Developments of National Significance”

40. A development which raises issues of national importance should not be confused with a “national development”, sometimes referred to a “development of national significance”.

41. The new Planning etc. (Scotland) Act 2006 (the 2006 Act) establishes a three tier hierarchy of developments:

- National Developments (Developments of National Significance)
- Major Developments
- Local Developments

42. The reason for introducing this hierarchy was described in the Policy Memorandum that accompanied the Planning etc. (Scotland) Bill as follows:

“Applications for proposed developments identified as falling within one of the designated categories (national, major, local and minor) will, during the development management process, be subject to different procedures for submission, processing and determination depending on the category in which they fall. The aim is to allow for a more proportionate approach by focusing engagement and scrutiny on the more complex development management issues, while at the same time seeking to streamline and speed up those processes, where possible.”

43. The 2006 Act also requires that all national developments are listed in the National Planning Framework.

44. The National Planning Framework is currently being reviewed. The Scottish Government recently published “National Planning Framework for Scotland 2: Consultation Draft”, which identifies nine large scale infrastructure projects as national developments. This list may change before the final version of the National Planning Framework is complete.

45. It is important to note that the provisions of the 2006 Act relating to the hierarchy of developments are yet to be enacted and do not apply to the Trump application. As such the Trump application is neither a national or major development, as defined in the 2006 Act.

46. In evidence to the Committee¹⁵ the Chief Planner confirmed that, were the provisions of the 2006 Act in force, the Trump application would have been

¹⁵ OR Col. 465

considered a major development rather than a national development. Scottish Ministers will retain the power to call-in all types of planning application, including major developments, following the enactment of the 2006 Act. Indeed, it is likely that at least some major developments will raise issues of national importance.

Process of call-in and subsequent procedure

47. Applications can be called-in by Scottish Ministers at any point during a planning authority's consideration of that application, up to the date at which the authority formally records a decision on the grant or refusal of planning permission. Article 22 of the Town and Country Planning (General Development Procedure) (Scotland) Order 1992, as amended, requires that the decision notice be made in writing, that it states the reasons for the authority's decision and, where permission is refused or granted subject to conditions, includes a notice setting out the applicant's right of appeal.

48. The date on which planning permission is deemed to be granted or refused is not necessarily the date on which the local authority reaches its decision. Section 37(4) of the Act states that the effective date is the date on which the "*...planning authority's decision bears to have been signed on behalf of the authority*". This is normally taken to mean the date on which the decision notice is sent to the applicant.

49. After an application is called-in, the Scottish Ministers effectively become the planning authority for that application. This means that Scottish Ministers are required to ensure that issues such as neighbour notification and public consultation are carried out as required by legislation. In practice, as most applications are only called-in once the planning authority is minded to grant permission, much of this work will already have been carried out. Such administrative tasks and general management of the application process following a call-in are handled by Scottish Government planning officials.

50. Just as local authorities rely on their planning staff to consider a planning application and make recommendations, so Scottish Ministers rely on an independent Reporter working for the Directorate of Planning and Environmental Appeals, formerly the Scottish Executive Inquiry Reporters Unit (SEIRU), to examine the merits of a called-in application. The Reporter considers the application, prepares a report setting out their conclusions and recommends whether Scottish Ministers grant the application unconditionally, grant the application subject to conditions or refuse the application. The report is then submitted to Scottish Ministers who subsequently issue their decision, which does not have to follow the Reporter's recommended course of action.

51. A called-in planning application is not automatically the subject of a public inquiry. Scottish Ministers must allow a public inquiry into any called-in application if this is requested by the applicant or the relevant planning authority. However, if no such request is made then it is up to Scottish Ministers to decide whether the Reporter appointed to consider the application will do so through written submissions, an informal hearing or full public inquiry.

52. The call-in system can only work when Scottish Ministers are aware of all the planning applications submitted to planning authorities which might meet their criteria for call-in. To ensure that all such applications are brought to the attention of Ministers, planning authorities are required to formally notify Scottish Ministers where they are minded to grant planning permission for certain types of application, e.g. development contrary to development plans, development on green belt land or industrial, petrochemical or business developments covering more than 100 hectares. Local authorities are not required to notify applications they are minded to refuse.

53. Once Scottish Ministers have been notified, they have 28 days to decide whether to call-in the application or return it to the planning authority for their own decision. Scottish Ministers can extend the 28 day period for as long as it takes them to reach a decision on whether to call-in an application.

54. Scottish Ministers call-in very few applications each year, given that planning authorities deal with over 40,000 applications annually, as shown in Table 1 below.

Table 1: Number of Applications Called in by Scottish Ministers¹

Year	Number of called-in applications
1999	44
2000	30
2001	41
2002	18
2003	23
2004	37
2005	21
2006	17
2007	19
TOTAL	250

55. The Menie estate application is the only one which was called in after a decision to refuse the application was made by a planning authority but before the authority issued the decision notice.

Code of Conduct for Members of the Scottish Parliament

56. In answer to questions asked at First Minister's Question Time on 13 December 2007, in relation to the Trump application, and in his oral evidence to the Committee, the First Minister drew the attention of members to the Code of Conduct for Members of the Scottish Parliament.¹⁶

57. The Code, published by the Scottish Parliament on 4 May 2007, provides a set of principles and standards for MSPs.¹⁷

¹⁶ OR Col 4433

¹⁷ Code of Conduct for Members of the Scottish Parliament, 4 May 2007

58. The particular section to which the First Minister referred reads:

“Duty as a representative

3.1.5 Members should be accessible to the people of the areas for which they have been elected to serve and to represent their interests conscientiously.”

Aberdeenshire Council’s Scheme of Delegation

59. At the time of considering the application for the proposed development at the Menie estate, the Aberdeenshire Council operated a Scheme of Delegation which had been adopted on 17 May 2007. Under this Scheme, the Council delegated various powers to Committees of the Council.

60. The scheme provided, inter alia, that:

“When such functions, services, undertakings or other matters are delegated to a Committee, the Committee shall have the power to exercise the function as the Council could have exercised it had there been no delegation; provided that it shall be competent for a Committee in relation to any matter, instead of taking a decision, to make a recommendation to the Council in which event the matter shall be decided by the Council after consideration of the Committee’s recommendation.”¹⁸

61. In particular, the delegation to the Infrastructure Services Committee, stated:

To exercise, with the exception of matters properly delegated to officers of the Council, the statutory functions of the Council under Planning and Building Control legislation to consider applications for planning permission, building warrant and listed building consent where the development concerned is in conflict with Council-wide policy and the relevant Area Committee is minded to approve the development.

SEQUENCE OF EVENTS

62. It appears to the Committee that the following is an outline of the series of events which took place since the first time that a proposed development at the Menie estate was mooted in 2003, until 12 December 2007, the date of a special meeting of Aberdeenshire Council.

63. The information in the following table is taken from Answers to Parliamentary Questions (in which case the PQ number is footnoted), the statement made by the Cabinet Secretary for Finance and Sustainable Growth on 20 December 2007, the written evidence provided by the Chief Executive of Aberdeenshire Council, oral evidence (in which case the Official Report reference is footnoted) or information reported in the media.

¹⁸ Aberdeenshire Council, written submission – Scheme of Delegation

Date	Action
2003	First proposal from owners of Menie estate for possible golf course development. Proposal not pursued. ¹⁹
2005	Renewed interest in a possible development expressed by developers, who included Trump International. Initial meeting held between developers' representatives and Council officials. ²⁰
Nov 2005	Developers requested scoping opinion in relation to environmental impact. Council's response indicated that proposals were likely to have a significant impact on the Site of Special Scientific Interest ²¹ .
End 2005	Site visit by Chief Executive of Aberdeenshire Council and representatives of Trump Organisation. ²²
29/12/05	Chief Planner met Neil Hobday of the Trump Organisation to explain the procedures involved in handling planning applications, the timescales involved and the interaction between the planning system and the requirements for Environmental Assessment.
Jan 2006	Meeting between representatives of developers (Jenkins and Marr), Council officials and Scottish Executive's Chief Planner. There were numerous subsequent meetings between Council officials and developers' representatives. ²³
April 2006	Proposals for a project discussed at a meeting between Donald Trump and then First Minister Jack McConnell MSP during "Tartan Week" in New York.
27/11/06	Trump application received by Aberdeenshire Council ²⁴
30/3/ 2007	Alex Salmond expressed qualified support for the proposed development during the election campaign, at a public meeting in Inverurie, prior to his being returned as MSP for Gordon. ²⁵
24/07/07	Formartine Area Committee considered the process of handling the application. ²⁶

¹⁹ Aberdeenshire Council, written submission

²⁰ *ibid*

²¹ *ibid*

²² OR Col 447

²³ Aberdeenshire Council, written submission

²⁴ Ministerial Statement 20 December 2007

²⁵ OR Col 511 and OR Col 528

²⁶ Aberdeenshire Council, written submission

29/08/07	Site visit by Scottish Government's Chief Planner, a Council planning officer and a representative of the applicant. ²⁷
18/09/07	Report to Aberdeenshire Council's Formartine Area Committee recommended approval of outline planning permission. Committee considered the application and agreed to defer consideration until after they had visited the site. ²⁸
24/09/07	Alex Salmond met representatives of the Trump organisation on a site visit to the Menie estate, at their request. ²⁹
27/09/07	Formartine Area Committee visited the site of the proposed development ³⁰ , together with members of the Infrastructure Services Committee, the Chief Executive and George A Sorial of the Trump Organisation. ³¹
27/09/07	Formartine Area Committee held a public hearing on the proposed development in Balmedie Primary School.
Early/10/07	Alex Salmond met the Chief Executive at a public meeting in Pennan and asked about the Trump application. ³²
18/10/07	Alex Salmond MSP met with objectors to the Trump application, in his capacity as MSP for Gordon,
25/10/07 ³³	John Swinney MSP, Cabinet Secretary for Finance and Sustainable Growth, took over responsibility for considering the application from Stewart Stevenson MSP, Minister for Planning, who has a constituency interest in Aberdeenshire, and he informed Alex Salmond. ³⁴ He told the Committee that he took this decision because Ministers had been operating under the assumption that it was inevitable that the application would come to them. In order to prepare for that, he wanted to make the process as transparent as possible. ³⁵
20/11/07	Formartine Area Committee voted seven to four in favour of the granting of outline planning permission, subject to conditions. Given the extent of the departure from the Council's Development Plan, the matter then required to be referred to

²⁷ ibid

²⁸ ibid

²⁹ OR Col 508

³⁰ Ministerial Statement 20 December 2007

³¹ OR Col 447

³² OR Col 441

³³ OR Col 567

³⁴ OR Col 515

³⁵ OR Col 499

	the Infrastructure Services Committee in terms of the Council's Scheme of Delegation. ³⁶
29/11/07 (Thursday)	Infrastructure Services Committee met at 10.15am. It refused the grant of outline planning permission for the Trump application. The decision was made on the casting vote of the Committee Chair, following a tied vote where seven Committee members voted for the refusal of permission and seven voted to defer the item to allow further negotiations with the applicants.
29/11/07	After the news broke, Alex Salmond had a request to meet the Trump Organisation and sought advice from officials as to whether he was still able to meet them. ³⁷
29/11/07	<p>The Scottish Government Chief Planner and Head of Planning Decisions Division offered advice to Alex Salmond MSP that, in his capacity as MSP for Gordon, he could meet with representatives of the Trump Organisation and other interested parties. They also confirmed that, because the proposed development was in his constituency, he could not become involved in the decision making process.³⁸</p> <p>Alex Salmond asked about the consequences of the Infrastructure Services Committee's decision to refuse planning permission.³⁹</p> <p>The Chief Planner told Alex Salmond that he would try to establish the facts with Aberdeenshire Council and that he would speak to Council officials the next day and phone back Mr Salmond.⁴⁰</p>
29/11/07	At some time, Alex Salmond asked the Chief Executive of Aberdeenshire Council what had happened at the Infrastructure Services Committee and what the options for the Council were at that point. ⁴¹
29/11/07	In the early evening, representatives of the Trump organisation asked for a meeting with the Chief Executive. ⁴²
29/11/07 – 30/11/07	In the evening of 29 and then again on the morning of 30/11/07 the Chief Planner sought to ascertain from Aberdeenshire

³⁶ Aberdeenshire Council, written submission

³⁷ OR Col 514

³⁸ Ministerial Statement 20 December 2007

³⁹ OR Col451

⁴⁰ OR Col 487

⁴¹ OR Col 442

⁴² OR Col 447

(Friday)	Council whether it was possible for the application to be reconsidered by the Council. ⁴³ The Chief Executive made it clear to the Chief Planner that the Council would be seeking legal opinion on whether it would be possible for the Council to proceed in accordance with what appeared to be the desire of the Council. ⁴⁴
30/11/07	Trump representatives were in contact with the Chief Executive. ⁴⁵
30/11/07	The Chief Planner phoned Alex Salmond in the afternoon to say that the Council was revisiting the matter and obtaining legal opinion on whether it could revisit the planning application and that the right of appeal still existed. ⁴⁶ The Chief Planner again offered verbal advice to Alex Salmond MSP that, in his capacity as MSP for Gordon, he could meet with representatives of the Trump Organisation and other interested parties. He also confirmed that, because the proposed development was in his constituency, he could not become involved in the decision making process. ⁴⁷
01/12/07 – 02/12/07	The Chief Planner told the Committee that over the weekend of 1-2 December, he formed the view that the simplest approach, which would give certainty to all parties and interests in the process to be followed, was to call in the application. ⁴⁸
02/12/07	John Swinney attended a welcome event for the Globalscot Conference at the Trump National Golf Club, Westchester, New York State. Full commercial rates were paid for this event and no sponsorship was received from the Trump Organisation. ⁴⁹ John Swinney met no members of the Trump organisation, which was not represented at the event. ⁵⁰
03/12/07 (Monday)	In the morning, ⁵¹ the Trump representatives were in contact with the Chief Executive. ⁵²
03/12/07	At around noon, George A Sorial of the Trump Organisation said on BBC radio that they were not going to appeal. ⁵³

⁴³ OR Col451

⁴⁴ OR Col 431

⁴⁵ OR Col447

⁴⁶ OR Col 487

⁴⁷ This is not a repetition. A [Scottish Government press release](#) of 20 December 2007 states that the Chief Planner and Head of Planning Decisions Division offered verbal advice to Alex Salmond MSP on 29 and 30 December 2007.

⁴⁸ OR Col 451

⁴⁹ S3W-7899, S3W-7902

⁵⁰ S3W-7823

⁵¹ OR Col 674

⁵² OR Col447

03/12/07	In the afternoon, Alex Salmond called the Chief Executive in relation to what the Council was doing. ⁵⁴
03/12/07	<p>In the early afternoon⁵⁵ (UK time), John Swinney spoke with the Chief Planner, from the USA, about the Trump Organisation's application for planning permission.⁵⁶ The call lasted 5 or 6 minutes.⁵⁷</p> <p>The Cabinet Secretary asked for an update on the situation, asked for the Chief Planner's opinion and asked him what options existed.⁵⁸</p> <p>The Chief Planner explained that he had become increasingly convinced that early call-in would provide certainty to all the parties.⁵⁹</p>
03/12/07	Some time after 5.00pm, Alex Salmond MSP was driven, by Government car, ⁶⁰ with his constituency secretary, Hannah Bardell, ⁶¹ to the Marcliffe Hotel, Aberdeen to meet representatives of the Trump Organisation, at their request. The meeting lasted around 45 minutes. The Trump representatives said to him that they wanted to request, directly, a meeting with the Chief Planner. ⁶² Fuller accounts of this meeting and of Alex Salmond's car journeys on this day are given later in this report, in paragraph 98.
03/12/07	Alex Salmond MSP then telephoned the Chief Planner and asked whether Scottish Government planning officials could meet with representatives of the Trump Organisation. The Chief Planner confirmed that this was possible. ⁶³ Alex Salmond handed his phone to George A. Sorial of the Trump organisation. ⁶⁴ George Sorial spoke to the Chief Planner to arrange a meeting. ⁶⁵ The phone call was very brief. ⁶⁶

⁵³ OR Col 679

⁵⁴ OR Col 526

⁵⁵ OR Col 472

⁵⁶ S3W-7675

⁵⁷ OR Col 472

⁵⁸ OR Col 489

⁵⁹ OR Col 451

⁶⁰ S3W-8088

⁶¹ OR Col 507

⁶² OR Col 512

⁶³ S3W-7666

⁶⁴ OR Col 526

⁶⁵ OR Col 526

⁶⁶ OR Col 526

04/12/07 (Tuesday)	By now, if not before, the Chief Planner would have received the papers that had gone to the Formartine Area Committee and the Infrastructure Services Committee. ⁶⁷
04/12/07	George A Sorial and Neil Hobday had a briefing meeting with Ann Faulds of Dundas and Wilson, their solicitors. ⁶⁸
04/12/07 2.20pm ⁶⁹	<p>They then met the Chief Planner and the Head of Planning Decisions Division in Victoria Quay, Edinburgh.</p> <p>...</p> <p>At some point during the meeting⁷⁰, the Chief Planner telephoned Ann Faulds of Dundas and Wilson. (The Chief Planner told the Committee that the call had taken place that afternoon, but did not indicate that it had occurred during the meeting.)</p> <p>Subsequently⁷¹, during the meeting, the Chief Planner telephoned the Chief Executive of Aberdeenshire Council for an update on the Council's consideration of the planning application. During this call the Chief Planner indicated that representatives of the Trump Organisation were present in his office. The Council's Chief Executive asked that they leave for the duration of the call, which they did.⁷² The call took place at around 3.00pm.</p> <p>These calls were not referred to in the subsequent minute of the meeting.</p> <p>A fuller account of this meeting is given later in this report.</p>
04/12/07	Following the end of the meeting with Trump Organisation representatives (just before they left the room ⁷³), the Chief Planner telephoned Alex Salmond MSP as a courtesy to say that the meeting had taken place and that all discussion of potential Ministerial action would be passed to the Cabinet Secretary for Finance and Sustainable Development. ⁷⁴
04/12/07	(After the Trump representatives had left the room ⁷⁵) the Chief Planner and Head of Planning Decisions Division agreed to

⁶⁷ OR Col 446

⁶⁸ OR Col 680

⁶⁹ OR Col 577

⁷⁰ OR Col 683

⁷¹ John Swinney's Ministerial Statement, 20/12/07

⁷² S3W-7699

⁷³ OR Col 487

⁷⁴ Ministerial Statement 20 December 2007

⁷⁵ OR Col 487

	recommend to Ministers that the Trump Organisation's application be called-in for ministerial decision. ⁷⁶
04/12/07	At around 3.45 pm the Chief Planner phoned the Chief Executive as a courtesy to tell him what they were talking about. ⁷⁷
04/12/07	Before the Cabinet meeting of that day ⁷⁸ , at around 3.45pm or 3.50pm ⁷⁹ , the Chief Planner telephoned the Cabinet Secretary for Finance and Sustainable Growth, John Swinney, and recommended that the Trump Organisation's application be called-in. During the call, the Chief Planner told the Cabinet Secretary that he had ascertained from Aberdeenshire Council that it was unlikely that the Council's standing orders would allow the planning application to be reconsidered by the Council. ⁸⁰ The Cabinet Secretary agreed that the application should be called-in. ⁸¹
04/12/07	The Cabinet Secretary for Finance and Sustainable Growth advised the First Minister that the application had been called in, ⁸² just before they walked into the Cabinet meeting. ⁸³
04/12/07	The Chief Planner telephoned the Chief Executive of Aberdeenshire Council to advise that the Trump Organisation's planning application was to be called in. ⁸⁴
04/12/07	There were further calls between the Council and the Chief Planner to obtain a faxed copy of the decision. The direction calling-in the application was faxed to the Chief Executive's office at around 5.00pm. ⁸⁵
After 3.50pm 4/12/07	At some time after the Chief Planner's conversation with the Cabinet Secretary on 4 December, a written options paper was sent to him. ⁸⁶
4/12/07?	At some time after the decision had been made, the Cabinet Secretary informed Stewart Stevenson that he had decided to call the application in. ⁸⁷

⁷⁶ Ministerial Statement 20 December 2007

⁷⁷ OR Col 487

⁷⁸ OR Col 488

⁷⁹ OR Col 471

⁸⁰ S3W-8014

⁸¹ S3W-7675

⁸² S3W-7676

⁸³ OR Col 515

⁸⁴ Ministerial Statement 20 December 2007

⁸⁵ *ibid*

⁸⁶ OR Col 472

⁸⁷ OR Col 570

12/12/07	Special meeting of Aberdeenshire Council. The Chair of the Infrastructure Services Committee was removed from that post following a vote on an emergency motion. The Full Council expressed support for the Trump application and agreed to amend their Scheme of Delegation so that, in future, planning applications of regional or national importance are scrutinised by the full Council rather than a Committee. (See also paragraph 90)
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CONSIDERATION OF THE PLANNING PROPOSAL BY ABERDEENSHIRE COUNCIL

64. According to the written evidence submitted by the Chief Executive of Aberdeenshire Council, in view of what he described as the national standing of the proposal, Aberdeenshire Council arranged a meeting with Jenkins and Marr⁸⁸ and the Chief Planner, Jim Mackinnon, to acquaint him with the issues concerning the proposal which was held in January 2006. The note of the meeting highlights that while “the principle of a golf course and tourism related resort was a good fit with the inward investment goals of SDI and the need to diversify the economy of the Aberdeen area, due process must be followed by Aberdeenshire Council and the Scottish Executive to ensure that there is a clear audit trail including a transparent and rigorous consideration of the issues”. The need for the applicants to “liaise closely with environmental agencies to ensure that all the relevant issues are addressed” was also noted. Reference was also made to the fact that should the Council be minded to approve the application, it would require to be referred to the then Scottish Executive.

65. For administrative purposes Aberdeenshire Council is split into six geographical blocks, each of which is covered by an ‘area committee’. Area committees are responsible for many Council functions within their geographic area, including the consideration of applications for planning permission “...against which material objections have been lodged or which are recommended for refusal by officers or which, in the opinion of officers, raise issues of local significance for the area, provided the development concerned is not in conflict with Council-wide policy”.

66. In addition to the six area committees, Aberdeenshire Council also has six subject committees. These include the Infrastructure Services Committee, which, at the time Aberdeenshire Council was considering the Trump application, was required to “...consider applications for planning permission, building warrant and listed building consent where the development concerned is in conflict with Council-wide policy and the relevant Area Committee is minded to approve the development”.

67. The Chief Executive of Aberdeenshire Council stated in his written submission that following the validation of the application and at all times during the processing of the application, information relating to the application was

⁸⁸ Representing the developers

available on the Council's website and updates on the processing and timescales involved in reporting the application to Committee were publicly available.

68. He said that the Planning Service met with the applicant and their agent on many occasions and letters were sent on 11 May 2007, 7 June 2007 and 8 August 2007 raising issues on which the Planning Service wished clarification or which had been raised by consultees. Meetings were also held with Scottish Natural Heritage to ascertain if there was any means by which its objection could be removed or ways in which the applicant could mitigate against the impact on the Site of Special Scientific Interest. Extensive discussions also took place with Transport Scotland with regard to access onto the Trunk Road in particular.

69. The Chief Executive stated that the principal planning issues in relation to the planning application were firstly, that the golf course, described in the application as the Championship Golf Course, affected part of a Site of Special Scientific Interest and was considered under Council policies related to wildlife, landscape and land resources, area of landscape significance, coastal planning, nature conservation, biodiversity and sustainability. Secondly, the residential part of the proposal was located in an area defined as countryside and not allocated for housing and was considered under Council policy relating to housing in the countryside. The relevant Development Plan comprises the Aberdeen and Aberdeenshire Structure Plan 2001 – 2016 and the Aberdeenshire Local Plan 2006.

70. Following an extensive process of consultation, which resulted in many submissions and representations of both support and objection, the application was placed on the agenda of the Formartine Area Committee meeting of 18 September 2007. That meeting deferred any consideration of the proposal pending a public hearing and site visit.

71. The site visit and public hearing took place on 27 September 2007. The written submission from the Chief Executive indicates that the public hearing took place in the evening at Balmedie Primary School and was very much in the context of an information gathering exercise. A large number of parties contributed to the event, a comprehensive note of which was later made available to both the Formartine Area Committee and Infrastructure Services Committee. Members of both the Formartine Area and Infrastructure Services Committees were invited to the site visit and hearing.

72. The Formartine Area Committee decided that it was minded to grant permission for the Trump development, at its meeting on 20 November 2007, after prolonged debate and two divisions. The Scheme of Delegation required it to refer the application to the Infrastructure Services Committee for their decision. This was due to the fact that the development would conflict with Council-wide policy, i.e. policies in both the local and structure plans.

73. The Chief Executive told the Committee that the application, having been considered by the Formartine Area Committee, required to go to the Infrastructure Services Committee. The Area Committee always knew this.⁸⁹ The application

⁸⁹ OR Col 437

could not have been referred to the Full Council without going through the Infrastructure Services Committee.⁹⁰

74. The Infrastructure Services Committee considered the application at its meeting of 29 November 2007. After extensive debate and two divisions, a tied vote of 7 for and 7 against resulted in the Chair using his casting vote in favour of refusal. The Chief Executive, in his written submission, states that this was fully in accordance with the Council's Standing Order 17(d), which states "Where there is an equality of votes, the Chair of the meeting shall have a casting vote." In oral evidence, he confirmed that there is no further guidance to Chairs on the use of the casting vote.⁹¹

75. He told the Committee—

"There is no such convention. It is interesting to speculate on that because some organisations hold that the convention in use of a casting vote is to vote for the status quo. However, that raises all sorts of questions about what the status quo would have been. Would it have been the Formartine area committee's decision? Would it have been to allow no development, because that is what is currently on the site? Sometimes it has been assumed that the officials' recommendation might be the one that would be approved. Even if there was a convention, it would be quite difficult to have applied it in this context without there being some element of controversy or review. There is no such convention."⁹²

76. Under the Scheme of Delegation, it would have been competent for the Infrastructure Services Committee, had it wished to do so, to have decided not to make a decision on the application but to make instead a recommendation to the Council, in which event the matter would have been decided by the Council. However, this was not an option that was considered by the Committee on this occasion.

77. The Infrastructure Services Committee was entitled to take the decision to refuse planning permission and in taking that decision it acted in accordance with the Council's Standing Orders and with its Scheme of Delegation.

78. After the decision of the Infrastructure Services Committee, the decision letter was not issued immediately. The Chief Executive said in his oral evidence that this was not unusual and it was usually a couple of weeks before a decision notice was drawn up and issued.⁹³

79. However, the Chief Planner, in his oral evidence, said that a decision letter can be issued quite quickly. He said that he could have written one in ten

⁹⁰ OR Col 446

⁹¹ OR Col 430

⁹² OR Col 430

⁹³ OR Col 446

minutes.⁹⁴ He accepted, though, that, on 4 December, he could have waited another 24 hours.⁹⁵

80. The RTPI, in its evidence, told the Committee that decision letters would normally be written within a couple of days of the decision being made.⁹⁶

81. Moves to requisition a Special Meeting of the Council started almost immediately. Very strong views were developing, both for and against the application.⁹⁷ The Chief Executive's evidence states that an Opinion of Senior Counsel was sought as to whether the Full Council could properly reopen the matter for further debate. By 4 December, the Council had a clear view of what the advice was likely to be,⁹⁸ and the Opinion was obtained on 5 December 2007. It indicated that, as the Scheme of Delegation currently stood, there appeared to be no legitimate way for the Council to reopen discussion on the merits of the decision.

82. George A Sorial said to the Committee that he had not been able to get any clear guidance on certain procedural matters from Aberdeenshire Council officials.⁹⁹ He described the environment at Aberdeenshire Council as chaotic, in which the Trump representatives had completely lost faith.¹⁰⁰

83. It was not, he told the Committee, clear that the decision of the Infrastructure Services Committee meant that the process was over. There was a lot of rhetoric to the effect that the Council might have been able to overturn the decision. Even on the Monday (3 December), no one, he said, could give him an answer on whether a decision of the full Council would have any force of law.¹⁰¹

84. According to the written evidence of the Chief Executive, he received a phone call from the Scottish Government's Chief Planner at around 3pm on 4 December. The conversation referred to whether the Council had exhausted its processes in regard to the application and the Chief Executive confirmed that legal advice was indicating that this was the case within the terms of the existing Scheme of Delegation.

85. At approximately 3.45pm, there was a further phone call from the Chief Planner indicating that the Scottish Government was considering calling-in the application. The Chief Executive states in his written submission that this was the first time that call-in had been referred to. At approximately 4.00pm a third phone call from the Chief Planner was received confirming that Scottish Ministers had directed that the application be referred to them and that the written Direction intimating the call-in was being prepared. The Chief Executive states in his submission that at this time the Decision Notice arising from the meeting of 29 November had not by then been issued or even drafted.

⁹⁴ OR Col 468

⁹⁵ OR Col 470

⁹⁶ OR Col 641

⁹⁷ OR Col 444

⁹⁸ S3W-8014

⁹⁹ OR Col 656

¹⁰⁰ OR Col 660

¹⁰¹ OR Col 661

86. The Committee notes that the Chief Executive of Aberdeenshire Council with over 30 years' public service was not aware of the option of call-in before the decision notice had been issued.

87. The Committee notes that there is no indication that the Chief Planner asked, during these conversations, whether the Decision letter had yet been signed. The official minute of the meeting makes no reference to such a question being asked.¹⁰²

88. The call-in meant that in effect the Scottish Ministers became the planning authority for the application.

89. George A Sorial of the Trump Organisation stated that the Committee inquiry had caused a delay in the process, although he adduced no evidence to support this view.¹⁰³ On the contrary, the Committee stresses that the call-in process is entirely a matter for determination by the Scottish Ministers. The Committee has no locus in the determination of the application. The process and timescale that are to be followed are a matter for Ministers and are not affected by the Committee's deliberations.

90. Aberdeenshire Council discussed the issue of the application at a Special Meeting on 12 December 2007. The Council agreed to amend the Scheme of Delegation, so that future applications for planning permission of regional or national importance would be considered by the full Council; it agreed that it supported the grant of planning permission for the Trump application, subject to conditions; and, on an emergency motion, it voted to replace the Chair of the Infrastructure Committee.

91. This Committee notes, however, that the Council's agreement to support the application is not relevant in terms of planning law. The Council, as planning authority, had in effect made its final decision when its Infrastructure Services Committee agreed to refuse the application on 29 November.

92. In his written submission, the Chief Executive stated that—

“Aberdeenshire Council accepts that this proposal is one of national scale. Given the wide powers available to the Scottish Government the decision to call-in the application was considered to be properly within the powers of the Scottish Government. While such planning matters are not routine or everyday, the Chief Executive did not regard the process which the Chief Planner followed as being irregular in the way in which some observers have suggested.”¹⁰⁴

93. The Chief Planner told the Committee that the circumstances of the application were “one in a million.”¹⁰⁵

¹⁰² Minute of meeting, 4 December 2007

¹⁰³ OR Col 658-9

¹⁰⁴ Aberdeenshire Council, written evidence

¹⁰⁵ OR Col 451

94. In his oral evidence to the Committee, Alistair Stark of the Royal Town Planning Institute in Scotland said that it was a situation in which a Council had properly reached a decision by its own procedures at that time. That had been immediately followed by statements made by Aberdeenshire Councillors outside the planning process that appeared to contradict the properly made view of the Council's Planning Committee. He described this as a "political decision with a small p."¹⁰⁶

EVENTS SUBSEQUENT TO INFRASTRUCTURE SERVICES COMMITTEE'S DECISION

Alex Salmond's meeting with Trump Organisation on Monday 3 December 2007

95. In oral evidence, Alex Salmond said that the Trump organisation issued a statement on 16 December which said that—

"On the advice of their legal counsel, meetings were requested with local MSP Alex Salmond and the Government Chief Planner Jim Mackinnon, which are clearly permissible and do not violate Scottish law or Ministerial rules. The purpose of those meetings was to seek clarification about legally available options relating to the procedural aspects of the planning process as no clear guidance had been provided by the local government officials."¹⁰⁷

96. It was put to Alex Salmond in questioning that it was rare for him to set up a meeting for developers with the Chief Planner within 24 hours. Alex Salmond did not contest this assertion.¹⁰⁸

97. In response to questions during oral evidence about his use of a Ministerial car, when meeting representatives of the Trump organisation on 3 December, Alex Salmond said—

"A special adviser was helping me in national engagements on both 3 and 4 December, and on 3 December I was dropping him off in Milltimber, which I think is where his parents' house is, and which is near the Marcliffe hotel. I knew that I would be doing that and that is why, as the permanent secretary indicated, the use of the ministerial car was perfectly in order, under the circumstances."¹⁰⁹

98. In a Written Answer to a Parliamentary Question, further detail was provided as follows—

Time	Pick Up	Via	Drop Off	Passengers
1145	Strichen		Inverurie	Alex Salmond

¹⁰⁶ OR Col 637

¹⁰⁷ OR Col 526

¹⁰⁸ OR Col 508

¹⁰⁹ OR Col 509

Time	Pick Up	Via	Drop Off	Passengers
1700	Inverurie	Special Adviser's Home, Aberdeen (Geoff Aberdein dropped off)	Marcliffe Hotel	Alex Salmond Geoff Aberdein Hannah Bardell (Constituency Assistant)
1825	Marcliffe Hotel		Strichen	Alex Salmond

99. Alex Salmond said that, during the meeting, the Trump Organisation was uncertain about the routes ahead. The bulk of the meeting was taken up by his (Alex Salmond's) opinion on what he detected about Aberdeenshire Council's wish to revisit the decision that the Infrastructure Services Committee had made. They spoke about the appeal process.¹¹⁰ Alex Salmond said in his oral evidence that he thought that the Trump representatives were uncertain about the process of appeals.¹¹¹

100. However, in oral evidence to the Committee, George A Sorial confirmed that the Trump organisation had a wide spectrum of advice on any issues that might conceivable arise. He said—

“There was never any issue relating to our not understanding our options.”¹¹²

and—

“We were aware of the possibility of appealing from the outset.”¹¹³

101. He said that the discussion at the meeting with Alex Salmond was strictly about procedure.¹¹⁴ They were focussed on whether procedurally it would be possible for the full Council to overrule the Infrastructure Services Committee.¹¹⁵

102. Alex Salmond said that he had asked the Trump representatives why they did not just appeal the decision. He said that they responded that they thought that they were in a position of great reputational damage. They did not want to be seen to be in a position of appealing over the heads of the local community.¹¹⁶

¹¹⁰ OR Col 512

¹¹¹ OR Cols 551-2

¹¹² OR Col 655

¹¹³ OR Col 656

¹¹⁴ OR Col 670

¹¹⁵ OR Cols 674-5

¹¹⁶ OR Col 512

103. However, in his oral evidence to the Committee, George A Sorial said that the organisation did not appeal because it did not have the time to wait and it had other development opportunities available to it.

104. He went on to say that the proposals had overwhelming public support. He had seen polls showing between 80% and 90% support. They had been shocked by the decision.

105. George A Sorial accepted that they did have a degree of reputational damage.¹¹⁷ He told the Committee, however, that the decision not to appeal had nothing to do with contempt for the process; it was simply that they had many opportunities elsewhere.¹¹⁸

106. Alex Salmond said that the question of call-in was never discussed at the meeting of 3 December. He was not aware that it was an option.¹¹⁹

107. He told the Committee that the Trump representatives had said that they wanted to request, directly, a meeting with the Chief Planner, Jim Mackinnon. Alex Salmond did not know whether, following Aberdeenshire's decision, someone from the planning department could still meet the developer. Therefore he phoned Jim Mackinnon at the close of the meeting.¹²⁰

108. George A Sorial told the Committee that he did not find it unusual that the Chief Planner was able to meet him at short notice. He said—

“If a chief planner is not ready at a moment's notice when they might lose a £1 billion investment for their country, what are they doing occupying that position? That is what they are there for. I do not find any of that to be unusual.”¹²¹

Chief Planner's meeting with Trump Organisation on Tuesday 4 December 2007

109. As a result of the phone call the previous evening, described in the “Sequence of Events” above, the Chief Planner and the Head of Planning Decisions Division met George A Sorial and Neil Hobday of the Trump Organisation in Victoria Quay, Edinburgh at 2.20pm on Tuesday 4 December 2007. The Chief Planner said to the Committee that he wanted to ensure that the Trump representatives were clear about the routes they could follow. He told the Committee that he was not there to negotiate or to say “We would prefer it if you appealed.”¹²²

110. George A Sorial told that Committee that he advised the Chief Planner that he had just finished the meeting with Ann Faulds and he wanted to hear his

¹¹⁷ OR Cols 657-8

¹¹⁸ OR Col 678

¹¹⁹ OR Col 527

¹²⁰ OR Col 513

¹²¹ OR Col 677

¹²² OR Col 460

explanation of the procedural aspects of a call-in. George A Sorial confirmed to the Committee that it was he who had raised the matter of call in.¹²³

111. George A Sorial told the Committee that Jim Mackinnon explained in detail the appellate route and the call-in route.¹²⁴

112. Gorge A Sorial told the Committee that they were not aware that call-in was an option before 4 December.¹²⁵ By the time of their meeting with the Chief Planner, Dundas and Wilson had fully explained the call-in procedure and they were also aware that it was still possible for the application to be called in.¹²⁶

113. He said to the Committee that the Trump Organisation—

“did not ask for the application to be called in – it just happened to us”.¹²⁷

114. George A Sorial further said that at some point during the meeting, the Chief Planner telephoned Ann Faulds of Dundas and Wilson to ask what her understanding was of the Trump organisation’s reluctance to appeal and the position with Aberdeenshire’s Standing Orders.¹²⁸

115. George A Sorial told the Committee that he did not recall the telephone call taking place. However, in a subsequent email to the Committee he said that while he did not remember the specifics of the discussion, to the best of his knowledge, Ms. Faulds subsequently reported to him that Mr. Mackinnon asked why the Trump Organization did not want to pursue an appeal. Ms. Faulds confirmed their position on an appeal, which he had already explained in evidence to the Committee.

116. He went on to say that Ms. Faulds also confirmed her view that the Council's Standing Orders precluded any review of the Infrastructure Committee's decision by the Full Council. Finally, Ms. Faulds confirmed her view that the Minister could call in an application up until the final notice was issued by the Council.

117. He did recollect discussing the three options with Ms. Faulds at the meeting between the Trump representatives and Ann Faulds at their meeting on December 4, 2007, which, he said, reinforced their decision not to pursue an appeal, because the process was long and expensive, and that they would be better off proceeding with another investment opportunity.¹²⁹

118. During the meeting between the Chief Planner and the representatives of the Trump organisation, at around 3.00pm, the Chief Planner telephoned the Chief Executive of Aberdeenshire Council for an update on the Council's consideration of the planning application. During this call the Chief Planner indicated that representatives of the Trump Organisation were present in his office. The Chief

¹²³ OR Col 680

¹²⁴ OR Col 675

¹²⁵ OR Col 674

¹²⁶ OR Col 675

¹²⁷ OR Col 679

¹²⁸ OR Col 457

¹²⁹ Email from George A Sorial 18/2/08

Executive told the Committee in his oral evidence that he was surprised that the Chief Planner had them in his room.¹³⁰ The Chief Executive asked that they leave for the duration of the call, which they did.¹³¹

119. The Chief Executive told the Committee that he would have regarded it as irregular if they had stayed.¹³² The Chief Planner told the Committee that he did not regard it as irregular to have called when the Trump representatives were in the room.¹³³

120. The call took place at around 3.00pm. The Chief Executive confirmed that legal advice was indicating that the Council had exhausted its processes.¹³⁴ It looked as if the council could not resolve the matter in a way that was unchallengeable.¹³⁵ The Council was heading towards a situation in which it believed that it could not revisit the decision.¹³⁶ The call lasted 5, 6 or 7 minutes.¹³⁷

121. The Committee notes that the official minute of the meeting between the Chief Planner and representatives of the Trump Organisation makes no reference to either of the above-mentioned telephone calls taking place.

Process of making the decision to call in

122. The Chief Planner told the Committee—

“I have been a practising planner for 33 years. I estimate that, during my career, a million planning applications have been determined in Scotland. Never though, in my professional experience, have I been aware of a development—widely reported as a billion-pound development—in relation to which a local authority resolved to refuse planning permission but many councillors who had been excluded from the decision-making process wanted the decision to be reversed. In addition, a broad cross-section of public opinion had expressed significant concerns about the way in which Aberdeenshire Council handled the application. The circumstances of the application for the Menie estate were, literally, one in a million. No circulars or internal procedure notes cover the circumstances.”¹³⁸

123. He said that he had thought over the options during the weekend of 1-2 December 2007 and felt that it would be a strange appeal by the Trump Organisation, with the Council formally refusing planning permission, but supporting the development at appeal. He formed the view that the simplest approach, which would give certainty to all parties and interests on the process to be followed, was to call in the application.¹³⁹

¹³⁰ OR Col 449

¹³¹ S3W-7699

¹³² OR Col 433

¹³³ OR Col 460

¹³⁴ Aberdeenshire Council written submission

¹³⁵ OR Col 433

¹³⁶ OR Col 470

¹³⁷ OR Col 449

¹³⁸ OR Cols 450-1

¹³⁹ OR Col 451

124. The Committee notes that this was prior to any request to meet the Trump Organisation, or to discussing the matter with the Cabinet Secretary for Finance and to Mr Salmond's meeting with the Trump Organisation on 3 December.¹⁴⁰

125. The Committee notes, however, that this explanation was not relied on by the Cabinet Secretary for Finance and Sustainable Growth, John Swinney, in his statement of 20 December 2007. He said in his statement that "the purpose of call in on this occasion is to provide enhanced scrutiny of a planning application which raises issues of national importance and has been the subject of widespread public interest. The recommendation to call in was based on a number of factors. The nature and scale of the proposals, and their potential impact on important natural heritage resources clearly raised issues of national importance."

126. The Chief Planner told the Committee that he wanted to recommend that course of action to ministers before there was any prospect of a decision letter going out. Had such a notice gone out, it would not have been possible to call in the application. He said that he did not want "an even more farcical situation in which a decision notice was going out just as the Scottish Government was issuing a direction. That would have been the worst of all possible worlds."¹⁴¹

127. He said that a decision letter could have been issued quite quickly - "in 10 minutes", and therefore he decided that action had to be taken quickly.¹⁴²

128. He subsequently acknowledged to the Committee, however, that he had not asked the Chief Executive, during the telephone conversation with him, whether the letter was ready to be signed. He said to the Committee that it was "pretty clear that it was not." He accepted that it would have been possible to have waited another 24 hours.¹⁴³

129. The Chief Executive, in his oral evidence, said to the Committee that such decisions normally take a couple of weeks to send out.¹⁴⁴

130. The Committee notes that the Chief Planner would have been aware that the Council's legal opinion on whether the Infrastructure Services Committee's could be reversed would not arrive until the following day.¹⁴⁵

131. In the early afternoon¹⁴⁶ (UK time) of Monday 3 December, the Cabinet Secretary for Finance and Sustainable Growth spoke with the Chief Planner, from the USA, about the Trump Organisation's application for planning permission.¹⁴⁷ The call lasted 5 or 6 minutes.¹⁴⁸ The Cabinet Secretary asked for an update on the situation, asked for the Chief Planner's opinion and asked him what options

¹⁴⁰ OR Col 450-1

¹⁴¹ OR Col 454

¹⁴² OR Col 468

¹⁴³ OR Col 470

¹⁴⁴ OR Col 435

¹⁴⁵ OR Col 474

¹⁴⁶ OR Col 472

¹⁴⁷ S3W-7675

¹⁴⁸ OR Col 472

existed.¹⁴⁹ The Chief Planner explained that he had become increasingly convinced that early call-in would provide certainty to all the parties.¹⁵⁰

132. On Tuesday 4 December, after the meeting with the Trump representatives described above, which would have finished some time after 3.00pm, the Chief Planner and Head of Planning Decisions Division agreed to recommend to Ministers that the Trump Organisation's application be called-in for ministerial decision.¹⁵¹

133. Before the Cabinet meeting of that day¹⁵², at around 3.45pm or 3.50pm¹⁵³, the Chief Planner telephoned the Cabinet Secretary for Finance and Sustainable Growth and recommended that the Trump Organisation's application be called-in. During the call, the Chief Planner told the Cabinet Secretary that he had ascertained from Aberdeenshire Council that it was unlikely that the Council's standing orders would allow the planning application to be reconsidered by the Council.¹⁵⁴ The Cabinet Secretary agreed that the application should be called-in.¹⁵⁵

134. Members of the Committee put it to the Cabinet Secretary that there was a contrast between the scrutiny of the application over a period of time by two Committees of Aberdeenshire Council and the decision made by the Cabinet Secretary to call in the application after two five-minute conversations with the Chief Planner.

135. The Cabinet Secretary said that he had had time to reflect on the option of calling-in the application after the telephone call from the chief Planner on Monday 3 December and the conversation recommending call-in on Tuesday 4 December.¹⁵⁶

136. He also said, in response to questions from the Committee, that it was perfectly possible for Ministers to consider issues without seeing everything on paper. He was perfectly able to have discussions with the Chief Planner, understand the issues that he set out to him and the points that were being considered. It was, he said, not particularly exceptional.¹⁵⁷

137. He said that he took the decision in the context of the knowledge and experience he had gained since he had become a Minister, his understanding of the issues and the way in which Ministers exercise responsibility on planning matters.¹⁵⁸ He confirmed that he knew that it was possible to call in an application during the period between the date of a planning authority's meeting and the signature or delivery of the decision letter.¹⁵⁹ The Committee noted that the

¹⁴⁹ OR Col 489

¹⁵⁰ OR Col 451

¹⁵¹ Minister's Statement 20 December 2007

¹⁵² OR Col 488

¹⁵³ OR Col 471

¹⁵⁴ S3W-8014

¹⁵⁵ S3W-7675

¹⁵⁶ OR Col 489

¹⁵⁷ OR Col 561

¹⁵⁸ OR Col 498

¹⁵⁹ OR Cols 498-9

Cabinet Secretary had experience of only one other planning case since the election and had only taken over responsibility for the Menie application in October.

138. He told the Committee that the application itself was not the question which he was addressing; the question was whether further consideration should be given to the planning application. He said that he took the decision that further consideration should be given to it.¹⁶⁰ He denied that he called the application in because that was the only way in which it would come to his desk for consideration. He said that the context in which the decision took place was that the overwhelming majority of the members of the Aberdeenshire Council felt that the application had not been given full and proper consideration by the Council.¹⁶¹ He went on to say—

“I thought that the planning system was in danger of falling into disrepute because of the contradictory positions being adopted within Aberdeenshire Council.”¹⁶²

Committee’s comments on the decision making process

139. The Committee accepts the evidence that the decision making process of Aberdeenshire Council was appropriate and valid, and that the decision of the Infrastructure Sub Committee, albeit highly controversial, was both competent and represented the decision of the Council under its then Scheme of Delegation.

140. However, the Committee has serious concerns about the course of events involved in the Scottish Government’s decision making process from the time of the refusal of planning permission by Aberdeenshire Council on 29th November 2007 until the Ministerial call in of the application on 4th December 2007.¹⁶³

141. These concerns surround a) the intervention of the First Minister; b) the Chief Planner’s meeting with the Applicants c) the decision making process of the Cabinet Secretary for Finance and d) the disparity between the ostensible grounds for the call in and the actual reasons.¹⁶⁴

142. The Committee notes in particular that the reasons given in the advice note to the Cabinet Secretary of 4 December 2007 which recommended call-in were not the reasons given by him in his public statement of 20 December 2007 or to the Committee, and the reasons given by him in his statement of 20 December and to the Committee do not feature in the advice note given to him by Planning officials.¹⁶⁵

¹⁶⁰ OR Col 498

¹⁶¹ OR Col 500

¹⁶² OR Col 565

¹⁶³ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

¹⁶⁴ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

¹⁶⁵ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

143. The Committee recognises that, both in terms of the Ministerial Code and of the quasi-judicial nature of the planning process, it is vital for Ministers to avoid imperilling the decision or exposing their actions to judicial challenge.

144. The Committee is strongly of the view that there should be an accurate audit trail of arrangements leading to key decisions by Ministers.

145. The Committee finds it difficult to accept that there was no connection between the First Minister facilitating a hastily arranged meeting for the Trump Organisation with the Chief Planner, the Trump representatives raising the option of a Ministerial call in at that meeting, and advising they were not going to appeal, the telephone call to the Trump legal consultants during that meeting and the Ministerial call in less than an hour later.¹⁶⁶

146. The Committee also notes the evidence suggesting that there appeared to be little, if any, difference in timescale or procedure between an appeal by the applicants and a call in by Ministers. They accepted, however, that this may not have been the perception or expectation at the time of the Trump representatives.

147. The Committee also wish to reiterate that the timetable and process undertaken by Ministers following the call in is not affected by the Committee Inquiry, and that the Committee has no jurisdiction over, nor influence on, these matters.

148. The Chief Executive of the Council quite properly sought legal opinion as to whether it was competent for the Council to reconsider the decision of its ISC. The content of that legal opinion was not known until 4th December and subsequently received in writing on 5th December. Until this issue was resolved, it would have been premature for the Council to issue a decision notice in respect of the application which is why none was issued.

149. The meeting of Aberdeenshire Council on 12th December also recommended that a hybrid process combining written submissions and a hearing should apply to the subsequent consideration of the application by Scottish Ministers following the call-in. Aberdeenshire Council did not recommend that a local public inquiry be held. The Committee also notes that it took Aberdeenshire Council only 8 days to come to a view about the appropriate process which should now apply, whereas it has taken 85 days for Scottish Ministers to come to a different conclusion.

150. The Committee recommends that Local Authorities review their schemes of delegated authority on planning schemes.

151. Aberdeenshire Council followed its own procedures and were entitled to follow the course of action they did. Aberdeenshire Council has since

¹⁶⁶ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

changed its scheme of delegation with a view to ensuring that the full Council will be able to decide on major planning applications.¹⁶⁷

152. The Scheme of Delegation is entirely transparent and understandable. The Committee does not accept that the process was chaotic.

Grounds for calling in the application

153. The Chief Executive of Aberdeenshire Council told the Committee that the application was always likely to be called in. It was contrary to the structure plan and to its local plans because of the intrusion on the SSSI, because of the housing element¹⁶⁸ and because of its scale.¹⁶⁹

154. The Chief Planner also told the Committee that there was a clear expectation that, by virtue of their nature, scale and location, the proposals at Menie estate would have to come before the Government, either as a notified application if it had been approved or as an appeal if it had been refused.¹⁷⁰

155. The Chief Planner told the Committee that, in his view, this project was “major”. “National developments”, within the hierarchy of the planning process, are, he said, essentially infrastructure developments in the fields of transport, energy and environmental infrastructure. He said that “major” developments are essentially speculative applications of a scale which requires agreement with the planning authority about how to handle them.¹⁷¹

156. John Swinney, in his oral evidence, drew a distinction between the reason for the call-in and the context in which the decision was made. He said that the call-in letter of 4 December made it clear that the Scottish Ministers gave the direction in view of

“the proposal raising issues of importance requiring scrutiny at national level.”¹⁷²

157. He said that the context of the decision made on 4 December was that one Council Committee had supported the application and one had refused it, and the overwhelming majority of Council members were excluded from the process but were making it obvious that they wanted to be involved in it. He said that—

“We believed, on the basis of information from council members, that the council was likely to express support for the application, which it did in its discussion on 12 December. However, in that situation, we could have faced an appeal by the Trump Organization for which the council could send officials to a planning inquiry to justify a refusal while the council also made the case for endorsement and approval. As I am mindful of the need to protect the planning system's integrity, I felt that the way to resolve the

¹⁶⁷ Jim Tolson dissented from this paragraph.

¹⁶⁸ OR Col 428

¹⁶⁹ OR Col 434

¹⁷⁰ OR Col 451

¹⁷¹ OR Col 465

¹⁷² OR Col 493

situation was to ensure that ministers could provide for greater consideration of the application.”¹⁷³

158. John Swinney said that there was a danger to the integrity of the planning system as a result of the scenario which they faced.¹⁷⁴ He said that his view of the events was that it was likely that Aberdeenshire Council would be pointing in two directions and that the planning system would be perceived in a very poor light as a consequence.¹⁷⁵

159. The Committee notes, however, that the decisions made by the Formartine Area Committee and then by the Infrastructure Services Committee were not, in some way, opposites. Having been supported by the Area Committee, the application, which was contrary to the Council’s Development Plan, required to be referred to the Infrastructure Services Committee. The decision of the Infrastructure Services Committee, in terms of planning law, was the final decision of the Council even though the planning decision notice had still to be issued.

160. The Chief Planner said that the application had not been called in earlier, because the clear practice of the Scottish Government, the former Scottish Executive and the former Scottish Office was to let planning applications run their course.¹⁷⁶

161. John Swinney told the Committee that—

“The application was properly considered by Aberdeenshire Council. When the stage was reached at which the consideration process could potentially have undermined the integrity of the planning system in Scotland, ministers exercised their right to call in the application.”¹⁷⁷

162. It is evident from the position of the Chief Planner and the Cabinet Secretary that they were fully aware of the process by which a decision was to be reached and that under such a process it was possible for the majority of members to be excluded from the decision making process.

163. Mr Swinney acknowledges that the application was properly considered.

164. The Chief Planner said that call-in would not have been possible after the decision notice on the refusal had been issued.¹⁷⁸ The Council expected that if it turned down the application, then it would be the subject of an appeal. It had not been anticipated that the application would be called in after rejection, but before the decision notice had been issued.¹⁷⁹ When the Council checked the position, it came to the view that the situation was legal and regular, although it was not within the normal experience.¹⁸⁰

¹⁷³ OR Col 492

¹⁷⁴ OR Col 493

¹⁷⁵ OR Col 560

¹⁷⁶ OR Col 486

¹⁷⁷ OR Col 494

¹⁷⁸ OR Col 435

¹⁷⁹ OR Col 429

¹⁸⁰ OR Col 448

165. According to the Royal Town Planning Institute there are around 50,000 planning applications every year, the Scottish government is notified of about 300 or 400 every year and about 10% of those are called in for determination.¹⁸¹

166. The representatives of the RTPI told the Committee that they did not recollect a case where Ministers had called in an application after a decision had been made but before the decision letter had been written.¹⁸²

Committee's comments on the decision to call in the application after the relevant Committee of the Council had decided to reject the application, but before the decision letter had been issued

167. **The Committee accepts that the decision to call in the application after the decision of the Infrastructure Services Committee but before the issue of the decision letter was a competent one, albeit unprecedented.**

168. **The Committee is very concerned at the disparity between the stated and apparent reasons for the call in and the actual reasons. They are particularly concerned that the Cabinet Secretary failed to explain the actual reasons for the call in his statement of 20th December 2007 or at any time prior to giving evidence to the Committee, nor to recognise that such a disparity might be an issue.**¹⁸³

169. **The Committee notes that the real reasons for calling in the application, as stated by the Cabinet Secretary, were a) the desire to retain the potential for the substantial investment by the Trump Organisation in the development, b) the fact that the Trump organisation had indicated that they would not be appealing, c) the belief that the planning system in Scotland would be perceived in a very poor light d) the view that Aberdeenshire Council might face an award of expenses in an appeal process.**¹⁸⁴

170. **The Committee also takes the view that none of these reasons were valid reasons for Ministerial call in terms of the planning legislation.**¹⁸⁵

171. **The Committee is concerned that the unprecedented decision to call in after a refusal can only suggest that Ministers were unhappy with the refusal and this runs the risk of creating an impression of bias by Ministers on the matter – a perception which is not raised by a call in prior to decision, or by an appeal by applicants.**¹⁸⁶

172. **The decision by the Cabinet Secretary to call-in the application in circumstances in which it had been rejected by the planning authority was unprecedented. The Committee is surprised that such an unprecedented decision was taken on the back of two short telephone conversations with the Chief Planner, the latter call being the one in which this course of action**

¹⁸¹ RTPI Written evidence

¹⁸² OR Col 634

¹⁸³ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

¹⁸⁴ Alasdair Allan and Bob Doris dissented from this paragraph.

¹⁸⁵ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

¹⁸⁶ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

was recommended to him. The Committee rejects the view that this decision was time critical. It notes that the power to call in the application only subsisted until such time as the decision notice was issued by Aberdeenshire Council. It was suggested in evidence by the Chief Planner that this created a degree of urgency since such a notice could be issued unbeknown to the Scottish Government in 10 minutes. It was later accepted by the Chief Planner that he could have waited another 24 hours. However all of this is contradicted by the evidence of the Chief Executive of the Council who said that it could have taken up to a fortnight and by the fact that until the Council received its legal opinion from Senior Counsel it would not have issued a decision notice anyway as it may have been advised that it was indeed competent for the Council to review the decision of the ISC. It is noteworthy that in the telephone conversation which took place between the Chief Planner and the Chief Executive of the Council on 4th December no request was made for information as to the timing of the issue of the decision notice which is surprising given the subsequent reliance placed on this timing as a reason for the speed with which the call-in decision was made by the Cabinet Secretary.¹⁸⁷

173. If a call-in of this application was justified on the grounds that it was of national importance at the time it was made, then the application was equally of national importance when it was submitted. Indeed the Scottish Government was fully aware of its significance both in economic terms and in respect of the planning issues which would arise from the location of the SSSI and the housing component of the proposal. The application was not called-in because Scottish Ministers expected it to be approved and accordingly that their subsequent consideration of it would have been in the context of an approval rather than a rejection. When the application was rejected by the Council as planning authority, the application was called in during the legal window of opportunity which existed prior to issue of the decision letter because if it had not been called in then the application would have “died” given the refusal of the Trump Organisation to appeal. In the opinion of the Committee that is the real reason for the call-in and subsequent explanations or justifications are ex post facto rationalisations of the decision. This is borne out by the terms of the advice note to the Cabinet Secretary of 4 December 2007.¹⁸⁸

174. The Scottish Government quite properly attaches great importance to economic development and the Trump Organisation’s proposal for a major development on this scale in the North East was clearly of interest to it as it was to the previous administration. It was also properly concerned about the reputational damage to Scotland as a place for major inward investment. It can be difficult to reconcile these goals with the operation of the planning system in which ministers are required to perform a quasi judicial role.

175. The Committee believes that greater efforts should have been made by Scottish Government officials to inform the Trump Organisation about the conduct of the appeal process and how this would not necessarily be any

¹⁸⁷ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

¹⁸⁸ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

longer or more expensive than a call-in process which involved a public inquiry if one was ordered by Ministers.¹⁸⁹

176. While many of the provisions of the 2006 Act are still to be enacted, the culture change signalled by the legislation is already being developed. Critically planning should be development plan led, the process should be transparent and the key role of early engagement with the local community in promoting a shared understanding of development proposals should already be regarded as good practice.

177. The Committee believes that the culture change agenda has been called into question. Up to date local plans such as existed for Aberdeenshire must have significant weight and being 'open for business' cannot mean that the planning process should be used to accommodate the impatience of developers. If the balance in the current system is not honoured, the consequence will be pressure to increase the rights of communities in the planning process such as the introduction of a TPRA and may feed again the cynicism that many feel about the priority given to development interests.¹⁹⁰

178. The Committee notes that it was not necessary for the application to be called in to maintain the integrity of the planning system. The appeal mechanism provides the checks and balances required.¹⁹¹

179. As the Cabinet Secretary with his stated confidence in his knowledge of planning legislation would be aware, the process adopted by Aberdeenshire Council was entirely comprehensible and predictable; the 2 Committees were 2 stages of a process with the decision by the Infrastructure Services Committee always having the potential to refuse the application, having considered the report of the Area Committee. This charge by the Cabinet Secretary of incoherence in the local process is a means of rationalising the decision to call in and has no regard for a key tenet of planning legislation for planning authorities – that decisions must be made on planning grounds and local authorities must not take a corporate view on applications being considered by them.¹⁹²

180. The requirement on local authorities to formally notify Scottish Ministers when they are minded to grant planning permission to certain types of development and the fact that local authorities are not required to notify applications they are minded to refuse make the decision to call in all the more remarkable. Ministers should have been alive to the charge that it would appear to be responding to the decision and not the process and yet there is no paper trail, no reasoned argument - only two five minute phone calls and Mr Swinney's very limited experience of this and one other planning case as justification.¹⁹³

¹⁸⁹ Alasdair Allan and Bob Doris dissented from this paragraph.

¹⁹⁰ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

¹⁹¹ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

¹⁹² Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

¹⁹³ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

181. **The Committee does not accept that this development was of national significance - and this is backed up by the Chief Planner. The Committee does not accept that it was of such significance that it merits “one in a million”¹⁹⁴ treatment.**

182. **The Committee notes that the Chief Planner and the Planning Minister (Cabinet Secretary for Finance and sustainable Growth, John Swinney) acted in accordance with planning laws when issuing the decision to call in the application. The Committee notes the evidence of the Chief Planner that he had decided over the weekend of 1-2 December that call-in would be the simplest solution for all parties.¹⁹⁵ The Committee notes that there are no definitive criteria for call-in and that each case is decided on its own merits (see para 36). The Committee notes the evidence that the planning minister took advice from the Chief Planner in reaching his decision. The Committee further notes that neither the Chief Planner nor the Planning Minister asked Aberdeenshire Council if the decision notice had been issued on 4 December.**

183. **Between 2.20pm and 3.45pm on 4 December the Chief Planner, meets with Mr. Sorial et al, speaks on the telephone with Ann Faulds, calls Aberdeenshire Council for an update, reconvenes the meeting with Mr. Sorial, calls Mr. Salmond, makes the decision following discussion with Mr. Ferguson, calls Aberdeenshire Council again and finally calls Mr. Swinney to have a conversation which results in the call in. This is not an appropriate timescale within which to take an unprecedented decision of this nature.¹⁹⁶**

184. **The Committee notes that neither the position on the planning system being brought into disrepute nor the issues of costs against Aberdeenshire Council featured at all in the explanation given in the ‘full account’ of 20th December, despite such weight being given to these positions by the First Minister, the Chief Planning Officer and John Swinney in evidence to the committee.**

Costs of an appeal

185. The Chief Planner also told the Committee that the costs of an appeal, which would involve hundreds of thousands of pounds arising from legal fees and planning consultant’s fees, could have been awarded to the Trump Organisation. He said that a circular from 1990 makes it clear that a planning authority is likely to face accusations of unreasonable behaviour if it is unable to defend its decision at appeal.¹⁹⁷ John Swinney told the Committee that it would have been difficult for the Council to do this if it had then decided to take the stance that it subsequently took.¹⁹⁸

186. However, the RTPI, in its oral evidence confirmed that it saw no great difficulty in principle in its members, as planning professionals, making a

¹⁹⁴ OR Col 451

¹⁹⁵ OR Cols 450-1

¹⁹⁶ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this sentence.

¹⁹⁷ OR Col 453

¹⁹⁸ OR Col 558

submission in an appeal process to Scottish Ministers that said that they favoured rejection of an application because it contravened the Council's planning policies.¹⁹⁹

187. The RTPI confirmed in oral evidence that, in considering an award of expenses against an authority, where the proposal was in contravention of the Council's planning policies, and proper procedure had been followed, the question would be whether any reasonable authority could have reached the same decision. Alistair Stark, the former Convener of the RTPI in Scotland said—

“If the answer to that question is yes, there is no claim for expenses.”²⁰⁰

188. Committee's comments on the Scottish Government's view that costs could have been awarded against Aberdeenshire Council

189. It seems to the Committee that it was highly unlikely that an appeal by the applicants would have raised any real issue as to costs for Aberdeenshire Council, given that there were substantial grounds relating to the SSSI and the housing element departing from the Structure Plan and the Local Plan which would have justified refusal, and that no less than 62 conditions would have been attached if permission had been granted.²⁰¹

190. The Committee does not accept the evidence of the Chief Planner that planning officials in Aberdeenshire Council would have been unable to stipulate valid reasons for the refusal of the application by the ISC just because it had been recommended for approval. It does not accept the evidence that Aberdeenshire Council was at risk of having a substantial award of legal expenses made against it had the Trump Organisation appealed the decision and Scottish Ministers found in its favour. The evidence given by the Chief Planner in this respect was contradicted by the evidence from the RTPI. Rejection of the planning application was entirely consistent with the local development plans which were up to date and had already been approved by the Council. The decision was fully justifiable on that basis and the expenses issue was not germane.²⁰²

191. The argument on costs was at no stage presented as grounds for call in prior to the Committee enquiry. It should also be noted that the decision to award costs against Aberdeenshire Council would have been a matter for Scottish Ministers.

Committee's comments on the views of the Trump Organisation on the appeal process.

192. The Trump Organisation is a major developer of projects both in the United States and abroad. It has ample and expert legal and other professional advice available to it both in house and through the employment of third party lawyers, consultants and advisers to guide it in all

¹⁹⁹ OR Cols 627-8

²⁰⁰ OR Cols 628-9

²⁰¹ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²⁰² Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

matters relating to its developments. Such advice was available to it in respect of the Menie Estate application. The Chief Planner knew this. The Trump Organisation was not confused by the process.

193. The only area of legal uncertainty in relation to the planning application was whether or not Aberdeenshire Council had power to reconsider the decision of its ISC. That uncertainty was removed on 4th December not only by the advice which came via Aberdeenshire Council but by the advice which the Trump Organisation was given by Ann Faulds of Dundas & Wilson. However that advice was not material in determining its position since the Trump Organisation had already announced that it would not appeal against a refusal of its application because of the delay and expense which it perceived would result from the appellate process and its expressed preference to devote such time and resource in pursuit of development opportunities elsewhere.

194. The Committee believes that the true purpose of the meetings with Alex Salmond and the Chief Planner on 3rd and 4th December was not to seek advice from either of them about legal processes but to emphasise the Trump Organisation's position following the decision of 29th November, its concern about that decision and in the case of the meeting with Mr Salmond to ask if he could facilitate a meeting with the Chief Planner.²⁰³

195. We note from the evidence of the Trump Organisation that it did not specifically request the Chief Planner to recommend the call-in of the application to the Cabinet Secretary. However, at the time of this meeting, it was known to both the Trump Organisation and the Chief Planner that this option existed. Furthermore, in view of the Trump Organisation's apparently irrevocable decision not to appeal and the conclusion that the application could not be revisited by Aberdeenshire Council, the situation was that a call-in by Scottish Ministers was the only way in which the application could be kept "alive". This was known to all concerned and accordingly there was no need to make an explicit request.

196. Whilst respecting the decision of the Trump Organisation that it would not appeal against the refusal of its planning application, there is no evidence that an appellate process would be any longer or more expensive than a call-in process involving a local public inquiry which Scottish Ministers have now determined to hold. The Trump Organisation believed that call-in would be more streamlined and less expensive. However an appeal by the Trump Organisation would have been in line with established procedure and would not have involved the Cabinet Secretary taking "a one in a million" decision²⁰⁴ which has given rise to controversy and concern about the integrity of the planning process.²⁰⁵

²⁰³ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²⁰⁴ OR Col 451

²⁰⁵ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from the words "and concern about the integrity of the planning process".

197. **The Chief Planner told the Committee that the Trump Organisation appeared to find the appeal process confusing. He thought that for Americans, appeals tended to be directed to a court. He was not sure to what extent the Trump Organisation understood that any appeal would be based not on points of law or procedure but on the merits of the application.**²⁰⁶

198. **The position taken by the Chief Planner was refuted by the Trump representative at the Committee. Indeed, in evidence Mr Sorial made it clear that the decision not to appeal had nothing to do with reputational damage or a lack of understanding of the system; it was because the organisation could look elsewhere.**

RELEVANCE OF THE MINISTERIAL CODE TO THE HANDLING OF THIS APPLICATION

199. As previously set out, it is important to note that the Code is not a rulebook and it is up to individual Ministers to decide how best to act in any particular situation. Enforcement of the Code is a matter for the First Minister, although the Permanent Secretary can provide advice to Ministers on the application of the Code.

200. The Committee, in pursuing this inquiry, has no power, nor does it intend, to judge whether or not any Minister is in breach of the Code.

201. The Cabinet Secretary for Finance and Sustainable Growth, John Swinney, did not accept that there was a perception of the Scottish Government taking sides by calling in an application only when it had been refused rather than allowing the application to go to appeal. He said that his response to the issue was designed to ensure that there was proper opportunity to consider the application.²⁰⁷

202. John Swinney said that in early November 2007, he decided that, to make the process as transparent as possible, there should be no involvement on the part of the designated planning minister, Stewart Stevenson, because he had a reasonably close constituency interest in the Menie estate application, as he represents the neighbouring constituency of Banff and Buchan.²⁰⁸

203. Other than the two occasions, when he told the First Minister that he would be acting as the Planning Minister and when he notified him that the application would be called in, John Swinney told the Committee that he had had no conversations with the First Minister on this application.²⁰⁹

204. He had not, until 16 January 2008, known that the First Minister had expressed an opinion on the application at a public meeting in Inverurie during the 2007 election campaign.²¹⁰

²⁰⁶ OR Col 455

²⁰⁷ OR Col 501

²⁰⁸ OR Col 499

²⁰⁹ OR Col 572

²¹⁰ OR Col 571

205. John Swinney told the Committee—

“What is known beyond dispute is that I took the decision to call in the application. Mr Salmond has sat in front of the committee and has been at pains to say that he knew nothing about the decision—and neither did Mr Campbell, the chief executive of Aberdeenshire Council. Mr Mackinnon did not have a conversation with Mr Salmond about a call-in, because that would not have been appropriate. That was a conversation for Mr Mackinnon and me to have.

“I can only ask members to take at face value the fact that, when I took the decision on 4 December, Mr Salmond was out of the process as a minister, because he is the MSP for Gordon—I viewed him as I would view any other MSP in relation to this issue. I was aware that I had to take a decision about the application and would be held accountable for it—and into the bargain I had no idea that Mr Salmond had ever expressed an opinion on the subject. I can only say that honestly in front of a parliamentary committee.”²¹¹

Committee’s comments on John Swinney’s actions in relation to the Ministerial Code and the Code of Conduct for MSPs

206. The Committee notes the Cabinet Secretary’s statement that he did not know at the time of the call in that the First Minister had expressed public support for the Trump application.

207. The Committee is very concerned that the Cabinet Secretary did not obtain legal advice nor official advice in written form before making a decision on a complex and unprecedented call in which could have the potential to imperil the decision, and taint the process. This contrasts with the careful action by the highly experienced Chief Executive of Aberdeenshire Council who took steps to carefully evaluate the legality of all relevant courses of action and indeed to take Counsel’s Opinion.²¹²

208. The Committee considered that the Cabinet Secretary did not appear to have assessed the risk that Ministerial or official actions could imperil the decision. This goes to the heart of the issue. Accordingly it is difficult for a neutral observer to have any clarity on what senior Ministers had been doing, who they had been meeting and in what capacity. It appears that no guidance was taken – as is appropriate – from the Permanent Secretary at any point during these events.²¹³

209. The Committee notes the evidence of the Cabinet Secretary that the First Minister had made no representations to him on the merits of the planning application even although it was permissible for the First Minister to do so in terms of Section 6.10 of the Code.²¹⁴

²¹¹ OR Cols 576-7

²¹² Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²¹³ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²¹⁴ Kenneth Gibson dissented from the words “even although it was permissible for the First Minister to do so in terms of Section 6.10 of the Code”.

210. **Given that a call-in decision happens in a very small proportion of cases, that call-in after refusal is unprecedented and that a normal call-in decision is allowed a minimum 28 days consideration, the Committee believes that the timescale for the decision exposed the Cabinet Secretary further to the charge that the key issue was keeping the application alive. The Cabinet Secretary's judgement in acting this way was unwise, given that it exposed his actions to the charge that his position was not neutral.**²¹⁵

211. **The Committee believes that John Swinney's acknowledgement that the application was properly considered by Aberdeenshire Council is the clearest indication that the issue at stake for Ministers was not the integrity of the planning system, nor the process used to determine the application. If it had been otherwise, the application would have been called in earlier.**²¹⁶

212. **The process was known but no call-in was made. It is clear that the application was called in because of the decision to refuse. This is confirmed by the terms of the advice note from officials to the Cabinet Secretary of 4 December 2007. It is the view of the Committee that the Cabinet Secretary acted inappropriately and potentially opened his decision to legal challenge.**²¹⁷

Alex Salmond's actions in relation to the Ministerial Code and the Code of Conduct for MSPs

213. The First Minister, Alex Salmond, stated in oral evidence to the Committee that as the constituency MSP, he was debarred from taking any role in the decision making process on the application. His actions in connection with the issue had been undertaken in his constituency rather than his ministerial capacity. He pointed out that Ministers were properly able to engage in a range of activities with regard to planning decisions in pursuing their legitimate constituency interest. He had adopted a cautious approach of not expressing in public his view on the merits of the planning application. He had followed that approach at private meetings,²¹⁸ and had never discussed the merits of the application with journalists.²¹⁹

214. The Committee notes that, before returning as an MSP and becoming First Minister, Alex Salmond had expressed qualified support of the application at a public meeting in Inverurie in March 2007, during the election campaign.

215. He said that, in representing the interests of his constituents he had met people from all sides of the debate. He said that—

²¹⁵ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²¹⁶ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²¹⁷ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²¹⁸ OR Col 505

²¹⁹ OR Col 523

“Each and every one of those answers made my role as a constituency MSP crystal clear and emphasised that as a minister I am debarred from decision making on a planning application in my constituency.”²²⁰

and—

“In every single phone call and meeting, I have gone through the limits that are placed on me by being the constituency MSP. No one can be in any doubt about that whatsoever.”²²¹

216. In answer to questions, he did not agree that it would have been better to delegate a regional MSP to act on his behalf in planning matters. He said that he believed that it was his responsibility as the constituency MSP to respond to requests for meetings.²²²

217. The Chief Executive of Aberdeenshire told the Committee that Alex Salmond always made it clear that he was talking as local MSP and not as First Minister.²²³ He did not express an opinion to the Chief Executive about the merits and outcome of the application.²²⁴

218. George A Sorial of the Trump Organisation told the Committee that in any dealings with Alex Salmond in connection with the meeting on 3 December, the Trump representatives were well aware that he was acting in his capacity as the constituency MSP for Gordon.²²⁵

219. George A Sorial further said that he had not been looking for any help from Alex Salmond and that he (George A Sorial) did not know whether or not Alex Salmond supports the application. He (George A Sorial) further said that he had never had such a discussion with Alex Salmond because he (George A Sorial) knew that it would be grossly inappropriate.²²⁶

220. Alex Salmond told the Committee that the only conversations that he had had with John Swinney on this application were when he was advised that John Swinney would take over the role of Planning Minister from Stewart Stevenson and when he was told of his decision to call the application in.²²⁷

221. In response to questions, Alex Salmond said that paragraphs 6.7-6.10 of the Ministerial Code deal with how Ministers are able to represent a constituency interest on planning matters. He said that the Code does not say that a constituency interest relates only to people who are on the voters roll.²²⁸

222. Alex Salmond stated that the Code makes a distinction between a Minister with a constituency interest, who must not be involved in the planning process, but

²²⁰ OR Col 505

²²¹ OR Col 506

²²² OR Col 507

²²³ OR Col 441

²²⁴ OR Col 442

²²⁵ OR Col 668

²²⁶ OR Cols 676-7

²²⁷ OR Col 515

²²⁸ OR Col 517

who can undertake a range of activity; and the Minister who is the Planning Minister or who is involved in the decision making process.²²⁹

223. The Committee notes that the wording of the Code makes reference to “electorate’s views” on planning cases, rather than to a “constituency interest”.

224. The Committee asked Alex Salmond why a special adviser to the First Minister had issued statements to the press on meetings that he had had in his capacity as constituency MSP, not as First Minister. Alex Salmond responded that the better approach is to respond but to make it clear what he does as a First Minister and as a constituency MSP.²³⁰

225. Alex Salmond said, in answer to questions, that the duty of the First Minister does not lie in the terms of the Ministerial Code or the Parliamentary Code. He said that we should not get into the situation where the First Minister or the economic Minister is not regarded as having the general responsibility to generally promote Scotland’s economic development.²³¹ (See also paragraph 241 below.)

226. He went on to say—

“I would express it as follows: if I am the constituency MSP, I have a bounden duty. That is for the reasons that I have already stated. As First Minister, I have a duty—like any minister—to respond to MSPs who ask questions. That is perfectly legitimate and has been done very many times by ministers. It would be shocking if ministers did not respond to MSPs’ queries. There is a general duty within the context and the confines of the ministerial code that must be followed. Scottish ministers should be promoting the best interests of the country, as long as they stay within the requirements of the ministerial code—which are there for a purpose.”²³²

227. Following the First Minister’s explanation to the Committee as to how he interpreted the Ministerial Code and the Code of Conduct for MSPs, members asked him about Ministers’ involvement in the application for a development at Aviemore, which had taken place at around the same time as decisions were being made in relation to calling in the Menie estate development.

228. The Committee notes that an in-depth investigation into the decision-making processes which took place in relation to the proposed Aviemore development would not be within the terms of reference of this inquiry. However, at the time of agreeing this report, the Committee still awaits a full response from the First Minister to questions about what Ministerial discussions took place in relation to that application.

229. The Committee notes that on many occasions in the Chamber and elsewhere where Ministers have been asked to comment on ‘live’ planning applications, they have declined with the usual position that they are unable as Ministers to do so. This well-known response, in the view of the Committee, is given as a

²²⁹ OR Col 524

²³⁰ OR Cols 540-1

²³¹ OR Col 542

²³² OR Col 544

consequence of official advice about the constraints placed on Ministers in responding to MSPs about live planning applications. It is evident that it is possible to promote economic opportunity in Scotland, without responding to specific planning applications. This has been the normal practice in the past.

230. The First Minister told the Committee that on 7 December he asked the Chief Planner about the status of the Aviemore application and about the relevant bodies. He did that so that he could reply to MSPs who had asked. Anything that he had done about Aviemore or anywhere else stayed exactly within the confines of the Ministerial Code.²³³

231. The Cabinet Secretary, John Swinney, said he had had no discussions with Stewart Stevenson or with the Chief Planner about the Aviemore development.²³⁴

232. He told the Committee that the First Minister had sought an update on the progress of the application in order to ensure that he could properly address the concerns that were drawn to his attention by members of the Westminster and Scottish Parliaments. He thought that was an entirely reasonable thing for the First Minister to do.²³⁵

Committee's comments on Alex Salmond's actions in relation to the Ministerial Code as it relates to planning matters and also to the Code of Conduct for MSPs

233. **The Committee entirely accepts the right of Alex Salmond MSP in his constituency capacity to meet with anyone he chooses about an issue in his constituency. However, in doing so and in any follow up action he takes, he must follow both the letter and the spirit of the Ministerial Code.**²³⁶

234. **The Committee are of the view that it was extremely unwise of the First Minister to directly facilitate a meeting between the Trump representatives and the Chief Planner.**²³⁷

235. **Alex Salmond MSP indicated repeatedly in evidence that his purpose was not to influence the process.**²³⁸ He said his purpose was to assist his constituents,²³⁹ but in fact he did not do any of the things permitted by the Ministerial Code. He did not correspond with the Minister, lead a deputation or have a personal interview to make his electorate's views known. Instead he went directly to the Chief Planner. At the vital time between the Council decision and the call in, he met only one side of the case, that of the applicants

²³³ OR Col 544

²³⁴ OR Col 579

²³⁵ OR Col 580

²³⁶ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this sentence.

²³⁷ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²³⁸ OR Cols 515 and 550

²³⁹ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from the rest of this paragraph after the word "constituents".

236. The applicants had previously met the Chief Planner in connection with this application and were able to seek a meeting with him without the intervention of Alex Salmond.

237. The Committee take the view that a request by the First Minister, whether in his constituency capacity or not, for an urgent meeting by a planning applicant with Government officials carries with it an implication that officials should be as helpful as possible to that applicant.²⁴⁰

238. It is not the role of the Committee to consider whether there have been any breaches of the Ministerial Code by either the First Minister or John Swinney as Cabinet Secretary. However the Committee wishes to highlight the following points.

239. Mr Salmond sought guidance from the Chief Planner before agreeing to meet with the representatives of the Trump Organisation on 3rd December. However he did not seek guidance on this matter from the Permanent Secretary and it is the Permanent Secretary and not the Chief Planner who is specified in the code as the person who can provide advice to Ministers on the application of the code. It is not clear why the Permanent Secretary was not consulted by the First Minister about this.²⁴¹

240. Mr Salmond as constituency MSP for Gordon was not obliged to meet with the representatives of the Trump Organisation on 3rd December by reason of the Code of Conduct for MSPs. It was not his “bounden duty”.²⁴² He had no particular expertise in relation to planning law or processes on which he could provide advice or guidance to the Trump Organisation which in any event claimed in evidence to be fully familiar with the law and relevant processes and had just engaged the services of Ann Faulds of Dundas & Wilson, one of the leading planning lawyers in Scotland.²⁴³ Mr Salmond could have declined to meet with the representatives of the Trump Organisation at that time given that he was aware from his conversations of 29th and 30th November that the whole situation was under active consideration by the Chief Planner and the Cabinet Secretary. He chose not to do so not just because of his constituency interest in the matter but because of what he believed to be his overall responsibility as First Minister to promote the economic development of Scotland. Whilst²⁴⁴ the Committee agrees that the First Minister has such a wider responsibility, the issue is whether the decision made by Mr Salmond to meet with the representatives at that time was wise given the quasi judicial role which Ministers play in the determination of planning applications.^{245 246}

²⁴⁰ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²⁴¹ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from all after “However” in this paragraph.

²⁴² Kenneth Gibson dissented from this sentence.

²⁴³ Kenneth Gibson dissented from this sentence.

²⁴⁴ Kenneth Gibson dissented from the word “Whilst”.

²⁴⁵ Kenneth Gibson dissented from the clause beginning “the issue is whether...”.

²⁴⁶ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from the whole of this paragraph.

241. Alex Salmond said that the duty of the First Minister does not lie in the terms of the Ministerial Code or the Parliamentary Code. He said that we should not get into the situation where the First Minister or the economic Minister is not regarded as having the general responsibility to generally promote Scotland's economic development.

242. As noted in above (para 238) the Committee has no power and does not intend to judge whether or not any Minister is in breach of the Ministerial Code or Code of Conduct for MSPs. The Committee notes the efforts made by Mr Salmond to ensure all stakeholders were clear that he was acting as Constituency MSP for Gordon and not as First Minister. The Committee notes that stakeholders have made it clear they were aware that Mr Salmond was acting as Constituency MSP for Gordon and not as First Minister at all times.

243. Given a) the controversy already surrounding the proposal, b) the fact the First Minister had never acted in this way on any development in his public life before, c) the fact that the First Minister had no detailed knowledge of the planning process, d) the First Minister maintains he understood he was constrained in what he could discuss with the developer, it seems astonishing to accept that the First Minister did not perceive there might be a risk in his actions, that his actions might be open to question and that as a consequence the decision might be open to legal action. The Committee believes that, far from taking a precautionary approach, the First Minister was cavalier in his actions and displayed, at best, exceptionally poor judgement and a worrying lack of awareness about the consequence of his actions.²⁴⁷

244. The Committee believes that the Code of Conduct for Members gave Alex Salmond discretion whether or not to meet with the representatives of the Trump Organisation but did not require him to do so.

245. It is the view of the Committee that, far from distancing himself from the proposal, the First Minister's overriding concern - as First Minister - was the charge that Scotland was not open for business. As a result he risked the accusation of Ministerial interference to meet Trump representatives to refute that charge.²⁴⁸

246. The issue of perception and the capacity of Alex Salmond to secure access for the developer to the Chief Planner are critical. Mr Salmond reports that he always acted as a constituency member. Despite Mr Mackinnon's reputation for being willing to meet with MSPs, it stretches credibility to breaking point to suggest that any MSP sitting in a room with any developer could make direct personal contact with the Chief Planner and set up a meeting at 24 hours notice.²⁴⁹

²⁴⁷ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²⁴⁸ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²⁴⁹ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

247. If that explanation is not credible, then it does expose the First Minister to the charge of behaving in an unwise and inappropriate way.²⁵⁰

Review of Ministerial Code

248. In response to a question, the first Minister confirmed that the Ministerial Code is currently under review. It had essentially been inherited from the Westminster Ministerial Code, which itself had recently been changed. He said that he was reflecting on whether the conduct of Ministers should be left to the First Minister to determine.²⁵¹

249. In its written submission, the RTPI noted that guidance in England and Wales, *'Guidance on propriety issues in handling planning casework in Communities and Local Government'* published in 2006 is more precise in providing detailed guidance on the basis for decisions relating to the call-in of applications and the appropriateness of levels of involvement and contact with applicants at different stages in the process.²⁵²

250. In oral evidence, Roger Kelly, the current Convener of the RTPI in Scotland, told the Committee—

“It is an excellent moment for that to take place because we are reforming the planning system.”²⁵³

Committee's comments on the First Minister's review of the Ministerial Code

251. The Parliament, at its meeting of 28 February 2008 agreed “That the Parliament believes that government should be open and accountable; affirms its support for the Seven Principles of Public Life established in the first report of the Nolan Committee and for the further principles governing ministerial conduct as set out in the Scottish Ministerial Code; notes that the First Minister is reviewing the code, in line with practice after each Scottish parliamentary election; acknowledges the increasing calls for independent oversight of the code; considers that a modern and progressive government has nothing to fear from ensuring transparency and accountability in all that it does, and therefore calls on the First Minister to include independent authority to direct ministers in the appropriate arrangements for ensuring that their conduct as ministers is in accordance with the Scottish Ministerial Code to avoid conflict or potential conflict of interest, and to oversee its administration, and to bring forward a statement to the Parliament on this when the review is concluded and further believes that the best way of ensuring independent oversight is for the Parliament to appoint a person independent of government to investigate alleged breaches of the Scottish Ministerial Code.”

²⁵⁰ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²⁵¹ OR Col 549

²⁵² RTPI Written evidence

²⁵³ OR Col 625

252. The Committee notes the above resolution and looks forwards to the conclusions of the review being brought to the Parliament at the earliest opportunity

253. The Committee recommends that the Ministerial Code should be reviewed and, in particular that the appropriateness of Ministerial contact with senior officials in the context of planning applications should be examined.²⁵⁴

Role of the Chief Planner

254. In his evidence, John Swinney told the Committee that Alex Salmond made no representations to him whatsoever in his capacity as the Minister responsible for this application, neither on behalf of his constituents nor in any other way.²⁵⁵

255. The Chief Planner told the Committee that he was under no pressure, far less an instruction, from any Minister to act in a specific way.²⁵⁶ Indeed, he made it clear in his evidence that he had formed the view over the weekend of 1-2 December that the simplest approach was to call in the application and that he suggested this option to John Swinney when John Swinney telephoned him on Monday 3 December for an update. Following the meeting with the Trump Organisation on 4 December, it was the Chief Planner who decided to recommend call-in immediately,²⁵⁷

256. The Committee notes, however, that the responsibility for seeking that advice and acting on it remains with the Planning Minister and it is for the Planning Minister to ensure that he is satisfied that he has sufficient information to make a decision.

257. Alex Salmond said to the Committee that the Chief Planner had not advised him that call-in was a possible option during their telephone conversation of 3 December.²⁵⁸

258. Alex Salmond told the Committee that he suspected that the Chief Planner deliberately did not advise him that call-in was a possible option because at that stage the Chief Planner was forming in his mind what his advice was going to be to the Minister, and had not considered it appropriate to tell Alex Salmond of this, or to give him advance warning of what the advice was going to be.²⁵⁹

259. George A Sorial said in evidence to the Committee that he was not aware that call-in was an option until 4 December, so on 3 December, when he met Alex Salmond, there was no discussion about a call-in.²⁶⁰

²⁵⁴ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²⁵⁵ OR Col 499-500

²⁵⁶ OR Col 452

²⁵⁷ OR Col 451

²⁵⁸ OR Col 536

²⁵⁹ OR Col 537

²⁶⁰ OR Col 674

260. George A Sorial, in his oral evidence, said that he did not see it as an irregular move that he sought a meeting with the Chief Planner. When asked whether there was a need to find out details that he did not already have access to from his on sources, he said—

“There is always a need. Someone in my position makes decisions based on information. You never have enough information. It is always worth talking to someone else, whether they are a lawyer, another business person, a cab driver or a civil servant. You should always gather information. That is the only way in which you can make an accurate decision. It never hurts. As a matter of routine, in every jurisdiction in which we have operated worldwide, we talk to Government officials.”²⁶¹

261. The Committee notes that it is unusual too for a developer not to exercise its right to appeal, where the developer is very committed to the proposal.

262. George A Sorial stated in his oral evidence to the Committee that he believed that the same rules that applied to everyone had applied to the Trump Organisation. They had asked no special favours and had been extended no special courtesies.²⁶² The Committee notes, however, that it would be unusual for an applicant for a planning development to seek a meeting with the Chief Planner at short notice, via a meeting with Alex Salmond. George a Sorial, in his oral evidence said—

“I do not find it so unusual. What else is a chief planner there for if not to meet at short notice in an emergent situation with a highly unusual application? We must acknowledge that the situation is different. If a chief planner is not ready at a moment's notice when they might lose a £1 billion investment for their country, what are they doing occupying that position? That is what they are there for. I do not find any of that to be unusual.”²⁶³

263. The Chief Planner told the Committee that he was accessible to all MSPs, dealt with requests in whatever form they came and tried to be as helpful and constructive as possible.²⁶⁴

264. The Chief Planner put it on record that he was not put under any pressure by Ministers.

CONCLUSIONS AND RECOMMENDATIONS

265. The Committee notes that, although the Trump Organisation was advised by its expert advisers that the call-in process is more streamlined than the appeal process, it was 85 days after the call-in decision was announced, before the Cabinet Secretary announced how the application is now to be taken forward. This is to be done by means of a local inquiry. To the Committee, it appears that the process of call in was no more streamlined than the appeals process.

²⁶¹ OR Cols 662-3

²⁶² OR Col 683

²⁶³ OR Col 677

²⁶⁴ OR Col 476

266. Given that the representatives of the Trump Organisation contrasted the reception which their application had had in Scotland compared to other countries, the Committee notes that they did not offer any views on how it might be improved despite being given the opportunity to do so.²⁶⁵
267. The Committee recommends that Ministers should only take significant decisions, particularly in exercising their planning functions, on the basis of proper written advice from officials, and that officials should ensure there is a full audit trail, including full Minutes of Meetings, and assessment of the risks to impartial decision making in the process and/or decision.
268. The Committee recommends that Ministers intervening in the Ministerial decision making process affecting planning applications should be particularly mindful of the Ministerial Code, how particular actions might affect the perceptions of the public, and whether Ministerial or official action might have the potential to imperil the decision.²⁶⁶
269. The Committee is concerned by the implications of Ministerial intervention in the Aviemore case. FOI evidence reveals that intervention by 5 Scottish Ministers pre-dates any request for action by a cross-party group of MSPs. Critically, the case reveals Ministerial intervention which favoured one planning proposal over another with which it was in competition.²⁶⁷
270. The Committee is concerned by Ministerial action which reinforces the view that there is preferential access for some developers and some developments over others and this clearly will undermine confidence in the balance of the planning system.²⁶⁸
271. The Committee notes that on Thursday 28th February the Cabinet Secretary for Finance announced that a public local inquiry would be held to determine the Trump Organisation application.

²⁶⁵ OR Cols 657 and 667

²⁶⁶ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²⁶⁷ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.

²⁶⁸ Alasdair Allan, Bob Doris and Kenneth Gibson dissented from this paragraph.



The Scottish Parliament

LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

MINUTES

9th Meeting, 2008 (Session 3)
Wednesday 12 March 2008

Present:

Alasdair Allan

Bob Doris

Kenneth Gibson (Deputy Convener)

David McLetchie

Jim Tolson

Patricia Ferguson

Johann Lamont

Duncan McNeil (Convener)

The meeting opened at 9.00 am.

1. **Decision on taking business in private:** The Committee agreed to take item 3 in private.
2. **Subordinate legislation:** The Committee considered the following negative instrument—

the Home Energy Efficiency Scheme (Scotland) Amendment Regulations 2008, (SSI 208/38).

The Committee agreed it had nothing to report on the instrument.

3. **Housing and Regeneration Bill (UK Parliament Legislation) (in private):** The Committee considered a draft report on legislative consent memorandum LCM(S3) 10.1. Various changes were agreed to.
4. **Planning application processes (Menie estate) (in private):** The Committee considered a draft report. Various changes were agreed to.

The meeting closed at 1.00 pm.

Martin Verity
Clerk to the Committee

Record of division in private

Bob Doris MSP proposed the inclusion of the following paragraph to be included in the section of the report entitled *Committee's comments on the decision making process*:

The Committee notes Aberdeenshire Council has changed its scheme of delegation in light of the perceived shortcomings following the Trump application.

The proposal was not agreed to by division: For 3 (Alasdair Allan MSP, Bob Doris MSP, Kenneth Gibson MSP), Against 5 (Patricia Ferguson MSP, Johann Lamont MSP, David McLetchie MSP, Duncan McNeil MSP, Jim Tolson MSP), Abstentions 0.

Bob Doris MSP proposed the inclusion of the following paragraph to be included in the section of the report entitled *Committee's comments on the decision making process*:

The Committee recommends Local Authorities review their scheme of delegated authority on planning.

The proposal was agreed to by division: For 4 (Alasdair Allan MSP, Bob Doris MSP, Kenneth Gibson MSP, David McLetchie MSP), Against 4 (Patricia Ferguson MSP, Johann Lamont MSP, Duncan McNeil MSP, Jim Tolson MSP), Abstentions 0. The Convener exercised his casting vote to support the proposal.

Alasdair Allan proposed the inclusion of the following sentence to be inserted at the end of paragraph 151 in the section of the report entitled *Committee's comments on the decision making process*:

This is a measure which is understandable in light of the confusion which their previous arrangements created.

The proposal was not agreed to by division: For 3 (Alasdair Allan MSP, Bob Doris MSP, Kenneth Gibson MSP), Against 5 (Patricia Ferguson MSP, Johann Lamont MSP, Duncan McNeil MSP, David McLetchie MSP, Jim Tolson MSP), Abstentions 0.

Johann Lamont MSP proposed to insert after paragraph 151 the following paragraph:

The Scheme of Delegation is entirely transparent and understandable. The Committee does not accept that the process was chaotic.

The proposal was agreed to by division: For 5, (Patricia Ferguson MSP, Johann Lamont MSP, David McLetchie MSP, Duncan McNeil MSP, Jim Tolson MSP), Against 4 (Alasdair Allan MSP, Bob Doris MSP, Kenneth Gibson MSP), Abstentions 0.

Kenneth Gibson MSP the inclusion of the following paragraph to be included in the section of the report entitled *Committee's comments on John Swinney's actions in relation to the Ministerial Code of Conduct for MSPs*:

As noted in above (para 144) the Committee has no power and does not intend to judge whether or not any Minister is in breach of the Ministerial Code or Code of Conduct for MSPs. The Committee did not find any evidence that Mr Swinney acted in any way other than in accordance with both codes.

The proposal was not agreed to by division: For 3 (Alasdair Allan MSP, Bob Doris MSP, Kenneth Gibson MSP), Against 5 (Patricia Ferguson MSP, Johann Lamont MSP, David McLetchie MSP, Duncan McNeil MSP, Jim Tolson MSP), Abstentions 0.

Kenneth Gibson MSP proposed the inclusion of the following paragraph to be included in the section of the report entitled *Committee's comments on Alex Salmond's actions in relation to the Ministerial Code as it relates to planning matters and also to the Code of Conduct for MSPs*:

The Committee did not find any evidence that Mr Salmond acted in any way other than in accordance with both codes.

The proposal was not agreed to by division: For 3 (Alasdair Allan MSP, Bob Doris MSP, Kenneth Gibson MSP), Against 5 (Patricia Ferguson MSP, Johann Lamont MSP, David McLetchie MSP, Duncan McNeil MSP, Jim Tolson MSP), Abstentions 0.

Kenneth Gibson MSP proposed the inclusion of the following paragraph to be included in the section of the report entitled *Committee's comments on Alex Salmond's actions in relation to the Ministerial Code as it relates to planning matters and also to the Code of Conduct for MSPs*:

The Committee did not find any evidence that Mr Salmond acted in any way other than in accordance with both codes.

The proposal was not agreed to by division: For 3 (Alasdair Allan MSP, Bob Doris MSP, Kenneth Gibson MSP), Against 5 (Patricia Ferguson MSP, Johann Lamont MSP, David McLetchie MSP, Duncan McNeil MSP, Jim Tolson MSP), Abstentions 0.

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