



## MINUTE

A

### Special Shetland Islands Council

Council Chamber, Town Hall, Lerwick

Wednesday 16 January 2008 at 2 p.m.

#### Present:

A J Cluness	L Angus
J Budge	A Cooper
A Doull	B Fullerton
I Hawkins	R Henderson
J Henry	A Hughson
B Manson	C Miller
R Nickerson	F Robertson
G Robinson	J G Simpson
C Smith	A Wishart

#### Apologies:

L Baisley	A Duncan
F Grains	

#### In attendance (Officers):

M Goodlad, Chief Executive  
W Shannon, Assistant Chief Executive  
D Irvine, Head of Business Development  
N Grant, Interim Head of Economic Development  
J Riise, Head of Legal and Administration  
S Spence, European Officer  
A Cogle, Service Manager - Administration

#### Also:

N McDougall, Interim General Manager – Shetland Development Trust  
S Keith, Project Manager – Shetland Development Trust  
M Ferris, External Auditor

#### Chairperson

Mr A J Cluness, Convener of the Council, presided.

#### Circular

The circular calling the meeting was held as read.

#### Declarations of Interests

Mrs B Fullerton declared a non-pecuniary interest in the following item. Mrs Fullerton said that she was unsure if any of her relatives would be affected by the matter, but at the moment she not think it would preclude her from participating.

Mr R Henderson also declared a non-pecuniary interest, for the same reason.

**State Aid**

The Council considered a report by the Assistant Chief Executive (Appendix 1).

Mr Cluness began by saying that in 1973 there were a number of people that thought Shetland was not capable of running and operating the port at Sullom Voe, but this had resulted in the formation of the ZCC Act. For the debate today, he said the main reference in the Act related to Section 67 and to the use of a Reserve Fund. Mr Cluness said the Act provided for the establishment of a Reserve Fund and provided the Council with power to invest in securities. He went on to state that the Act allowed this Reserve Fund to be used in any number of ways in connection with the harbour undertaking, and other business which in the opinion of the Council was in the interests of the community and its inhabitants. In this regard, Mr Cluness said that the Council's permission was granted through this Act of the UK Parliament, and as a result of that, the Council set up various organisations, such as the Shetland Charitable Trust in 1976 which had been extremely successful, and had invested over £12m in Shetland every year in many areas, including the agricultural industry. Mr Cluness said that all of these investments may now be challengeable in terms of any decisions in relation to the matter concerning grants to fishermen.

Mr Cluness said that it was difficult to see how the whitefish industry could have survived had there not been investment in quotas and other aspects of the industry. He added that in the 1980s and 1990s, the European Commission had used these grants as the basis for matching funding for their own loan assistance schemes. Mr Cluness said advice provided at the time was that Reserve Fund grants and loans were private and not public funds, other than that they were owned by the community itself. During 2000, Mr Cluness said that complaints had been made from anonymous individuals and in 2003 the Council had received the first decision which said that it was the view of the Commission that these were public funds and subject to State Aid Regulations, although there was no requirement to recover the funds.

Mr Cluness said that this had led to the present situation whereby this financing was now declared by the Commission to be public funds and disbursement would be State Aid, and the fishermen and others were being required to repay the grants, plus interest, which would be difficult for some, or in some cases their dependants. He added that since November, the Chief Executive and staff from the Economic Development Unit had provided the Scottish Government with information on each case. Mr Cluness said that he wished to thank the Scottish Government and their staff for all their assistance to date, and the European Commission staff had also been helpful and sympathetic to the Council's stated position, namely that the punishment would be disproportionate to the alleged offence and that the Council had no reason to believe that these grants could ever contribute to distortion of trade between trading nations.

Regarding the timescale for the appeal, the Convener said that this was a relatively short timescale, and although the Council had the support and backing of the Scottish Government, the UK Government were not yet seemed able to state their position. Mr Cluness said that the Council was now faced with the question of lodging its own appeal in the event that the UK Government was not able to make a decision within the next couple of days, but he continued to hope it would be with the support at least from the UK Government in any event.

Mr Cluness said that this whole issue was a problem for the recipients of these particular funds, but that it did not stop there. Shetland had invested millions into the economy over 20 years and at any future time another complaint could come along and the Council would be in the same position. He said another factor to consider was that unless there was investment in the Shetland economy, it would be unable to sustain itself. Mr Cluness reiterated the point that this was not just a problem for the fishermen, but it was they who had been invited to apply for the sums involved, and in good faith, but were now being asked to repay them.

Mr Cluness said he believed that the Council had no option, despite the expense involved, to make this appeal. He said the early advice regarding the case had been prepared and was ready to go, but the detail required work to be done, as European cases required written submissions. Accordingly, Mr Cluness moved that the Council go ahead with the appeal, on the basis of its importance to the people of Shetland. Mr J G Simpson seconded.

In seconding, Mr Simpson said that he knew the amount of work that had been put into this matter, and the Chief Executive alone had spent a lot of time on it, as well as staff at the Economic Development Unit. Mr Simpson said that to stop at this stage would be a big mistake, as the issue was much wider than the cases referred to, and there were no options available other than to take this matter as far as it could go.

Mr C Smith asked, regardless of whether the Council won or lost its appeal, whether some written evidence or guidelines would be provided regarding future schemes. Mr Cluness said that this would be one of the real benefits of proceeding to the European court, as clear and detailed advice regarding any future courses of action would be provided. Mr Cluness re-iterated the fact that this was a very short timescale, but the Scottish Government staff had done tremendous work, as had DEFRA. Mr Cluness confirmed that whilst UK Government officials had expressed some sympathy, it had yet to commit its support or lodge its own appeal on behalf of the Shetland community.

The Chief Executive advised that he had received a letter this morning from the UK Government confirming that it would consider the basis for an appeal, and that all the information had to be forwarded to the Treasury Solicitors, and thereafter the Government would make a decision on whether or not to appeal. The Chief Executive said that was the current position, and the Scottish and UK Governments were awaiting the outcome of today's meeting. He said that the information would be passed to the Treasury as requested as a good deal of the detailed work had already been done.

Mr L Angus said that the Council was in this position because of the insistence of the UK Civil Service to make the returns requested. He said that the position was accepted by them that the funds were not subject to State Aid when the complaint was made. In this regard, Mr Angus said that the UK Government and Civil Service owed the Council their support, which would mirror the support from the Scottish Government.

Mr W H Manson agreed, and said that the fact that these grants were included in the returns to the UK Government would have given them the opportunity study at that time, and consider if they were correct or incorrect. Mr Manson said no one had been harmed by these grants, and it was not a normal course of action to have retrospective legislation.

Mr A Cooper said he had no problem with the motion to proceed to an appeal, but he had concerns regarding the individuals involved. He said that some were willing to pay now, given that compound interest was being applied, in order to reduce their liability.

The Chief Executive said that as part of the appeal process, the Council would attempt to suspend the interest as part of the application. He said that all recipients would be advised.

Mr R Nickerson referred to the financial implications of between £200k to £250k. He said that whilst this was understood to be estimates at this time, he asked whether setting a ceiling on the costs should be a consideration. Mr Nickerson also asked whether the information to be provided to the Treasury was also ready to be proceeded with directly to the European Court.

Regarding costs, the Convener said that this was understood to be the normal costs for submission of appeals to the European Court, which were also done on the basis of written evidence.

The Chief Executive said that whilst the timing was short, there was still time for the Council to lodge its representation by next Wednesday if the UK Government were unable to take a decision within that timescale.

Mr A Wishart asked whether there were any similar cases that could be studied. He also referred to the need to report back to the Council and asked that it be made clear that feedback on progress be regularly reported back to the full Council. The Council concurred.

The Chief Executive said there were no other similar cases, and on technical and legal grounds the prospects for success on appeal might be small. He said there were other cases on different matters arguing similar principles, but they had not in the main been successful.

Mrs B Fullerton said she was assured that efforts would be made for the clock to be stopped in relation to interest being applied. However, she said her main concern was the overall effect on community funds for the future. Referring to the financial implications, Mrs Fullerton asked if this would mean less money to assist the fishing industry. Mrs Fullerton also asked if a timescale would be placed on the appeal process.

The Chief Executive said that, if the Council agreed, the spending on this would be taken off the Reserve Fund budgets. He said that within 3 or 4 days, it was possible that the de minimis regulations matter would be clarified which would affect the First Time Shareholders Scheme, and this would influence matters on a wider basis.

Mr WH Manson said that the Council had to be careful. He said that if the Council was told that the de minimis regulation would apply and was taken out of the process, then it would be a huge relief, but he felt continuing with the appeal should still have to be considered again by Council as to the wider implications. Regarding the appeal procedure, Mr Manson asked if the European Court would deal directly with the Council if the UK, as a member state, did not conduct the appeal.

The Chief Executive said there was no definitive answer, but QC opinion was that the Council had a standing for an appeal if the UK Government did not. He said that if the Council agreed to lodge an appeal it would be better for that to be done within the timescale and with UK support.

Mr Manson said he understood there was no alternative to proceeding with an appeal if the UK Government did not, but asked if the Council would have to withdraw if the UK did lodge the appeal. He said that it would be useful for the Council to provide as much information to the Treasury as it would to the European Court.

The Head of Legal and Administration advised that in order to embrace the elements of Members' debate and continued uncertainty as to whether the UK Government would act or not, a slight modification of the motion might be required. He suggested that the motion should ask the Council to agree to take whatever steps are necessary to ensure that the appeal is lodged. This would include committing the resources now in the preparation of detailed appeal papers. He said that this could be done in collaboration with the UK Government, and further discussions would ensure that an appeal was lodged one way or another within the timescale required, either by the UK Government, or by the Council with Government support. Mr AJ Cluness and Mr J G Simpson agreed to include this within the motion for clarification.

Mrs C Miller asked if the QC opinion was based on the terms of the ZCC Act. The Chief Executive confirmed that consideration of the ZCC Act would form part of the analysis. However, the QC opinion was primarily concerned with the question of the Council having a standing to lodge an appeal and the conclusion was that it did have standing.

Mr A Cooper referred to the financial implications, and sought clarification on whether the £250k would be a draw on the Reserve Fund or the General Fund. The Chief Executive confirmed that it would be drawn from the Reserve Fund, as there was no funding available within the General Fund.

Mr C Smith said that the Council had no option, but the likelihood of winning an appeal was not in the Council's favour. Mr Smith asked if it would be UK Government that would give instructions on repayments.

The Chief Executive confirmed that it would be, perhaps via the Scottish Government, the UK Government that would be required to instruct the Council to seek recovery of the monies. He added that he was unsure whether the Scottish Government could make the instruction, or what would happen if fishermen refused to make repayments or whether a longer repayment period could be instructed.

Mr R Nickerson said that as a community Shetland had to protect its interests, and he recalled a previous court action regarding a tanker at Sullom Voe, and the Council had won its action. Mr Nickerson said that where there were moral rights he believed the system would support the Council.

At the request of the Convener, the Council agreed that the decision to ensure that an appeal is lodged within the timescale, and in discussion with the Scottish and UK Governments, was unanimous.

Mr J G Simpson said he was pleased at the level of support being given to Shetland, and showed that it was also matter that went much further than fishermen. Regarding the de minimis regulation, Mr Simpson said that even if that was removed from the decision, Shetland still had a moral obligation to pursue a definitive answer through the Appeal process to establish its rights as to how money was spent.

The Chief Executive confirmed that it was clear from the Council's discussions today that the Council was committed to an appeal, regardless of any decision made regarding the de minimis regulation. It was noted that the Council could still make any decision to withdraw at a later date, if required.

The meeting concluded at 2.45 p.m.

A J Cluness  
CONVENER