

POLICY NOTE

THE TOWN AND COUNTRY PLANNING (APPEALS) (SCOTLAND) REGULATIONS 2013

SSI 2013/156

Introduction

1. The above instrument was made in exercise of the powers conferred by section 47(2) and (3), 75B, 75F, 130(3) and 131(1) (and as applied by section 180(3)), 154(2), 169(3) and (4), 182, 186, 267, 275 and 275A of the Town and Country Planning (Scotland) Act 1997 (“the 1997 Act”), sections 18, 19, 35, 36 and 82 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (“The Listed Buildings Act”) and all other powers enabling them to do so. The instrument is subject to negative procedure.

Policy Objectives

Background

2. The Planning etc. (Scotland) Act 2006 removed the right to be heard for appellants and planning authorities in relation to applications called-in for determination by the Scottish Ministers and appeals to the Scottish Ministers in a number of areas of planning. The intention is that the person, appointed by the Scottish Ministers, considering the case decides whether further processing is required (or whether there is sufficient information available to make a decision) and what the most effective form of processing would be in a particular case. This ensures the procedure is proportionate to the case, therefore improving efficiency while ensuring a fair and transparent process and a high quality of determination.
3. The Town and Country Planning (Appeals) (Scotland) Regulations 2008 (“the 2008 Regulations”), came into force on 3 August 2009 introducing procedures that apply to appeals in respect of decisions on planning applications, or the failure to take such decisions, enforcement notices, notices requiring replacement of trees, amenity notices and refusals of certificates of lawful use or development (CLUD).
4. They make provision for the timescales for making an appeal, the notice to be given of an appeal and the submission of views by the applicant or appellant and the planning authority and, in most cases, “interested parties” (who vary depending on the nature of the case, but include, for example, those who made representations to the planning authority on a planning application which is now before Ministers). The Reporter can then decide whether there is sufficient information to make a decision or whether further processing is required and, taking due account of the views of the applicant or appellant and the planning authority, what form it should take.

5. Further processing can be by written submissions, a site inspection, hearing session or inquiry session or combination of these. The 2008 Regulations set out the procedures for each of these processes.
6. The Town and Country Planning (Appeals) (Scotland) Regulations 2013 (“the 2013 Regulations”) update and consolidate the 2008 Regulations. They include previous amendments to the 2008 Regulations to cover appeals and applications called in for determination by Scottish Ministers in relation to listed buildings and conservation areas consent cases, and applications to modify or discharge planning obligations or good neighbour agreements.
7. In addition, these regulations include amendments in relation to:
 - i) the appeals procedure for control of advertisements cases;
 - ii) provision for applications for urgent Crown development and cases where information is national security sensitive and therefore cannot be subject to full disclosure;
 - iii) allowing reporter’s discretion to deal with minor pieces of additional information (e.g. plans of different scale or minor corrections to submissions); and
 - iv) providing an “opt-in” procedure, whereby the reporter can ask those who made representations in a case whether they wish to be a part of any further processing of the appeal.
8. A summary of the 2013 Regulations as a whole is set out at the end of this paper.

Background

i) Control of advertisements

9. The planning system has specific procedures for consenting the display of advertisements on hoardings, buildings etc. for the purposes of advertisement, announcement or direction (there are a number of exemptions from the need for such consent). Applicants can appeal against the planning authority’s decision on their application for consent (or failure to reach a decision) or against a discontinuance notice requiring them to remove an existing advertisement, or against an enforcement notice served in relation to alleged breach of advertisement control.
10. The current appeal procedures in this regard are set out in the Town and Country Planning (Control of Advertisements) (Scotland) Regulations 1984 (“the Advertisement Regulations”) and they include the right to be heard. This right means if either the planning authority or the applicant request to appear before and be heard by a person appointed by the Scottish Ministers in an appeal, a hearing must be held. The 2013 Regulations, together with a separate statutory instrument amending the Advertisement Regulations, bring

appeal procedures in this area into line with the main planning appeal procedures, allowing the reporter to decide on the most appropriate process for considering the case.

11. Part 4 of the 2013 Regulations includes provisions for appeals against various kinds of planning enforcement notice. A new provision is included to apply the regulations to appeals against enforcement notices served under Regulation 24 of the Advertisement Regulations.
12. Part 6 of the 2013 Regulations includes new provisions applying these regulations to appeals in relation to applications for advertisement consent made or discontinuance notices served under the Advertisement Regulations. Regulation 19 of the 2013 Regulations modifies slightly the basic planning application appeal procedures to address differences in the nature and procedures between applications for planning permission and advertisement consent. Regulation 20 deals with appeals against discontinuance notices, applying the general appeal procedures to such cases, e.g. the reporter's discretion as to whether further processing is required and the form it should take. This regulation also specifies:
 - the period for making an appeal against an advertisement discontinuance notice;
 - the content of the appeal;
 - requirements for the planning authority to notify other parties of the appeal and the time period for making representations.

ii) Crown Development and National Security

13. In 2006, upon the removal of Crown immunity from planning control, legislation on planning application and appeal procedures was amended to make some accommodations for the Crown, either by or using powers under the Planning and Compulsory Purchase Act 2004. In particular, the Planning and Compulsory Purchase Act 2004 made provision for making applications for "urgent Crown development" directly to Ministers and for dealing with national security sensitive information in processing planning applications. The amendments made by that Act defined "urgent Crown development" as that which the appropriate authority (e.g. the Government Department responsible) certifies is both of national importance and which it is necessary to carry out as a matter of urgency.
14. The subordinate legislation in 2006 for planning applications called in by Ministers and planning appeals had provisions added governing the processing of applications for urgent Crown development and for controlling the access to national security sensitive information at inquiry. When the planning system was modernised in line with the Planning etc. (Scotland) Act 2006, we did not include similar provisions in the 2008 Regulations, the priority being the amended planning procedures which apply to the vast majority of planning applications. We are now taking this opportunity to include these provisions with this current consolidation.

15. Regulation 25 applies elements of the 2013 Regulations to applications for urgent Crown development along similar lines to the way they apply to applications called-in for determination by Ministers. This involves the options for procedural steps in Part 3; the general provisions in Part 9 and the Hearing Session Rules and Inquiry Session Rules in Schedule 1 and 2 respectively.
16. Schedule 4 to the 2013 Regulations makes provisions for parties to withhold national security sensitive information until such time as a decision is made by the Scottish Ministers, in conjunction with the UK Secretary of State, on whether or not to direct that information must be withheld on the grounds of national security from a public inquiry. If a direction is made, Schedule 4 sets out restrictions on circulating information and holding inquiry sessions in relation to “closed evidence”, i.e. the information directed to be withheld.
17. The Planning (National Security Directions and Appointed Representatives) (Scotland) Rules 2006 (SSI 2006/265) make provision for the procedure for making national security directions and the functions of appointed representatives to act on behalf of those parties unable to view national security sensitive information.
18. If no such direction is made, the applicant or appellant would need to decide whether to pursue the case given that the normal requirements under the 2013 Regulations for the disclosure of information would apply.

iii) Additional minor information

19. There is no provision for a reporter to request submission of relatively minor information on a case which would not constitute new evidence, requiring circulation and information gathering from all parties concerned. As a result the requests for minor pieces of information can lead to unnecessary processing and delay. Regulation 9(1) (decision as to further procedure) of the 2013 Regulations, has been amended to remove the requirement on any new information being treated as new evidence and subject to requirements for circulation and further comment. The reporter will ensure that any additional minor information will be processed to ensure a fair and transparent appeal process.

iv) The “opt-in” procedure

20. Some appeal cases can involve vast numbers of representations made to the planning authority, sometimes copy letters or pro-forma, with each party making such representation having to be treated as an “interested party” in the appeal procedure. This can mean that large amounts of paperwork on the conduct of the appeal is sent to these parties, many of whom, while interested in the outcome of the appeal, may not necessarily wish to be involved in its detailed processing.
21. Regulation 8 provides for the reporter the option to write to parties who made representations to seek confirmation as to whether they wish to be involved in

any further procedure. The intention is to use this where there are large numbers of representations, especially those with pro-forma or copy letters, where people have indicated their views but may not wish to engage further in each step of any further processing.

22. Due consideration would still have to be given in the appeal process to the views expressed in the original representations, even if the party who submitted those views did not wish to “opt-in” to any further processing.

Consultation

23. A public consultation took place from 28 March 2012 to Friday 22 June 2012 on a number of refinements and amendments to the procedures on appeals, development management, schemes of delegation and local reviews. Only the change to allow more discretion for reporters on requiring additional minor information was included in this consultation. The other changes are primarily technical – bringing advertisement control appeal cases into line with other planning appeal procedures, re-introducing the accommodations for the Crown and the ability to seek confirmation whether “interested parties” wish to be involved in further processing of an appeal.
24. Of the 94 responses received, most came from planning authorities and developers. Other responses were from community councils, professional bodies, statutory organisations, other organisations, consultants and some individuals.
25. There was a high level of support for the proposals to change how requests from reporters for minor information in appeals are treated (91% of those who replied on this point agreed). Those disagreeing with the proposal were concerned that cases could be prejudiced if all new information was not subject to full circulation and comment.
26. A full list of those consulted and who agreed the release of information is attached to the consultation report published on the Scottish Government website. <http://www.scotland.gov.uk/Publications/2012/08/1764>

Impact Assessments

27. A final Business and Regulatory Impact Assessment is attached. These amendments are not expected to have any significant impacts on business, other than streamlining the planning process in general. An Equalities Impact Assessment is also attached, though there are not expected to be any implications for equalities groups arising from these amendments.

Summary of the Regulations

28. These regulations contain basic procedures for dealing with appeals in relation to applications for planning permission. They then make specific provision for how these procedures are adapted to deal with other planning appeals in relation to various planning applications or enforcement measures.

Examples include applications for certificates of lawful use or development (CLUDs), listed building consent applications, applications to discharge or modify planning obligations, enforcement around breaches of listed building consent and duties to replace trees.

Part 2 specifies

- how the notice of appeal in relation to planning permission is made to Scottish Ministers;
- the applicant's intimation of the appeal to the planning authority and the planning authority's response;
- details on notifying "interested parties" and the publication of appeal documents.

Part 3 specifies the procedure for determination. The appointed person may determine the appeal without further procedure or determine the manner in which the further processing of the appeal is to be conducted. Further procedure can include:

- written submissions;
- holding of one or more hearing sessions;
- holding one or more inquiry sessions;
- a site inspection;
- or a combination of these procedural steps.

The appointed person may also hold a pre-examination meeting to consider the manner in which the appeal or stage of the appeal will be conducted.

Part 4 specifies how the basic appeal procedures are adapted for appeals against:

- a planning enforcement notice (section 130(2) of the 1997 Act);
- an enforcement notice on duties as to replacing trees (section 169(1) of the 1997 Act);
- notices requiring the abatement of the adverse effect of the condition of land on amenity (section 180(2) of the 1997 Act);
- appeals against enforcement notices regarding listed building consent (section 35(2) of the Listed Buildings Act); and
- appeals against enforcement notices regarding advertisement control (regulation 25 of the Advertisement Regulations).

This part also adds some requirements to address the fact these are appeals against enforcement notices rather than against decisions on applications previously made to the planning authority. Specific provision is therefore made regarding, for example, how statements of appeal are to be made, how the planning authority and other parties are to be notified of and are to make representations on the appeal.

Part 5 adapts the basic appeal procedures to deal with appeals under the Listed Buildings Act in relation to applications for listed building consent or conservation area consent.

Part 6 includes new provisions which similarly adapt the basic appeal procedures to deal with appeals in relation to advertisement consent and notices for the discontinuance of advertisements (see paragraphs 11 and 12 above).

Part 7 contains the adaptations of basic appeal procedures to deal with appeals in relation to applications for the modification or discharge of planning obligations, of good neighbour agreements and applications for CLUDs.

Part 8 indicates how the appeal procedures are adapted for the purposes of applications called in for determination by Scottish Ministers and applications for “urgent Crown development” made directly to Ministers or appeals which are not delegated to reporters for determination.

Part 9 of these regulations includes general provisions for the 2013 Regulations for:

- non-delegated appeals – specifying how the 2013 Regulations apply to appeals where a direction or regulations specify the decision on the appeal will be made by Ministers rather than delegated to a reporter;
- national security (provides that an appeal is not invalid because information is withheld on national security grounds);
- requiring parties to submit further copies of documents;
- compliance with consultation and notification procedures (e.g. in cases where appeals are sought on non-determination of an application, the reporter is required to carry out statutory consultation or notification of parties where the planning authority has not already done so);
- the appointment of an assessor (i.e. person(s) to help the reporter address specific aspects of a case;
- distribution of the decision notice; and
- the criteria for sending electronic communications relating to a case.

Part 10 specifies the transitional arrangements for bringing the changes to appeal procedures into force and the revocation of the statutory instruments or the parts of them which these consolidated regulations replace.

Schedule 1 — Hearing session rules

Schedule 2 — Inquiry session rules

Schedule 3 — Notices under regulation 18 (To owners of buildings to which an appeal under Section 18 of the Listed Buildings Act relates)

Part 1 — Notice for service on owner of the building

Part 2 — Notice for publication in local newspaper

Schedule 4 — Closed evidence (dealing with national security sensitive information)

Schedule 5 — Revocations (the list of legislation revoked as a result of consolidating the 2008 Regulations)

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Directorate for Local Government and Communities
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