

EXECUTIVE NOTE

THE PLANNING ETC. (SCOTLAND) ACT 2006 (COMMENCEMENT NO. 9) ORDER 2009 (SSI 2009/217) (C. 17)

THE PLANNING ETC. (SCOTLAND) ACT 2006 (DEVELOPMENT MANAGEMENT AND APPEALS) (SAVING, TRANSITIONAL AND CONSEQUENTIAL PROVISIONS) ORDER 2009 (SSI 2009/222)

The Planning etc. (Scotland) Act 2006 (Commencement No. 9) Order 2009 (the Commencement order) is made in exercise of powers conferred by section 59(2) of the Planning etc. (Scotland) Act 2006 (the 2006 Act). This order is not subject to any resolution procedure. The Planning etc. (Scotland) Act 2006 (Development Management and Appeals) (Saving, Transitional and Consequential Provisions) Order 2009 (The Savings and Transitionals Order) is made in exercise of the powers conferred by section 58(1) and (2) of the 2006 Act. The Savings and Transitionals Order is subject to negative resolution procedure.

Policy Objectives

The Commencement Order will bring into force the majority of the remaining provisions relating to new development management procedures contained in the 2006 Act on 3 August 2009. It will also commence the majority of the remaining repeals in Section 56 and the Schedule to the 2006 Act. What follows is a breakdown of the provisions being commenced together with a note of the related provisions in the Savings and Transitionals order. After that is a breakdown of the provisions in the Savings and Transitionals Order not covered in the discussion of the Commencement Order.

Commencement Order

Section 6 of the 2006 Act will introduce new provisions requiring developers to serve notice on the planning authority of when they intend to start development and when they have completed development. In addition there are also provisions relating to the display of notices on sight during development for certain projects. Article 2 of the Savings and Transitionals Order applies these requirements only in relation to development granted planning permission on or after 3 August so that developers have a chance to be made aware of the new requirements and developers implementing permissions granted some years ago, for example, are not caught out.

Section 7(1) and (2) – Sub section (1) replaces the current section 32 of the Town and Country Planning (Scotland) Act 1997 on the powers to specify in regulations or a development order the form and content of planning applications. The new provisions elaborate on what such specification should contain, including requirements for design and access statements and pre-application consultation reports, and allow different provisions to be made for different categories of development in the new hierarchy (i.e.

national, major or local developments). Sub section (2) contains some additional powers to the existing ones for regulating the display of advertisements to specify the form and content of applications for advertising consent. These powers have already been commenced for the purposes of making regulations or development orders.

Section 8 of the 2006 Act specifies the extent to which applications for planning permission can be varied before a new application would be required. It also prevents variation being made once an appeal to Ministers is made. This is in line with the new policy on limiting the introduction of new information on proposals at the appeal stage to encourage such appeals to be a review of the planning authority's decision on the application based on the information they had before them. This is to encourage front loading the system with information provided upfront rather than drip fed at various stages. Article 3 of the Savings and Transitions Order indicates that the restriction on the variation once an appeal has been made applies only in relation to appeals made on or after 3 August. The latter is to prevent a situation where in an appeal made before that date a proposal can be varied but cannot from that date onward and any uncertainty about at which point a variation could be said to have occurred and whether or not this was before 3 August.

Section 9 - this allows planning authorities to serve a notice requiring a retrospective planning application to be made for unauthorised development and provides that such a notice represents formal enforcement action (so the time bar on enforcement action does not come into effect while authorities are determining a retrospective application). It also makes minor technical amendments to add in references to these new powers and those on temporary stop notices elsewhere in the Town and Country Planning (Scotland) Act 1997 (the 1997 Act).

Section 10 – This commences the new provisions on publicity for applications, including neighbour notification (responsibility for which is transferred from applicants to planning authorities) and advertising of applications. Article 4 of the Savings and Transitional Order preserves the original legislation in this regard for planning applications made before 3 August and for certain minerals applications (where neighbour notification is not being transferred to planning authorities).

Section 12 – Public availability of information – this amends the legislation on planning registers in particular to introduce provisions for reports of handling on all planning applications to improve the transparency of decision making.

Section 13 – The keeping and publication of lists of applications. This introduces a new requirements for a list of the live planning applications before the planning authority and this list should be published and available to the public. It summarises information on applications held on the planning register. Article 5 of the Savings and Transitions Order applies this to applications made on or after 3 August, so that authorities are not faced with having to put on all the outstanding applications made before on the list at one time but will gradually build to having such a list.

Section 14 – Pre-Determination Hearings. This introduces the requirement for the planning authority to afford the opportunity for parties (the applicant and those who made representations on the application) to attend a pre-determination hearing for applications for certain developments – the applications in question (major developments which are significantly contrary to the development plan and national developments) are specified in the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 (the DMR). This section also requires that applications specified as requiring parties to have an opportunity for a pre-determination hearing should be referred to the full council for a decision.

Section 15 – Additional grounds for declining to determine applications. Current powers in this regard allow planning authorities to refuse to consider repeat applications where the Scottish Ministers have refused permission on a similar application within the previous 2 years on appeal or as a called-in planning application. The new provisions in addition allow authorities to refuse to consider repeat applications where they have refused more than one similar application within the previous 2 years, even if such applications have not been considered by Ministers. This is to allow planning authorities to prevent applicants using repeat applications which are refused but not appealed to Ministers simply to wear down opposition. In addition, planning authorities and Ministers are required to decline to determine applications where pre-application consultation was required but the applicant did not comply with the requirements in this regard.

Article 6 of the Savings and Transitionals Order preserves the existing powers in this regard for applications made before 3 August. The new powers only relate to applications made on or after that date.

Section 16(b) – This introduces new requirements on the content of decision notices on planning applications, including the decision (e.g. refuse or grant), any conditions attached to a grant of permission and the reasons for the decision. The DMR contain additional information requirements for decision notices for different types of application.

Section 17 – Local Developments: Schemes of Delegation. This brings into force from 3 August the remaining provisions on the preparation of schemes of delegation for local developments and for local reviews (replacing appeals to Ministers) for cases determined under such schemes. Article 7 of the Savings and Transitionals Order preserves rights of appeal on the grounds of non-determination of applications where the right to do so arises before 3 August, where the application might otherwise be determined after that date under a scheme of delegation and subject to local review. This avoids any question about whether or not a right of appeal which existed on a case prior to 3 August has changed to a right to local review from that date. Where such applications are determined under a new scheme of delegations on or after 3 August, the decision will be open to challenge under new local review not appeal procedures.

Section 19 – Appeals – this section introduces new provisions on appeals in terms of seeking to restrict the introduction of new information in order to encourage front loading of the system and certain technical amendments to incorporate into legislation references to planning authorities’ decisions and actions in relation to the new local reviews. The powers in this section to make new appeal regulations have already been brought into force. Article 9 of the Savings and Transitional Order preserves the current appeal provisions in relation to appeals where notice of an appeal is given before 3 August, i.e. for consistency, where an appeal is made under the current system it will continue to be processed under the current system even after the changes on 3 August.

Section 20(1) and (2) – This changes the statutory default duration of a planning permission (time within which development must be started) from 5 to 3 years, but planning authorities retain the right to specify longer or shorter durations. Article 10 of the Savings and Transitionals Order preserves the current provisions on duration of planning permission and related provisions for those permission granted prior to 3 August.

Section 21 – This replaces the concept of outline planning permission with planning permission in principle, reduces some of the statutory default time periods for the duration of such permission, but again allows planning authorities discretion to set their own durations on a permission. It also, along with provisions in the DMR, changes the nature of the approval of detailed matters so that all conditions requiring matters of detail in relation to planning permission principle to be approved by the planning authority will require a formal application. Article 11 of the Savings and Transitionals Order specifies that applications for outline planning permission made before 3 August but determined after that date will, where successful, result in a grant of planning permission in principle. This brings these cases into the new planning system when determined from 3 August.

Section 22 – this makes various changes to references to outline planning permission and the duration of planning permission in various sections of the Town and Country Planning (Scotland) Act 1997 as a result of section 20 and 21. Article 10 of the Savings and Transitionals Order preserves the original versions of these sections of the 1997 Act for the purposes of permission granted before 3 August.

Section 25 – Fixed Penalty Notices. New powers for planning authorities to serve a fixed penalty notice in relation to breaches of planning enforcement notices or breach of condition notices as an alternative to pursuing matters through the courts. In paying the penalty the recipient of the notice discharges any liability to conviction for an offence in relation to enforcement notices and breach of condition notices. The levels of penalty have been set in the Town and Country Planning (Amount of Fixed Penalty) (Scotland) Regulations 2009 (SSI 52 of 2009).

Section 26 – Temporary Stop Notices. This introduces new provisions for planning authorities to serve temporary stop notices to stop immediately activity which they consider to be a breach of planning control. This is to address the situation where, for example, the delays associated with the procedures for putting in place a regular stop

notice could exacerbate significant environmental damage associated with a breach of planning control. Additional provisions are introduced on the matters which a temporary stop notice would not prohibit, offences associated with temporary stop notices and compensation provisions in certain circumstances, e.g. where the activity is subsequently deemed lawful.

Section 54 – various amendments to the 1997 Act:

Subsection (3) – amends provisions on development orders so such orders can make provisions for different categories of development in the new planning hierarchy (major, national and local development).

Subsection (4) – Prevents planning authorities granting permission on a retrospective planning application to run from when the development was carried out if a planning enforcement notice was served prior to the retrospective application being made. This is in line with the removal for the right to appeal against an enforcement notice on the grounds that planning permission should be granted.

Subsection (5) – amends the provisions of the 1997 Act on granting planning permission with conditions to refer to new requirements in relation to conditions on phased development in new section 27B and on matters of detail relating to planning permission in principle in the new version of section 59 of the 1997 Act. It also clarifies that the date of a grant or refusal of permission is the date of the notice of the planning authority's decision.

Subsection (6) – amends the remaining grounds of appeal against an enforcement notice as a result of the removal of the text relating to appeal on the grounds that planning permission should be granted.

Subsection (7) – amends the section of the 1997 Act defining the compliance period of an enforcement notice to include reference to the new provisions on new fixed penalty notices, as the latter rely on the compliance period of an enforcement notice.

Subsection (8) – provisions on allowing entry to land without a warrant in order to ascertain whether specified powers available to the planning authority (e.g. on enforcement or stop notices) should be used are amended to include reference to new temporary stop notice.

Subsection (9) – amends the list of circumstances in which a tree preservation order cannot prevent certain works being undertaken to include where such works are required as a result of an Act of the Scottish Parliament.

Subsection (10) – current provisions specifying when land can be statutory undertakers' operational land as a result of a specific grant of planning permission

as a result of a private Act of Parliament or by an order approved by both Houses of Parliament are amended to include permission granted by a private Act of the Scottish Parliament or an order approved by the Scottish Parliament.

Subsection (13) – section 242A of the 1997 Act on making applications for urgent Crown development directly to Ministers are amended to take account of the removal of the right to be heard from the provision, to which section 242A cross refers, on applications called-in by Ministers, namely section 46 of the 1997 Act. Article 13 of the Savings and Transitionals Order saves the current version of section 242A in respect of an application made before 3 August.

Subsection 17(a)(i) – amends the interpretation section of the 1997 Act to include reference to new terminology, such as temporary stop notices.

Section 56 and the Schedule - Repeals of Sections of the 1997 Act. A number of these relate to the removal of the right to be heard for applicants or planning authorities when certain cases (e.g. called-in planning applications and appeals against refusal of permission) are before the Scottish Ministers; in future the consideration process will be determined by the reporter considering the case in light of the circumstances of the individual case.

Section 41(5) – removes redundant reference to conditions specifying the duration of a planning permission (in future such duration will not be specified in a condition).

Section 42(3) – sub-sub-section (a) is repealed as the powers to specify procedures for certain planning applications to which it relates are covered by the new version of the general powers for specifying planning application procedures.

Section 46 – right for the planning authority and applicant to be heard in relation to a called-in planning application is removed.

Section 48 – repeals in relation to those for section 46.

Section 130(1)(a) – repeal of the right to appeal against an enforcement notice on the grounds that planning permission should be granted for the breach of planning control being enforced.

Section 131(2) – removal of the right to be heard in enforcement notice appeal cases.

Section 133 (1)(a)-(c) and (3)-(11) – repeal of provisions relating to granting permission as a result of an enforcement notice appeal. The right to appeal against an enforcement notice on the grounds that planning permission should be granted will be repealed.

Section 143(2) – compensation for loss due to stop notice – repeal relates to provisions relating to an enforcement notice appeal on grounds that planning permission should be granted; such grounds are now being repealed. Article 12 of the Savings and Transitions Order saves the provision in relation to enforcement notice appeal cases made on these grounds which have been made before but not determined by 3 August.

Section 155 (1) – right to be heard in an appeal relating to a certificate of lawful use or development repealed.

Section 169(6) – right to be heard in relation to an appeal against an enforcement notice relating to trees repealed.

Section 263 – repeal of redundant powers for applying certain aspects of the 1997 Act to development proposals by planning authorities. Such proposals are subject to normal planning application procedures with certain safeguards, namely notification of applications to ministers in certain cases, who may call the application in for their own determination.

Section 277(9) and Part II of Schedule 18 repealed as a result of repeal of the powers in Section 263.

Schedule 3 paragraph 4(3)(a)– correction of an error where the Forestry Commission had to be consulted on certain conditions to be attached to minerals permissions relating to agriculture and forestry uses were involved. Reference to agriculture is repealed.

Schedule 4 paragraph 2 (2)-(5) and paragraph 3 (4)-(6) – repeal of provisions on right to be heard in certain appeal cases determined by reporters appointed by Ministers.

Savings and Transitions Order

Article 6 Call-in of Applications by the Scottish Ministers – this provision saves the existing provisions in section 46 of the Town and Country Planning (Scotland) Act on processing called-in applications where call-in directions are issued prior to 3 August. In particular the right to be heard will be maintained for such cases.

Article 14 The Conservation (Habitats &c.) Regulations 1994 – Textual amendments to take account of the changes from outline planning permission and reserved matters to planning permission in principle and approval of matters specified in conditions.

Article 15 Planning (Hazardous Substances) (Scotland) Act 1997 (the PHS Act)– The PHS Act applies various provisions in the Town and Country Planning (Scotland) Act 1997 on publicity for applications, enforcement and fees for applications for planning permission to similar processes for hazardous substances consent. The modernisation of

planning did not include the planning hazardous substances regime and consequently the original versions of the relevant provisions in the 1997 Act are saved for the purposes of the PHS Act.

Article 16 Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Regulations 2004 – The various references to outline planning permission and reserved matters are amended to take account of planning permission in principle and approval of matters specified in conditions in line with the new procedures from 3 August. There is a saving provision for reserved matters applications made on or after 3 August in relation to outline planning permission granted prior to 3 August. Article 16 also adds references to new local review procedures where the Fees Regulations refer to appeals to ministers.

Consultation

The provisions of the Planning etc. (Scotland) Act 2006 being commenced have been subject to consultation through the Bill process. The Saving, consequential and transitional provisions are technical measures just to smooth the transition to the new system and were not subject to public consultation.

Financial Effects

The effects of the main changes to the planning system were covered in the financial memorandum accompanying the bill, which became the Planning Etc. (Scotland) Act 2006, and the Executive Notes and Regulatory Impact Assessments accompanying the related secondary legislation, which has already been through the Parliament:

Financial memorandum for the Bill

<http://www.scottish.parliament.uk/business/bills/51-planning/index.htm>

The Town and Country planning (Hierarchy of Developments) (Scotland) Regulations 2009 (SSI 2009/51)

http://www.opsi.gov.uk/legislation/scotland/ssi2009/en/ssien_20090051_en.pdf

The Town and Country Planning (Development Management) (Scotland) Regulations 2008 (SSI 2008/ 432)

http://www.opsi.gov.uk/legislation/scotland/ssi2008/en/ssien_20080432_en.pdf

The Town and Country Planning (Schemes of Delegation and Local Reviews) (Scotland) Regulations 2008 (SSI 2008/ 433)

http://www.opsi.gov.uk/legislation/scotland/ssi2008/en/ssien_20080433_en.pdf

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