Executive Note
The Town and Country Planning (Application of Subordinate legislation to the Crown) (Inquiries Procedure) (Scotland) Order 2006 SSI/2006/339

1. The above instrument was made in exercise of the powers conferred by sections 98 and 122(3) of the Planning and Compulsory Purchase Act 2004 (the 2004 Act).

Policy Objectives

2. This order relates to the removal of Crown immunity from planning control in Scotland. The overall aim is to subject the Crown to statutory planning provisions while recognising that the unique nature and responsibilities of the Crown mean that certain exceptions and special arrangements need to be made.

3. In bringing the Crown within the statutory planning system it is necessary to recognise the possibility that planning cases may involve security sensitive information and that there may be development proposals which are required urgently and are of national importance. In catering for these sorts of cases we need to modify the Town and Country Planning (Inquiries Procedure) (Scotland) Rules 1997 (the 1997 Rules) and The Town and Country Planning Appeals (Determination by Appointed Person) (Inquiries Procedure) (Scotland) Rules 1997 (the 1997 Appeal Rules) accordingly. That is what The Town and Country Planning (Application of Subordinate legislation to the Crown) (Inquiries Procedure) (Scotland) Order 2006 (the 2006 Order) does.

Security Sensitive Information

4. The provisions in the 2004 Act insert new sections into the Town and Country Planning (Scotland) Act 1997 (the 1997 Act) which apply the 1997 Act to the Crown. On the removal of Crown immunity from planning control new section 265A of the 1997 Act will allow the Secretary of State or the Scottish Ministers in consultation with the Secretary of State to direct, in relation to a planning inquiry, that access be restricted in relation to information on 1) national security or 2) the measures taken, or to be taken, to ensure the security of any premises or property where, in either case 1) or 2), the public disclosure of that information would be contrary to the national interest. This is a shared power as national security is a reserved matter.

5. New Section 265A also provides for rules to be made governing the functions of a person appointed (known as an "appointed representative") by the Lord Advocate to represent those who are prevented from seeing the restricted material. New section 265A of the 1997 Act also allows the Scottish Ministers to direct who should pay for the appointed representatives and, if it cannot be agreed, how much. It is anticipated that the party holding the security sensitive information which triggered the need for a direction and for appointed representatives would pay the latter.

6. Article 2 of the 2006 Order introduces a new Rule 2A and Schedule to the 1997 Rules to make modifications to the 1997 Rules where applications for planning permission, listed building consent or hazardous substances consent are to be considered at a planning inquiry and involve security sensitive information access to which has been restricted by direction ("closed evidence"). Part 1 of this Schedule contains the modifications:

Paragraph 1 of the new Schedule introduces new terminology such as "appointed representative", "closed evidence", "open statement of case" and so on;

Paragraph 2 introduces a new rule 3B governing the treatment of closed evidence throughout the regulations where steps involve the submission and circulation of statements of case and amendments or additions to such statements;

Paragraph 3 modifies rule 4 on preliminary information and notice of an inquiry to include notice that a security direction has been made and to ensure "appointed representatives" receive the relevant notice.

Paragraph 4 amends rule 5 on pre-inquiry meetings called by the Scottish Ministers, again to ensure appointed representatives are notified of such meetings and to cover the conduct of the meeting in relation to any closed evidence.

Paragraph 5 does the same as article 4 where the reporter calls a pre-inquiry meeting under rule 6.

Paragraphs 6, 7 and 8 modify rules 7, 8 and 9 to ensure appointed representatives receive statements of case from the planning authority, the applicant and other persons respectively.

Paragraph 9 amends rule 12 on precognitions to deal with closed evidence and service on "appointed representatives".

Paragraphs 10, 11, 12 and 13 amend rules 13 (Service of statements of case, documents and precognitions), 15 (Date and notification of inquiry), 16 (Appearances at inquiry) and 19 (Procedure at inquiry) to include reference to "appointed representatives".

Paragraph 14 amends rule 20 on site inspections where the inspection of "closed evidence" is involved, limiting who may attend and when it may be conducted.

Paragraph 15 amends rule 21 on the procedure after inquiry and deals with the inclusion of closed evidence in reports of the inquiry and the handling of the notification of parties where the Scottish Ministers reach different conclusions to the reporter in relation to a matter involving closed evidence.

Paragraph 16 amends rule 22 on the notification of decisions and covers the limitation of disclosure of reasons for a decision which relate to closed evidence or of the closed evidence itself.

Paragraph 17 introduces a new rule 22A which contains a general provision on the non-disclosure of closed evidence other than in relation to the Scottish Ministers or a specified person (i.e. a person specified as being able to view closed evidence in the direction restricting access said evidence).

7. Article 3 of the 2006 Order introduces a new rule 2A to the 1997 Appeals Rules which introduces modifications to the 1997 Appeals Rules where security sensitive information is involved in an appeal in relation to planning permission, listed building consent or hazardous substances consent. It introduces a Schedule to the 1997 Appeals Rules (set out in Schedule 2 to the 2006 Order) which contains the modifications to individual provisions. These modifications are along the same lines as those described above in relation to the 1997 Rules.

Urgent Applications

8. Section 92 of the 2004 Act introduces new sections to the 1997 Act (section 242A) and to the Planning (Listed buildings and Conservation Areas) (Scotland) Act 1997 (section 73B) to allow that applications for development which the appropriate authority (i.e. the Crown body) certifies is of national importance and is required urgently can be made directly to the Scottish Ministers rather than to the planning authority. This means that where such a development was at the risk of refusal by the planning authority, which would trigger an appeal to the Scottish Ministers, the case can be made directly to the Scottish Ministers. This would cut down on the 2 month period of consideration by the planning authority (any applicant can appeal to the Scottish Ministers where a planning authority has not determined their application after 2 months – 4 months in a case involving environmental impact assessment).

9. In addition, the time periods for various steps to be taken in the run up to an inquiry are to be compressed to cut down on the time it takes to get to inquiry, again in the interests of urgency. Once the inquiry has started, the time it takes will depend on the nature of the issues and so on and there is no time limit on the duration of an inquiry which could be modified. These reductions in time periods (processing by planning authorities and pre-inquiry procedures) are of significance where a nationally important development is required urgently, and a decision on the planning merits of the case would be available that much more quickly.

10. The usual consultation and publicity arrangements for applications will apply to these urgent cases, along with additional requirements in the 2004 Act for local advertising and consultation with the planning authority. Local interests will therefore be able to make their views known on the proposals and these will be given due consideration in determining the application.

11. New Rule 2A introduced by Article 2 of the 2006 Order also introduces the modification to the 1997 Rules in relation to urgent applications, which are contained in Part 2 of the new Schedule to the 1997 Rules:

Paragraph 1 of Part 2 of the Schedule amends Rule 2(1) to make it clear the 1997 Rules apply to applications made to the Scottish Ministers.

Paragraph 2 introduces a new rule 4A which sets out the preliminary information to be supplied where an application is made direct to Ministers rather than to the planning authority. It covers notice of the inquiry to parties, notice of the statutory parties and notice to local authorities and any government departments who have made views on the application.

Paragraph 3 reduces the timescales for the steps where the Scottish Ministers cause a pre-inquiry meeting to be held.

Paragraphs 4, 5 and 6 reduce the time periods for service of statements of case by the planning authority, the applicant and other persons respectively under rules 7, 8 and 9.

Paragraph 7 reduces the time period for statements of case, documents and precognitions in rule 13(4).

Paragraph 8 reduces the overall time limits in rule 15 on the start of an inquiry where the Scottish Ministers have called for a pre-inquiry meeting and where they have not so done. It also transfers the requirement to publish local notices of the inquiry from the planning authority to the Scottish Ministers where urgent applications have been made direct to Ministers.

Consultation

12. The question of the removal of Crown immunity from planning controls in Scotland was the subject of public consultation in the early 1990s. It is only in recent years that a suitable legislative opportunity arose to make the necessary provisions in planning legislation. While a number of Crown bodies have been consulted on aspects of the secondary legislation, we have not carried out a full public consultation on the secondary legislation. In light of the European infraction proceedings in relation to applying the requirements of the European Directive on environmental impact assessment to Crown development we have pressed ahead with the laying of Scottish Statutory Instruments.

Financial Effects

13. With the removal of Crown immunity from planning controls, Crown bodies will have to pay planning fees to the planning authorities for planning applications, as private developers do at present. The extent of these costs will depend on the number and nature of Crown developments which may come forward in any given year. However, planning fees generally are a very small fraction of the overall costs of a development proposal. Planning authorities do not currently receive a fee for considering Crown development proposal under the existing administrative arrangements which reflect statutory planning controls.

14. Where the procedure involving representatives appointed by the Lord Advocate applied in relation to an application involving information on national security and/or the security of any premises or property, the appointed representatives would be paid for by the holder of the closed evidence, normally the developing department. Cases involving security sensitive material of national importance are likely to be very limited in number.

The Scottish Executive Development Department
June 2006