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Democracy and Informal Policy-Making: Planning appeals in Scotland

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Abstract

Through a study of two planning appeals regarding student housing in Edinburgh, this paper demonstrates the process by which new policy is effectively created 'under the radar', without the expected oversight by elected politicians and without the rigour, accountability and democratic legitimacy demanded of policy making. The paper highlights tensions between local and central government, between efficiency and democracy, and between discretion and rule-based systems. It argues that by an excessive use of discretion, Scottish government Reporters do not only interpret policies, but, in effect, make them.

Keywords: Planning policy, planning appeals, local government, student housing, discretion, governance, Scottish planning, urban development

Democracy and Informal Policy-Making: Planning appeals in Scotland

Tahl Kaminer

Policy making

Governmental policy-making is expected to be a transparent, public endeavour led by local or central government (Dorey, 2005; Reed and Croft, 2010).¹ In contemporary democracies, processes of policy-making include consultations with experts, with the public and with key stakeholders. The preparation of a key statutory document such as the Local Development Plan (LDP, or Local Plan, LP) in British cities, includes extensive consultations with professionals in the relevant fields, representative organisations and the public, in-depth scrutiny by elected local councillors and other forms of oversight. Yet policy is also made through activities and processes that are not specifically designated to do so and are consequently less scrutinised and accountable (Brodkin, 1987-88). Policy is also created via policy networks and communities, namely, the negotiations and interactions with government by diverse stakeholders and interest groups, or shaped bottom up by ‘street level bureaucrats’ in the actual implementation of policy (Dorey, 2005; Richardson and Jordan, 1979). Some of these processes are relatively transparent while others are opaque; in some, non-political agents are central to steering, shaping or making policy. Within the planning system in Scotland, this paper will argue, an informal policy-making process exists in which singular, non-elected experts have the power to make policy in defiance of elected and accountable local government and with the tacit backing of central government. Informal, because of the manner in which policy is created inadvertently through a process designed for a completely different purpose – the formulation of quasi-judicial judgements based on policy interpretation.

Planning permissions in Scotland are handled by local authorities’ planning departments and planning committees. The person or company seeking permission can appeal a rejection; third parties, such as local residents or competing interest groups, cannot. The appeal is handled either by a local review board (est. 2009 for simple cases) or by the Planning and Environmental Appeals Division (DPEA) of the Scottish Government, which, in effect, delegates the review of the appeal to a Reporter (sections 47-48 of the Town and Country Planning (Scotland) Act 1997).² The Reporter’s response to the appeal is usually the final verdict; Scottish Government rarely recalls permissions after this point, and litigation through court is an expensive and lengthy process usually avoided. Local authorities’ success rate in appeals demonstrates only the level of agreement or disagreement – it does not expose the degree to which local authorities adjust their decision-making processes in order to avoid rejection,³ i.e., the capacity of Reporters to shape policies and decision-making indirectly.

Discontent regarding the planning appeals process has been acknowledged in the media, in academic studies and in reports. ‘The evidence shows that the planning system is not yet effective in engaging, let alone empowering, communities,’ a 2016 report stated (Beveridge, Biberbach and Hamilton, 2016, 36).⁴ While a lack of right of appeal for local residents benefits developers at the expense of locals, a third party right of appeal would not only threaten and slow development, but allow competing interests (e.g. other developers) a say; it would further erode local authorities’ control of the process as most contested decisions would be deferred to central planning.⁵ Nevertheless, a concern arises that the final verdict is currently handled by single, non-elected, and only partially accountable Reporters.⁶ This paper studies two recent appeals regarding student housing in Edinburgh, in order to bring to light the process by which policy is created by Reporters, in effect, through the appeals process.

The aim of this paper is to demonstrate how the miniscule aspects of policies and processes determine and control urban development, how democracy can be weakened by discreet power structures within state bureaucracy. It will closely interrogate one specific area – the handling of planning appeals by Reporters in Scotland – as a means of illustrating the manner in which policy is de facto created without the direct involvement of the political sphere. The focus on a specific area such as student housing is necessary in order to enable identifying the effects of the appeals on later decisions. The selection of student housing as the area of focus was driven by the growing discontent and

contestation surrounding such endeavours in many British cities, particularly those with large universities, in which growth in universities and their student population has effected local communities and triggered a popular backlash. In this sense, the development in Edinburgh of purpose-built student housing echoes similar processes elsewhere, hence the significance and sensitivity of appeals' decisions in this field.⁷

One of the aims of this paper, then, is to expand an already significant literature on veiled power structures within bureaucratic frameworks and processes (Richardson and Jordan, 1979). '[P]olicy making that occurs as a by-product of bureaucratic routine, lower-level coping mechanisms, and informal decision rules', wrote the political scientist Evelyn Brodtkin, 'is difficult to identify analytically, much less challenge politically. This, of course, is a virtue in terms of managing political conflict over policy' (Brodtkin, 1987-88, 579).

The preparation of the statutory LDP, as mentioned above, includes discussions with multiple stakeholders and extended consultations; Reporters, in contrast, and as this paper will show, single-handedly steer policy through their role in the appeals process. The Reporters rethink and rewrite policy according to their interpretation, well beyond the familiar shaping of policy through its implementation by 'street level bureaucrats' and with only limited consultation.⁸ It is this unscrutinised aspect of the appeals system that this paper will interrogate. The study of appeals in this paper will inevitably highlight tensions found throughout the planning system between (1) local and central government, (2) efficiency and democracy, and (3) flexibility, enabled through discretion, and clarity, typically achieved through rule-based systems.

Identifying the process by which Reporters, in effect, create urban policy, enables a better understanding of the power structures that shape the built environment and consequently also provides an opportunity to transform and democratise them. Acknowledging that the work of Reporters is a policy-making process is merely a first step, which can be followed up either by rethinking the entire process in order to increase its legitimacy, democracy and accountability, or, alternatively, by curtailing the discretionary powers of the Reporters by limiting appeals to technical issues. Without addressing the discreet forms of policy-making in planning, power will remain de-politicised, entrenched within the opaque processes and procedures of governance.

Student housing policy

The key statutory document consulted by city council planners and Reporters is the LDP (section 25 of the Town and Country Planning (Scotland) Act 1997). It is a general document that guides local government decisions over 4-5 years, and coalesces local policies regarding housing, retail, public space, sustainability, development, communities and more. It mostly avoids specificity: an approach that enables tailored and nimble decisions regarding particular cases of development and redevelopment over a number of years. The generality of the document, then, is aimed at providing discretion and flexibility, which are characteristic of the British planning systems as a whole (Cullingworth and Nadin, 2006). The other documents frequently consulted by Reporters include non-statutory guidelines by local government that elaborate the LDP policies, the Strategic Development Plan by Scottish Government and the non-statutory Scottish Planning Policy. These are addressed as 'other material considerations', and their weighting in each case depends on the discretion of the planners or Reporter. The argumentation and verdict of Reports emulate legal and quasi-legal deliberations and interpretations of law.

[INSERT FIGURE 1 AROUND HERE]

At the centre of this paper's study of the work of Reporters are two recent planning permission applications that were rejected by the City of Edinburgh Council (CEC) but were accepted on appeal. Both regard student housing in Edinburgh's South Side (Figure 1). Local residents in Edinburgh's Old Town and nearby areas such as the South Side have increasingly opposed the recent growth of student numbers in their neighbourhoods. The first (2014) of the two appeals regards a proposal for new students' housing in Lutton Place in place of a printers' workshop and a neoclassical house (Figure

2).⁹ The second (2015) regards the nearby Homebase retail site on St. Leonards (Figure 3). The former was proposed by a private developer, the latter by student accommodation specialists UNITE.

The context of the cases includes the growth in student numbers in Edinburgh, the burgeoning lucrative market of student accommodation, which in Edinburgh enables high-end holiday-lets during the summer festival season, and the attempt by the city council to respond to local concerns through a ‘social mix’ policy intended to limit student numbers in particular areas. The specific qualities, strengths and weaknesses of the CEC’s policy in question, Hou10 in the 2010 Local Plan, are not at the centre of this study, nor is the question whether purpose-built student housing ought to be supported. What is important, though, is to establish that the policy is not blatantly unreasonable.

Both Reports in question are highly dependent on interpreting the 2010 Local Plan’s policy Hou10. The key paragraph of Hou10, which stands for ‘Housing 10’ and outlines the CEC student housing policy in general terms, reads as follows:

6.35 Planning permission will be granted for purpose-built student accommodation where: a) the location is appropriate in terms of access to public transport and university and college facilities; and b) the proposal will not result in an excessive concentration of student accommodation in any one locality. (CEC, 2010, 69)

The following point of Hou10, 6.36, describes the growth in the student population and laments the effects of this growth on specific parts of the city. It highlights the problem of the loss of family homes to Houses in Multiple Occupation (HMOs) for students. Point 6.37 explicitly calls for more purpose-built student accommodation, understood as a means of reducing conversion of family housing to HMOs. It calls for placing such accommodation in proximity to campuses but qualifies this:

In assessing the degree of concentration of student accommodation the Council will take into account the nature of the locality in terms of mix of land use and housing types, the existing and proposed number of students in the locality and evidence of problems in rapid population turnover and less stable communities referred to in paragraph 6.36 above. (CEC, 2010, 70)

The non-statutory supplementary guidance ‘Student Housing’ identified three categories of areas: 1. adjacent to or within university campuses; 2. within reasonable reach by walking, cycling or public transport; 3. distant areas. It argued that purpose-built student accommodation should not be placed in distant areas, suggested that in areas belonging to the second category students’ should not surpass 30% of the population, whereas in adjacent areas student numbers should be allowed to reach up to a maximum of 60%.

The policy exposes the values and assumptions of the CEC; namely, its understanding of public interest and ‘the good life’: it infers that a neighbourhood requires a sizable ‘stable’ long-term population; it suggests that a ‘good’ social mix consists not only of long-term and short-term population, but also of students, as a specific age and social group, *and* families. An excessive presence of students, the policy infers, would undermine such a mix.

Social-mix policies, aimed at achieving what is perceived to be a ‘good’ social balance, are familiar in planning, and have been deployed in differing forms by both conservative and progressive local governments. Social-mix policies were originally formed in order to curtail the effects of the market on the social makeup of neighbourhoods (Rose et al. 2013). Their focus has often been socioeconomic, aimed at diversifying a neighbourhood’s class composition. However, the growing awareness and concerns regarding other forms of spatial segregation, such as age-based segregation and concentrations, have become increasingly prominent in discussions regarding health and well-being and are likely to become more prominent in forthcoming years in social-mix policies (see WHO). Social-mix policies can be criticised from a market-oriented or libertarian perspective as strong-handed forms of governance intervening in a territory that ought to be government-free. Yet, as

local governments have a limited array of instruments to address spatial segregation, they are commonly used – primarily in housing policies, which provide a tacit instrument of achieving the desired mix while avoiding political backlash (Musterd and Andersson 2005).

[INSERT FIGURE 2 AROUND HERE]

Student accommodation: Lutton Place

The CEC sided with the local residents in the Lutton Place case and denied planning permission, citing the high concentration of students. The developers appealed, and the case was sent to a Reporter. The Reporter in the appeal devoted much of his argumentation to the question of the appropriateness of the location for student housing. The Reporter consulted the CEC's supplementary guidance 'Student Housing', identified as a material consideration. Here, he points out, 'Four problematic consequences [of growth in student population] are identified: increased HMOs; less stable communities; a rapid turnover of population; and properties left vacant for extended periods in the summer.' (PPA-230-2122.18) As purpose-built student accommodation is generally supported in the LP and the supplementary guidance, and, according to the speculation in the LP, may even alleviate the conversions of family housing to HMOs, the one issue requiring further consideration was the concentration of students in the area.

The limited data regarding the number of students and student homes in the area, collated from outdated census data and changing data zones, meant that the Reporter could doubt CEC's argument that the area had reached the 60% limit. The Reporter, in fact, suggested that pursuing a precise number was not necessary in this case; the high number of students in the area was a reasonable conclusion. Yet he belittled the importance of this fact to the consideration of the application:

in carrying out [the] assessment [whether the proposal would result in an excessive concentration of student accommodation], regard must be had to the particular circumstances of the case and to the objective of the policy as a whole, which is to support purpose-built student accommodation in locations which are close to higher education facilities. (PPA-230-2122.23)

Subsequently, the Reporter proceeded to disagree with the CEC, arguing that the area in question must be considered 'adjacent' (i.e. susceptible to 60%) rather than 'in reasonable distance' (i.e. susceptible only to 30%). Moreover: purpose-built student housing, the Reporter continued, *has to be* built in areas adjacent to the campuses, no matter how high the student concentration:

It would be illogical if those locations which the policy accepts are most suited to student accommodation (those closest to main campuses) were ruled out solely on the basis that they were, unsurprisingly, already popular with students. In addition to the important policy aspiration to reduce the need for students to travel, there are basic market economic factors to consider. If purpose-built student accommodation is to be delivered it must be where students want to live and where prospective providers consider there will be strong enough demand to make the development viable. A location like the appeal site, which is adjacent to a main campus, is in such a location. (PPA-230-2122.25)

This argument is precisely the locus in which policy is inadvertently created. To begin, the Reporter expands spatially the area considered 'adjacent' to include, in effect, the entire city centre, much beyond the intentions of the CEC. Furthermore, the Reporter privileges argument a) in point 6.35 of the LP ('the location is appropriate in terms of access to public transport and university and college facilities') over b) ('the proposal will not result in an excessive concentration of student accommodation in any one locality'). There is no clear reason for such weighting, except for the extended focus of points 6.36, 6.37 and the supplementary guidance on issues related to a). The Reporter, in effect, diverges from the CEC policy: a significantly larger area than intended is now considered 'adjacent', and he questions the basic principle of limiting student numbers in 'adjacent' areas.

The Reporter's argument suggests, then, that caps on student numbers in the most viable areas should be invalidated, that there should be no concern for 'rapid population turnover and less stable communities' (CEC, 2010, 70). This provides an original re-reading of the LP and its intentions, quite removed from the original intentions of CEC, it would seem. When the Reporter writes 'I conclude that the proposal would not result in an excessive concentration of student accommodation in the locality' (PPA-230-2122.26), he merely states what has become self-evident, following his earlier conclusion that there can be no such thing as 'excessive concentration' in areas adjacent to campuses.

[INSERT FIGURE 3 AROUND HERE]

Student accommodation: St. Leonards

The second appeal in question regards another site in Edinburgh's South Side, a proposed development by UNITE on the grounds of a Homebase store. The main objection of locals was that the student housing would be detrimental to the neighbourhood by increasing the number of short-term residents in the area. CEC accepted these concerns and refused permission; the developers appealed. This appeal was considered in 2015, after the issuing of the Report in the Lutton Place case. The latter was consulted in the process, and the main questions the Reporter addressed here were no different: the appropriateness of the development to the area and the concern for excessive concentration of students in the neighbourhood (PPA-230-2146.1).

The site is adjacent to the university campus, the Reporter concurred with the Lutton Place Report, therefore the area is acceptable for students accounting for up to 60% of the local population. The Reporter disagreed with the CEC claim that the current percentage should be considered to be 55%, and argued that a more adequate number is around 50%. 'Policy Hou10 positively encourages the provision of further purpose-accommodation,' she wrote, 'because, as the SG [Supplementary Guidance 'Student Housing'] states, there is a need for more purpose-built student housing [...]. Generally, higher densities are welcomed provided that they are satisfactorily integrated into surrounding areas' (PPA-230-2146.16). The Reporter questioned the alleged relation between growth in purpose-built student accommodation and reduction in student numbers in HMOs, but nevertheless underlined the perceived benefits of purpose-built student accommodation: (1) reducing the number of homes converted to HMOs; (2) 'managed' schemes prevent the detrimental effect of students living in an area through provision of on-site facilities and control of students' behaviour; (3) students' presence has a positive impact by contributing to the local economy.

The main argument of the Report in favour of the student accommodation rests on the idea that a 'managed' scheme will prevent the negative consequences of growth in student population. It demonstrates a very limited understanding of the effect in question, focused primarily on forms of 'anti-social' behaviour. Invisible to the Reporter are many other potential effects once the social composition is significantly altered and age diversity reduced: change of local retailers in response to students' needs at the expense of other age and social groups; limited ability of an area to sustain local services and amenities for children and elderly; increasing role of night economy in the area and so on. All these long-term effects of population change remain moot in the Report. All locals receive is commiseration:

I have some sympathy for those long term residents who are seeing their former family orientated communities diminishing, particularly in the falling numbers of young children in the area, but this is the result of changing trends in occupation and not solely the result of university expansion. In the future, it is highly likely that those same families will be looking for secure accommodation for their children when they reach further education stage, at which time well managed accommodation like that proposed may well be the only type available. (PPA-230-2146.37)

Echoing the Lutton Place Report, here too the LP demand that 'the proposal will not result in an excessive concentration of student accommodation in any one locality' (CEC, 2010, p. 69) was overruled. And while the two Reports offered arguments to support this verdict, they raise the

question whether, according to the logic of the argumentation in either, a moment of student saturation can be reached, a level of concentration that could be recognised as ‘excessive’, and would require refusal of permission. The ‘need’ for student accommodation, the ‘trend’ of purpose-built student housing, the ‘laws’ of the market and the consequences of the growth of student population, are all accepted as a *force majeure*, while the LP policy is side-lined.

Adapting policies

The battles surrounding these developments involved not only local residents but also the local MP Sheila Gilmore, the University of Edinburgh, and the local MSP Marco Biagi, the minister at the time for the apt and relevant Local Government and Community Empowerment. Biagi called the St. Leonards’ Report a ‘novel interpretation’, whereas a local resident commented that ‘The decision all hinged on the interpretation of words, and what an excessive concentration of students is. The reporter is just playing with words.’ (Nicolson, 2014) MSP Sarah Boyack, reacting to the decision regarding the St. Leonards case, commented that ‘[u]nless the council’s approach to assessing these applications is updated, I’m concerned we will see more decisions overturned in future. The council recently consulted on this issue and that process must lead to clearer, more effective guidance’ (EN, 2015).

The Reports were, to some extent, an ‘interpretation of words’, as the local resident had commented. In its decision to deny permission, the CEC interpreted the document it had itself created, the 2010 LP, in a manner that appears consistent with it. In contrast, the two Reporters could nevertheless produce their own interpretation of the intentions of the policies. While the LP is a statutory document, its generality and other ‘material considerations’ allowed discretion, in effect enabling central government to bypass the LP. In the cases outlined above, CEC remained bound to the LP whereas the Reporters exercised their discretion, upending local government’s policy in the process.

As the LDP/LP is prepared and implemented by the same body, CEC in these cases, one form of necessary oversight is the Reporter, providing checks and balances. In many countries appeals are handled by independent bodies to ensure separation of legislative from administrative powers. Such bodies are usually limited to reviewing appeals based on technical shortcomings of the local government process – they cannot question the content of local government decisions if the procedures and protocols were properly followed in the process - they cannot rethink policy.

So far, the focus of this paper has been on the Reports themselves and consequently their argumentation and relation to the policies and decisions applied to specific cases. This paper, however, argues that such decisions by Reporters go beyond producing judgement in the cases in question and have significant and long-lasting affect on local government planning policies and decisions. A 2016 study suggests that Reports are being used by central government as a means of enforcing its own policies and priorities, particularly regarding housing provision: ‘There are particular concerns about Reporters attempting to address a deficit in housing land late in the plan [*Sic.*] process without the benefit of further local community involvement,’ the study commented (Beveridge et al., 2016, p. 9).

DPEA publishes the statistics of success and failure of local councils in appeals, a ‘naming and shaming’ that places pressure on local planning departments and committees to improve their success rate. Local planning departments carry out their own internal reviews – quarterly reviews in the case of CEC. These mechanisms pressurise local government to align its policies and decision-making with the findings of Reporters. In an internal briefing document assessing the success rate in appeals for April-June 2015, the CEC Planning Department announced that ‘[t]he most significant decision [in the period] is the student housing in St Leonard’s *and the policy framework is being reviewed on this matter.* Other than that the cases are small scale and no policy or guideline changes are necessary.’ (CEC 2015b, 1; my emphasis) Hence, policy is adjusted as a response to Reports; policy is not merely interpreted or elucidated by Reporters; it is made.

In April 2015, a planning application notice was made to the CEC for a mixed development at King’s Stables in Edinburgh’s Old Town. The site was a former transport depot. A complex of diverse

structures in different states of maintenance and upkeep surrounding a courtyard, King's Stables was identified a few years earlier as a potential site for a 'cultural quarter'. But as the plan gravitated from vision to proposition, the cultural quarter turned into an all-too-familiar complex including a hotel and student housing and a limited number of affordable homes unsuitable for families, to the ire of local residents. An initial response by the Development Management Sub-Committee of the CEC dated 20 May 2015 stated that:

The proposal should be accompanied by a planning statement justifying the sustainability of the location for student housing having regard to the current concentration of student population in the area, student accommodation either completed, under construction, pending determination or in the pre-application process and any changes to the non-statutory guidance. (15/01938/PAN, 4)

In the consultation carried out over summer 2015 by Scott Hobbs Planning for the developer, local residents raised concerns 'over the need for more student accommodation in Edinburgh as many believe there to be enough within the area.' (Scott Hobbs Planning, 2015a, 5) The planning application, submitted in December 2015, proposed a 245 bedroom student accommodation, a 128 bedroom hotel, food & beverage, an arts facility, and 28 flats, of which 20 were studio or one bedroom suitable for students and singles rather than families (Scott Hobbs Planning, 2015b).

The Planning Statement by Scott Hobbs Planning quotes from a letter received from the CEC dated 25 June 2015: 'in principal (sic) the proposed mix is acceptable; [...] student accommodation is supported on sites adjacent to identified campuses and the site is suitably adjacent to the Edinburgh College of Art [...]' (Scott Hobbs Planning, 2015b, 13). The CEC, it seems, decided to overlook argument b) of its own policy – the CEC letter was issued after the Reports of the appeal cases discussed above were published.

Acknowledgement is made in further documents of the local residents' concerns regarding the concentration of students. The Development Management Sub Committee highlighted in the report of its 1 July 2016 meeting the 'overproduction of student accommodation' (15/05716/CON, 5) in public comments to the development. Hou10 is addressed in yet another committee report, and this time the losses at previous appeals are shown to shape the decision in the King's Stables case:

The proposal would increase the concentration of students in the immediate area from 32.89% to 36.78% (41.03% to 42.79% if the whole Grassmarket is included). However, two appeal decisions (Lutton Place and St Leonard's Street) deemed 'adjacent' to a main campus to be a short walk of 10 to 12 minutes. Using this interpretation the site is adjacent to a campus and does not need satisfy the 30% concentration threshold. On this basis, the concentration is acceptable in this locality. (15/05715/FUL, 9)

This time, the CEC did not side with the locals. The Development Committee voted for the King's Stable redevelopment by 11 votes to 3 on July 1st 2016, avoiding another potentially humiliating defeat in appeals.

Another case, unrelated to student housing, can provide further evidence of the wide influence of Reports. In 2014, CEC Planning Committee considered a planning permission application for an Aldi store and housing development on Baileyfield, a contested former site of Scottish Power in Edinburgh's Portobello. Local residents, who had already blocked proposals for a supermarket and for high-density housing on this site, had taken part in 2008 in a series of consultations that led to the creation of the (non-statutory) 'North West Portobello Development Brief', a document which clearly stated that retail in the area would be limited to a corner shop. This document was a material consideration in the discussions.¹⁰ A second document consulted in the process was a Report regarding an unrelated case, concerning a site outside Portobello, from 2012. This Report included a comment suggesting that the Portobello site in question, Baileyfield, was suitable for locating a store:

The former Scottish Power site in Portobello High Street is approximately 200 metres from the defined town centre boundary from where it is clearly visible. I consider this site is sufficiently close to the centre that it could form an effective extension to it. It is therefore within category b in structure plan Policy RET 1 and is sequentially preferable to the appeal site [as a location for a supermarket]. (PPA-230-2055.20)

The Reporter's comment was given more weight by the CEC planners than the 'North West Portobello Development Brief'. In effect, the Report on an unrelated case shaped the outcome of the conflict on this particular site: planning permission was given to the developers. It demonstrates the manner in which a Report shapes development and redevelopment beyond the limits of the specific appeals case in which it was issued.

Discretion, power and accountability

The turn, decades ago, from public inquiries to written submissions, the deployment of single Reporters rather than teams or committees, the absence of lengthy consultations, the recruitment as Reporters of 'freelancers', the ability to bypass rules and policies in unforeseen circumstances thanks to discretion: all these highlight the importance of efficiency to the appeals system. Andy Inch has shown (2018, 1085) how the 'streamlining of process and speeding up of plans and decisions' has been central to planning reform in Scotland. Efficiency, though, does not support democratisation or justice; more often, 'efficiency' means less participation and less democracy (Brodkin, 1988, 578). Inch wrote that:

since the onset of recession and the election of a Scottish Nationalist Party (SNP) administration 'sustainable economic growth' has been further prioritised as the overarching purpose of the planning system [...]. The hegemonic position of pro-growth planning means that development is effectively synonymous with the public interest, the primary good that the planning system should seek to promote. This suggests that participation is subordinate to the goal of pursuing light touch planning and ensuring that any perceived 'costs of delay' in decision-making are minimised in the interests of development and growth. (Inch, 2015, 411)

'Efficiency', then, is necessarily pitted against democratisation. As a positive technical term, it facilitates a political agenda, veiled as an apolitical technical endeavour. An ambition by central government to curtail planning and empower, in effect, developers, is furthered by an increased focus on efficiency while bypassing inconvenient political debate.

The authority or manager that delegates to an 'unbiased agent' often selects a 'clone', an agent that replicates their own position and values (Montagnes and Wolton, 2017, 458-459). This enables central government to obtain the results it requires while distancing itself from unpopular decisions by Reporters. The delegation to Reporters means depoliticisation; while on the local level, a permission application progresses from a technical sphere (Planning Department) to political (Planning or Development Management Committee or Subcommittee, on which elected Councillors sit), in central government the appeals process is the reverse – the delegation to 'technical' Reporters depoliticises. This changes the terms of the contestation and 'contains' the conflict.

The Reporter's ability to make policy stems from the discretion of the Scottish planning system. Discretion allows flexibility in the implementation of laws and policies, allows a tailored response to specific conditions where rigid rules can fail to serve public interest, can create unforeseen results that counter the law or policy's original intentions. The delegation of decisions to a Reporter and reliance on discretion rather than rule is considered ex-post, in the sense of the uncertainty it produces within a system as a result of the late emergence of key decisions in the process. In contrast, a rule-based system is ex-ante, as the major decisions had been made in advance (Montagnes and Wolton, 2017, 457).

Discretion can be identified in law and policy making as well as in the interpretation of rules, laws and facts. The former process (law and policy making) is presumed to be the realm of politics, and the

latter (the interpretation of rules) the realm of courts, administration and others (MacCarthaigh, 2011, 678-79). Local government planners can be considered 'street level bureaucrats' whereas Reporters are 'independent regulatory agents'. While the latter's work should be considered the interpretation of rules, laws, facts and policies, it extends inadvertently into the territory of policy making, the process elected public representatives are expected to lead. Hence, the appeals system leads to what has been called 'policy politics' (Wildavsky, 1967), which is here a territory of informal policy-making.

In the often tense relationship between central and local government, ultimate power in Britain resides in central government. In this sense, the power of Reporters over local government reflects these conditions, and the Reports amount to an informal pressure on local government exercised somewhat indirectly by central government. The exercising of discretion empowers Reporters to do more than merely curtail the excesses of power of local government, more than demand clear process, accountability, and coherence from local government. Reporters can question, contradict, and, in effect, bypass the policies of local government. Reporters pressurise local government to adapt policies in accordance with their findings, argumentations and verdicts.

Reporters are part of a system of checks and balances exercised by central government, but to what extent and to whom are the Reporters accountable? Reporters are accountable to central government that nominates them; their decisions receive media scrutiny only in cases of wide public interest. Accountability, therefore, is relatively limited. While the local government processes of creating the LDP and discussing planning permissions are relatively transparent and public endeavours, the work of the Reporter is relatively opaque and problematically a one-person effort. Policy-shaping by a single expert is professionally and democratically deficient.

The limited accountability of the Reporter relatively to local government planning committees or planners, means the Reporter can deploy discretionary powers in a more radical sense than others within the planning system. '[T]he capacity of administrative agencies to shape policy,' wrote Bodkin (1988, 582), 'depends on the extent to which they exercise discretion over policy delivery'. This ability is enhanced by the power vested in a decision made by a singular expert rather than a team or committee, bypassing negotiations, deliberations and compromises typical of juries and committees. Consequently, Reporters seem to exercise their discretion more often and more radically than other agents within the planning system who, in principle at least, command similar discretionary powers but are pressurised to avoid divergence from existing policies.

The current appeals system, then, lacks transparency, accountability and democratic legitimacy. The problems identified here exist also in the English planning system, which has very similar policies and processes. Consequently, while the cases discussed here are specific to Scottish Planning, the issues they raise are not restricted to local concerns. The two main alternatives to rectify the appeals system without a radical overhaul of the entire planning system would be either to curtail the discretionary powers of Reporters, for example by limiting appeals to technical issues, or to add accountability and increase the voices involved in decision making. Without change, the appeals system will continue to overrule local concerns and increase the democratic deficit, citizens' discontent, and local government's timidity and paralysis.

References

- 15/05716/CON
15/01938/PAN, Committee Report, May 2015.
15/05715/FUL, Committee Report, July 2015.
PPA-230-2055, Appeal Report, 2012.
PPA-230-2122, Appeal Report, 2014.
PPA-230-2146, Appeal Report, 2015.
- ARNSTEIN, S. R. (1969) 'A ladder of citizen participation', *Journal of the American Institute of Planners*, 35, 4, 216-24.
BEVERIDGE, C., BIBERBACH, P., AND HAMILTON, J. (2016) 'Empowering planning to deliver great place. Scottish Government', available at: <<<https://beta.gov.scot/publications/empowering-planning-to-deliver-great-places/Empowering%20Planning%20to%20Deliver%20Great%20Places,%2031%20May%202016.pdf?inline=true>>> (accessed 21 November 2017).
BRODKIN, E. Z. (1987-88) 'Policy politics: if we can't govern, can we manage?', *Political Science Quarterly*, Vol. 102, No. 4, Winter, 571-87.
CITY OF EDINBURGH COUNCIL (CEC) (n.d.) 'Appeals – lessons learned, internal Power Point presentation', Edinburgh: CEC.
CITY OF EDINBURGH COUNCIL (CEC) (2008) 'North West Portobello development brief', Edinburgh: CEC.
CITY OF EDINBURGH COUNCIL (CEC) (2009) 'West Port/King's Stables Road development brief', Edinburgh: CEC.
CITY OF EDINBURGH COUNCIL (CEC) (2010) 'Local Plan', Edinburgh: CEC.
CITY OF EDINBURGH COUNCIL (CEC) (2015a) 'Planning information bulletin: appeals and reviews 2014/15', Edinburgh: CEC.
CITY OF EDINBURGH COUNCIL (CEC) (2015b) 'PBS leadership team: appeals and reviews report', 1st Quarter. Edinburgh: CEC.
CITY OF EDINBURGH COUNCIL (CEC) (2016) 'Local Development Plan', Edinburgh: CEC.
CHANDLER, J. A. (1988) *Public Policy-Making for Local Government*, London; New York: Croom Helm.
CULLINGWORTH, B. and NADIN, V. (2006) *Town and Country Planning in the UK*, 14th edition. London; New York: Routledge.
DAVIDOFF, P. (1993) Democratic Planning. In Ockman, J (ed.), *Architecture Culture 1943-1968*. New York: Rizzoli, 442-45.
DOREY, P. (2005) *Policy Making in Britain: An Introduction*, Thousand Oaks: Sage.
EN (2015) 'Student ghetto fears fail to halt Homebase plan', *Edinburgh News*, 3 June. Available at <<<https://www.edinburghnews.scotsman.com/news/education/student-ghetto-fears-fail-to-halt-homebase-plan-1-3790963>>> (accessed 27 February 2018).
HAJER, M. and WAGENAAR, H. (eds) (2003) *Deliberative Policy Analysis: Understanding Governance in the Network Society*, Cambridge: Cambridge University Press.
HARVEY, D. (2013) *Rebel Cities: from the right to the city to the urban revolution*, London New York: Verso.
HEALEY, P. (1996) 'The Communicative Turn in Planning Theory and its Implications for Spatial Strategy Formation', *Environment and Planning B: Planning and Design*, Vol.23(2), 217-34.
INCH, A. (2015) 'Ordinary citizens and the political cultures of planning: in search of the subject of a new democratic ethos', *Planning Theory*, Vol. 14(4), 404-24.
INCH, A. (2018) 'Opening for business? neoliberalism and the cultural policies of modernising planning in Scotland', *Urban Studies*, Vol. 55 (5), 1076-92.
JACKSON, E., BUTLER, T. (2015) 'Revisiting "social tectonics": The Middle Classes and Social Mix in Gentrifying Neighbourhoods', *Urban Studies*, Vol. 52(13) 2349–65; DOI: 10.1177/0042098014547370.

- KAMINER, T. (2017) *The Efficacy of Architecture: Political Contestation and Agency*, London: Routledge.
- LIPSKY, M. (1980) *Street-Level Bureaucracy: The Dilemmas of Individuals in Public Services*, New York: Russell Sage.
- MACCARTHAIGH, M. (2011) 'Discretion', In Badie, B; Berg-Schlosser, D; Morlino, L (eds) *International Encyclopaedia of Political Science*, Thousand Oaks: SAGE, 678-79.
- MARCUSE, P. (2013) 'Housing policy and the myth of the benevolent state', in *The Affordable Housing Reader*, Tighe, R., Mueller, E. (eds), Oxon: Routledge, 36-43.
- MIAZZO, F., KEE, T. (eds) (2014) *We Own the City: Enabling Community Practice in Architecture and Urban Planning*, Amsterdam: Trancity-Valiz.
- MONTAGNES, B. P. and WOLTON, S. (2017) 'rule versus discretion: regulatory uncertainty, firm investment, and bureaucratic organization', *The Journal of Politics*, Vol. 79, nr 2, 457-72.
- MUALAM, N. (2014) 'Where planning meets the law: the rise of appeal tribunals for deciding land-use disputes', *Journal of Planning Literature*, Vol. 29(4), 370-85.
- MUSTERD, S., ANDERSSON, R. (2005) 'Housing Mix, Social Mix, and Social Opportunities', *Urban Affairs Review*, Vol. 40, No. 6, July, 761-90, DOI: 10.1177/1078087405276006.
- NICOLSON, K. (2014) 'Call for debate as student flats get go-ahead', *Edinburgh News*, 15 August.
- PLANNING AND ENVIRONMENTAL APPEALS DIVISION (2017) 'Annual review 2016/17', Edinburgh: Scottish Government.
- PLANNING DEMOCRACY (2014) 'Ordinary citizens and democratic planning in Scotland', available at: <<https://docs.google.com/document/d/1MUB62zro6bUswvzA5eOp_L-y6XR3GppP-X_C4qKqpWk/edit>> (accessed 2 May 2018).
- REED, G. E. & CROPF, R. A. (2010) 'Policy Making', In Couto, R. A. (ed.) *Political and Civic Leadership: A Reference Handbook*, Thousand Oaks: Sage.
- RICHARDSON, J. J., JORDAN, A. G. (1979) *Governing under Pressure: The Policy Process in a Post-Parliamentary Democracy*, Oxford: Martin Robertson.
- ROSE, D. (2010) 'Local State Policy and "New-Build Gentrification" in Montreal: the Role of the 'Population Factor' in a Fragmented Governance Context', *Population Space Place* 16, 413–28; DOI: 10.1002/psp.592.
- ROSE, D., GERMAIN, A., BACQUÉ, M. H. et al (2013) "'Social Mix" and Neighbourhood Revitalization in a Transatlantic Perspective: Comparing Local Policy Discourses and Expectations in Paris (France), Bristol (UK) and Montréal (Canada)', *International Journal of Urban and Regional Research*, Volume 37.2 March, 430–50, DOI:10.1111/j.1468-2427.2012.01127.x.
- SCOTT HOBBS PLANNING (2015a) 'King's Stables Road: pre-application consultation report', Edinburgh, unpublished.
- SCOTT HOBBS PLANNING (2015b) 'King's Stables Road, Edinburgh: planning statement', 14 December, Edinburgh: unpublished.
- SCOTTISH GOVERNMENT (2013) 'Planning appeals', Circular, Edinburgh: SG.
- SCOTTISH GOVERNMENT (2014) 'Scottish Planning Policy', Edinburgh: SG.
- SCOTTISH GOVERNMENT (2013) 'Town and country planning (appeals) (Scotland) regulations 2013'; available at <<http://www.legislation.gov.uk/ssi/2013/156/pdfs/ssi_20130156_en.pdf>> (accessed 7 September 2017).
- VICKERS, G. (1968) *The Art of Judgment: A Study of Policy Making* [1965]. London: Methuen.
- WHO, 'WHO Global Network for Age-friendly Cities and Communities', at: <<http://www.who.int/ageing/projects/age_friendly_cities_network/en/>> (accessed 2 September 2018).
- WILDAVSKY, A. (1967) 'The political economy of efficiency', *Public Interest*, 1967, 30-48.
- WILLEY, S. (2007) 'Planning appeal processes: reflections on a comparative study', *Environment and Planning, A* 39 (7), 1676–98.
- WILSON, J., SWYNGEDOUW, E. (eds) (2014) *The Post-Political and Its Discontents: Spaces of Depoliticization, Spectres of Radical Politics*, Edinburgh: Edinburgh University Press

Notes

¹ While these presumptions are particularly visible in the ‘policy cycle’ model (see Reed and Cropf 2010), they are present, whether overtly or covertly, in all policy-making models with the exception of those focused on the irrational aspects of the process, such as John Kingdon’s ‘garbage can’ model.

² New legislation is altering some of these processes, though the overall structure will remain similar. See [http://www.parliament.scot/Planning%20\(Scotland\)%20Bill/SPBill23S052017.pdf](http://www.parliament.scot/Planning%20(Scotland)%20Bill/SPBill23S052017.pdf) (accessed 15 December 2017).

³ For example, 38% success rate in delegated appeals for City of Edinburgh Council in 2016/17 compared to 62% for 2014/15 (CEC, 2015a; Planning and Environmental Appeals Division, 2017).

⁴ See also civil society campaign groups such as Planning Democracy: <http://www.planningdemocracy.org.uk/> (accessed 23rd August 2018).

⁵ Third parties in many countries have a right of appeal. In the Republic of Ireland, for example, any individual, entity or group who had made submission or observations during the earlier planning process and consultation has a right of appeal.

⁶ In many Western countries, appeals are handled by regional or central boards or planning committees. These often involve non-government employees in order to broaden the involvement of diverse expertise and points of view. Such involvement in a committee or board public decision is significantly different from the process by which Reporters, many of whom also work as professional planners for developers, are singularly responsible for decision-making. The Republic of Ireland, which has many governance structures similar to those of the United Kingdom, has such a planning board (*An Bord Pleanála*) that decides appeals. The new legislation mentioned above will alter some of these dynamics in Scotland, allowing expanded right of appeal through expanding the role of the local boards of appeal, i.e. without expanding the power of central government.

⁷ Edinburgh’s Old Town community has consistently raised concerns about ‘touristification’ – the ongoing erection of new hotels, conversion of family homes to short-let apartments (e.g. AirBnB)- and the growth in student numbers, rather than gentrification, congestion or other issues that dominate contestations in many city centres.

⁸ Modes of inquiry typically include ‘hearings’, ‘inspection’ and ‘inquiry’.

⁹ Completed in summer 2017, the housing has been named Salisbury Court.

¹⁰ The brief stated clearly that ‘Other than a possible purely local “corner shop” facility within the development, perhaps as the focus of a local centre or at the seafront, no new retail provision is envisaged within the area’ (CEC, 2008: 3.8).