

# Shetland Islands Council

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## Scheme of Delegations Planning Service

XXXXX 2009

Approved by report PBXXXXX SIC 22 XXXXXr 2009 – Minute Ref:

XXX/09

Planning Board XXXXXXXX9 – Minute Ref: XX/09

## Scheme of Delegation

### Land Based Planning and Marine Aquaculture

#### Notes:

**1 Officer interest**

Any determination on an application involving the direct interests of a member of ~~staff in the a~~ Planning Service ~~section involved in the assessing the merits of an application~~ must be taken by the Planning Board or the Council. Any decision involving the interests of the Head of Planning must be taken by the Council, advised by the Executive Director, Infrastructure Services.

**2 Council interest**

Applications subject of this Scheme in which the Council has an interest and where there are objections will be referred to the Planning Board for a decision.

SEDD Planning Advice Note 82 states that there are different ways in which local authorities might have an "interest" in a development, and therefore stand to benefit in some way from development proceeding. For example:

- Where the council, as well as being the planning authority, is also the developer.
- Where the council has an ownership or financial interest in the land to which the application relates.
- Where the authority is working in partnership with other bodies.
- Where the authority is likely, in future, to enter into a contract or be a future operator in relation to the development.
- Where the developer is financially supported or sponsored by the local authority.

In circumstances when the development is significantly contrary to development plan or is subject to objections from a Government agency, applications will require further referral to the Scottish Ministers.

(Town and Country Planning (Notification of Applications)(Scotland) Direction 2009, SEDD Planning Circular 3/2009 and PAN 82 Local Authority Interest Developments

**3** Head of Planning includes his/her nominee where appropriate

**4** ~~Where the applicant is a member of the Council, the application will be referred to the Planning Board. In terms of section 43(A) 1 – the Appointed Person shall be Head of Planning, Service Manager or Lead Officer~~

**TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997  
(and other legislation where indicated)**

**National Planning Framework**

<b>Legislation/ Subject Matter</b>	<b>Section(s)</b>	<b>No.</b>	<b>Decision</b>	<b>Head of Planning</b>	<b>Planning Board</b>	<b>Council</b>
<b>National Planning Framework</b>		1	Recommendations for content of National Planning Framework			x

**Development Plans**

<b>Legislation/ Subject Matter</b>	<b>Section(s)</b>	<b>No.</b>	<b>Decision</b>	<b>Head of Planning</b>	<b>Planning Board</b>	<b>Council</b>
<b>Development Plans Strategic Development Plan</b>	4 - 14	1	Representations on Strategic Development Plans			x
<b>Local Development Plans, Development Plan Schemes, Action Programmes and Supplementary Guidance</b>	15-19, 19A, 20, 20A, 20B, 21 & 22	2	Decision to carry out surveys and pursue all other tasks necessary in the preparation and review of the Local Development Plan, Development Plan Schemes, Action Programmes and Supplementary Guidance, including the form and extent of publicity to be undertaken, provided that the expenditure to be incurred is within the appropriate budgets for such work and that no invoice for any item of expenditure exceeds the amounts prescribed by Standing Orders H2 (a) and (b) which, in this Scheme, includes any amendment or replacement of such Standing Orders, from time to time; this includes the work involved in preparing shorter-term or ad hoc policy; contributing to joint studies with other agencies which will provide material for the development plan; commissioning external consultants to undertake studies or projects; and the preparation of guidance notes or leaflets for the public which, explain or illustrate policy, and secure them an opportunity to make representations	x		

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
		3	Decision to adopt, significantly alter, repeal or replace a Local Development Plan			x
		4	Decision to hold a local inquiry to consider objections to a Local Plan or proposals for the adoption, alteration, repeal or replacement of a Local Plan	x		
		5	Decision to formulate and circulate Development Plan, Interim Planning Policy or Supplementary Guidance draft policies for public consultation		x	
		6	Decision to approve a new Development Plan Scheme		x	
		7	Decision to approve any revisions to a Development Plan Scheme, which are of a minor nature in the opinion of the Head of Planning	x		
		8	Decision to approve new Action Programmes		x	
		9	Decision to approve any revisions to Action Programmes which are of a minor nature in the opinion of the Head of Planning	x		
		10	Decision to adopt new Interim Planning Policy and Supplementary Guidance			x

## Development Management

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
Town and Country Planning (Scotland) Act 1997	(Ss 32, 32A 34, 36, 36A,, 39, 43)	1	Decisions relating to the procedures to be applied in handling applications, pre-applications, appeals and negotiations under the Planning and related Acts under relevant regulations including decisions to modify the design, content or layout of application forms, a decision to decline to determine an application, the methods of payment acceptable, the completeness or otherwise of any application, the notification, publicity and consultation arrangements to be made, the need for environmental assessment, the maintenance of the Planning Register and expenditure on any advice or survey necessary to the making of any decision or the preparation of any recommendation in relation to a planning application, provided that the total cost of such advice or survey in relation to any one application does not exceed the amounts prescribed by Standing Orders H2 (a) and (b)	x		
Various inc. Town and Country Planning (Scotland) Act 1997 Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997 Planning (Hazardous Substances) (Scotland) Act 1997	(Ss 46, 47 47A, 48, 130, 131 & 169)  (Ss 6, 9, 17, 66 & 68)  (Ss 18, 19)	2	All decisions relating to the handling of: planning appeals; appeals relating to Listed Building Consent and Conservation Area Consent; appeals against Enforcement Notices; hazardous substances consent appeals; appeals against Notices issued under S 168; negotiations; or the calling in of applications including (a) the preparation and presentation of the authority's case; and (b) the procedure to be adopted (written representations or public inquiry) except where, in relation to the handling of a call-in or appeal, the Head of Planning or his staff cannot be involved for professional reasons, i.e. where the Council wish to pursue a case which in the opinion of the Head of Planning is not defensible in terms of sound planning. In such cases an external consultant may be engaged to act for the Council.	x		

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
Town and Country Planning (Scotland) Act 1997	(Ss 37,38, 38A, 39,41,42 and Part 1 of Schedule 3)	3	Determination of applications for planning permission <del>for</del> National Developments <del>which are in the opinion of Head of Planning</del> <del>significantly contrary to the development plan, and National</del> <del>Developments</del>			
			<ul style="list-style-type: none"> <li>• Pre determination hearings</li> <li>• final decision taken by Full Council.</li> </ul>		x	x
			Major Developments which are in the opinion of Head of Planning significantly contrary to the development plan, <del>and National</del> <del>Developments</del>		x	x
			All Other Major Developments	x		
			<ul style="list-style-type: none"> <li>• All determinations in line with policy, other than statutory exceptions</li> <li>• Statutory exceptions, i.e. (a) where application is made by (i) the planning authority or (ii) a member of the planning authority or (b) the application relates to land in the ownership of the planning authority or to land in which the planning authority have a financial interest.</li> <li>• <u>Where a consultee (Scottish Natural Heritage, the Scottish Environment Protection Agency, Historic Scotland, the Health and Safety Executive, Scottish Water or the Community Council, has specifically objected to a proposal, and conditions cannot address those issues</u></li> </ul>		x	
					X	
Town and Country Planning (Scotland) Act 1997	(Ss 37,38, <del>38A</del> , 39,41, 42, <del>43A</del> and Part 1 of Schedule 3)	4	Determination of applications for planning permission Local Developments			
			<ul style="list-style-type: none"> <li>• All determinations other than <del>specified</del><del>statutory</del> exceptions.</li> <li>• Statutory exceptions, i.e. (a) where application is made by (i) the planning authority or (ii) a member of the planning authority or (b) the application relates to land in the ownership of the planning authority or to land in which the planning authority have a financial interest.</li> </ul>	<u>Appointed person*</u>		
					x	

- Where a consultee (Scottish Natural Heritage, the Scottish Environment Protection Agency, Historic Scotland, the Health and Safety Executive, Scottish Water or the Community Council, has specifically objected to a proposal, and conditions cannot address those issues.

x

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
Town and Country Planning (Scotland) Act 1997 Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997		5	Determination of applications for consent, agreement or approval required by conditions attached to consents	<u>Appointed person</u>		
Town and Country Planning (General Permitted Development) (Scotland) Order 1992		6	Discharge of conditions requiring the submission and approval of schemes and details in respect of permitted development	x		
Local Review Body (Town and Country Planning (Scotland) Act 1997)	(S43A)	7	Appeals by applicants against decisions taken by the <u>appointed person</u> <del>Head of Planning</del> on proposals that are classed as Local Developments will be determined by the Planning Board sitting as the Local Review Body.		<u>Local Review Body</u> *	
Pre- Application Consultations	(Ss 35A, 35B)	8	Response to statutory pre-application consultation	x		

(Major Developments)

Scheme of Delegation	(S43A)	9	Approval of the Scheme of Delegation to be put before the Scottish Ministers.		x
Good Neighbour Agreements	(S75D)	10	Participation in the promotion and development of good neighbour agreements.	x	

## Enforcement

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
Enforcement Town and Country Planning (Scotland) Act 1997	(S 61)	11	Decision to serve or withdraw a completion notice where in the opinion of the planning authority the development will not be completed within a reasonable period.	x		
Fixed Penalty Notices Town and Country Planning (Scotland) Act 1997	(Ss 136A, 145A)	12	Decision to serve Fixed Penalty Notice	x		
Temporary Stop Notices	(Ss 144A – D)	13	Decision to serve Temporary Stop Notice	x		
Enforcement Charters	(S158A)	14	Decision to adopt enforcement Charter	x		
Town and Country Planning (Scotland) Act 1997	(S64)	15	Decisions to permit non-material variations of planning permissions, i.e. which do not depart significantly from the proposal originally approved	x		
	(S65 & 66)	16	Decision to make an order to revoke or modify planning permission where the owner, lessee or occupier of land affected or such other person who in the opinion of the Head of Planning will be affected by the order has objected to the order		x	
	(S65 & 67)	17	Decision to make an order to revoke or modify planning permission where the owner, lessee and occupier of the land affected and all persons who, in the opinion of the Head of Planning will be affected by the decision, have notified the planning authority in writing that they do not object to the order	x		

Subject Matter				Planning	Board
	(S71 and Schedule 8)	18	Decision to serve an order requiring the discontinuance of a use, the compliance with conditions on the continuance of a use, or the removal of buildings or structures (see Note 1)	x	
Town and Country Planning (Scotland) Act 1997	(Ss88-99)	19	Decisions in response to a Purchase Notice		x
	(Ss101-122)	20	Decisions in response to a Blight Notice		x
Town and Country Planning (Scotland) Act 1997	(S125)	21	Decision to serve a Planning Contravention Notice	x	
	(S126)	22	Decision to report any alleged offence in connection with a Planning Contravention Notice to the Procurator-Fiscal	x	
	(Ss127-129)	23	Decision to serve an Enforcement Notice, within policy or where the Planning Board or Council have made a decision to refuse a proposal.	x	
	(Ss135,136, 170)	24	Decision, following a failure to comply with an Enforcement Notice, or a Notice issued under S.168, to enter land, take action required by the Enforcement Notice or Notice issued under S.168 and attempt to recover costs reasonably incurred in so doing, provided that the estimated costs are within a budget approved for the purpose or available through delegated virement	x	
	(Ss135,136, 170)	25	Decision, following a failure to comply with an Enforcement Notice or Notice issued under S.168, to enter land, take action required by the Enforcement Notice or Notice issued under S.168 and attempt to recover costs reasonably incurred in so doing, when the estimated costs exceed the approved budget		x
	(S136)	26	Decision to report to the Procurator-Fiscal any instance of non-compliance with an Enforcement Notice	x	
	(Ss140,141)	27	Decision to serve a Stop Notice (following, or at the same time as, service of an Enforcement Notice) (see Note 1)	x	

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
Town and Country Planning (Scotland) Act 1997	(S144)	28	Decision to report to the Procurator-Fiscal any instance of non-compliance with a Stop Notice	x		
	(S145)	29	Decision to serve a Breach of Condition Notice	x		
	(S145)	30	Decision to report to the Procurator-Fiscal any instance of non-compliance with a Breach of Condition Notice	x		
	(S146)	31	Decision to seek interdict to restrain a breach of planning control	x		
	(S146)	32	Decision to seek interdict to restrain a breach of planning control in a case of urgency following approval of the action by the Executive Director Infrastructure Services Director, Infrastructure Services	x		
	(Ss148,149)	33	Decision to report to the Procurator-Fiscal any instance of failure to comply with an order under S.71 and Schedule 8 of the Act requiring the discontinuance of a use, compliance with conditions on the continuance of a use, or the removal of a building or structure	x		
	(S150)	34	Decision to issue, or to refuse to issue, a Certificate of Lawfulness of Existing Use or Development, or to issue a letter of comfort	x		
	(S151)	35	Decision to issue or to refuse to issue a Certificate of Lawfulness of Proposed Use or Development	x		
Town and Country Planning (Scotland) Act 1997	(S153)	36	Decision to report to the Procurator-Fiscal any instance of the making knowingly of false or misleading statements in connection with any application for the foregoing Certificates	x		
	(Ss156, 161A,176)	37	Decision to authorise any person to enter land without a warrant in the circumstances specified by the Act	x		
	(Ss157,177)	38	Decision to apply to the Sheriff for a warrant to enter land	x		

### Special Controls (including trees and waste land)

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
Town and Country Planning (Scotland) Act 1997	(Ss160-162)	1	Decision to make a Tree Preservation Order	x		
	(Ss160-162)	2	Decision to confirm, vary or revoke a Tree Preservation Order			x
	(Ss168)	3	Decision to serve a notice requiring the replacement of trees	x		
	(Ss171,172)	4	Decision to report to Procurator-Fiscal any offence with respect to a Tree Preservation Order or any tree in a Conservation Area	x		
	(Ss160)	5	Decision to grant consent for the cutting down, topping, lopping or uprooting of a tree protected by a Tree Preservation Order where the proposed decision is in accordance with policy and there have been no objections	x		
	(Ss160)	6	Decision to grant consent for the cutting down, topping, lopping or uprooting of a tree protected by a Tree Preservation Order where the proposed decision is in accordance with policy but there has been an objection		x	
	(Ss160)	7	Decision to grant consent for the cutting down, topping, lopping or uprooting of a tree protected by a Tree Preservation Order where the proposed decision is not in accordance with policy			x
	(Ss172-175)	8	Decision, following notification by a person wishing to undertake the cutting down, topping, lopping or uprooting of a tree in a Conservation Area, to advise the person that the Council consents to the act in question	x		
	(Ss172-175)	9	Decision to report to the Procurator-Fiscal any act resulting in the cutting down, topping, lopping, uprooting or wilful damage or destruction of trees within a Conservation Area	x		
	(S179)	10	Decision to serve a Waste Land Notice, within policy	x		
	(S179,S135)	11	Decision following a failure to comply with the terms of a notice served under S179, to enter land, take action required by the Notice and attempt to recover costs reasonably incurred in so doing, provided that the estimated	x		

costs are within a budget approved for such purposes or available through delegated virement

(S179,S135) 12

Decision, following a failure to comply with the terms of a notice served under S179, to enter land, take action required by the Notice and attempt to recover reasonable costs, reasonably incurred in so doing when the estimated costs exceed the approved budget

x

## Assessment

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
Assessment of Planning Authority's performance or Decision Making Town and Country Planning (Scotland) Act 1997	(Ss 251A – D)	1	Preparatory work and agreeing scope of assessment with Scottish Government	x		
		2	Response to assessment and Action Plan		X	

## Business Improvement Districts

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
The Planning etc. (Scotland) Act 2006,(Part IX) and BID (Scotland) Regs 2007	33 35-49	1	Participation and development in Business Improvement Districts	x		
		2	The Council will act as facilitator in the BIDs process, however any proposals relating to the retrieval of a BID Levy as a result of ballots taken by the members of the BIDs group will be subject to the approval by full Council			x

## Miscellaneous & Other Provisions

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
Town and Country Planning (Scotland) Act 1997	(S186)	1	Decision to report to the Procurator-Fiscal any instance of an advertisement displayed in contravention of the Advertisement Regulations	x		
	(S186)	2	Decision to take enforcement action in respect of an advertisement displayed without consent	x		
	(Ss186,187)	3	Decision to serve a discontinuance notice in respect of an existing advertisement displayed with deemed consent		x	
	(S187)	4	Decision to remove or obliterate any placard or poster displayed in contravention of Advertisement Regulations	x		
Town and Country Planning (Scotland) Act 1997	(S188)	5	Decision to acquire or exchange land or buildings by agreement (after consideration by Planning Board)			x
	(S189)	6	Decision to acquire land compulsorily			x
	(S191)	7	Decision to dispose of land held for planning purposes (after consideration by Planning Board)			x
	(Ss193,196)	8	Decision to develop or manage land held for planning purposes			x
Town and Country Planning (Scotland) Act 1997	(Ss 202,207, 208)	9	Decision to promote the stopping up or diversion of a road, footpath or bridleway (after consideration by Infrastructure Committee and Planning Board)			x
	(Ss203,204)	10	Decision to convert road into footpath or bridleway (after consideration by Infrastructure Committee and Planning Board)			x
	(S205)	11	Decision to enhance the amenity of a road reserved for pedestrians (after consideration by Infrastructure Committee and Planning Board)			x
	(S206)	12	Decision to extinguish public rights of way over land held for planning purposes, (where there are no objections after the exercising of the proper processes, in all other cases the decision rests with the Council)		x	

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
Town and Country Planning (Scotland) Act 1997	(S269)	13	Decision to authorise any person to enter land for the purposes specified in the Act	x		
	(S272)	14	Decision to serve notice on an occupier or on a person who receives rent in respect of any land requiring information about the land	x		
	(S272)	15	Decision to report to the Procurator-Fiscal any instance of failure to provide information in response to a notice under S.272, or of knowingly or recklessly making a mis-statement	x		
Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997	(Ss 3,4,5, 54,55,67)	1	Decision to serve a Building Preservation Notice when the decision to do so is outwith Council policy			x
	(Ss 3,4,5, 54,55,67)	2	Decision to serve a Building Preservation Notice when the decision to do so is within Council policy		x	
	(Ss 3,4,5, 54,55,67)	3	Decision to serve a Building Preservation Notice in a case of urgency, following approval of the action by the Executive Director Infrastructure Services	x		
	(Ss 6,7,9,66)	4	Decisions relating to the procedures to be applied in handling applications relating to Listed Building Consent and Conservation Area Consent, including decisions to modify the design, content or layout of application forms, the completeness or otherwise of any application, the publicity and consultation arrangements to be made and expenditure on any advice or survey necessary to the making of any decision or the preparation of any recommendation in relation to such an application, provided that the total cost of such advice or survey in relation to any one application does not exceed the amounts prescribed by Standing Orders H2(a) and (b)	x		
	(S8)	5	Decision to refer cases of unauthorised works to a listed building to the Procurator Fiscal	x		
	(Ss 6,9, 17,66,68)	6	Decision (subject, in appropriate cases, to confirmation by the Scottish Ministers) to grant Listed Building Consent (including consent for demolition) or Conservation Area Consent for demolition, or to vary or discharge conditions attached to a Listed Building Consent or Conservation Area Consent.	x		
	(Ss 21,22)	7	Decision to make an order to revoke or modify Listed Building Consent or Conservation Area Consent where the owner, lessee or occupier of land affected or such other person who in the opinion of the Head of Planning will be affected by the order has objected to the order		x	

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning B o a r d	Council
Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997	(Ss 21,23)	8	Decision to make an order to revoke or modify Listed Building Consent or Conservation Area Consent where the owner, lessee or occupier of land affected and all persons who, in the opinion of the Head of Planning will be affected by the decision, have notified the planning authority in writing that they do not object to the order	x		
	(Ss 28-30)	9	Decisions in response to a Listed Building Purchase Notice			x
	(S34)	10	Decision to serve Listed Building Enforcement Notice		x	
	(S34)	11	Decision to serve Listed Building Enforcement Notice in cases of urgency following approval of the action by the Executive Director Infrastructure Services	x		
	(S38)	12	Decision to enter land, carry out works required by a Listed Building Enforcement Notice and attempt to recover costs	x		
	(S39)	13	Decision to report to the Procurator-Fiscal any instance of non-compliance with a Listed Building Enforcement Notice	x		
	(Ss 42,54,55)	14	Decision to acquire compulsorily a Listed Building in need of repair (subject to authorisation from the Secretary of State)			x
	(S43)	15	Decision to serve a Repairs Notice as preliminary to compulsory acquisition			x
	(S45)	16	Decision to make a direction for minimum compensation in the case of a building deliberately left derelict			x
	(Ss 48 & 59)	17	Decision to develop or manage land held for planning purposes			x
(Ss 49,54, 55, 68)	18	Decision to carry out urgent works for the preservation of unoccupied listed buildings where the expenditure involved exceeds the amounts prescribed by Standing Orders H2 (a) and (b) but is within the approved budget following approval of the action by the Executive Director Infrastructure Services	x			

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning B o a r d	Council
Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997	(Ss 49,54, 55,68)	19	Decision to carry out urgent works for the preservation of unoccupied listed buildings where the expenditure involved is within the approved budget and does not exceed the amounts prescribed by Standing Orders H2 (a) and (b)	x		
	(S50)	20	Decision to seek recovery of expenses incurred in the carrying out of urgent works under S.49 of the Act.	x		
	(Ss 51, 52 & 81(6))	21	The making or alteration of policy in connection with grant assistance for historic buildings or areas (including the development of projects or schemes of works to improve areas and associated grant schemes)		x	
	(Ss 51, 52 & 81(6))	22	Decision as to whether a proposal is eligible for Conservation Grant.	x		
	(Ss 51, 52 & 81(6))	23	Decision to offer Conservation Grant which fall within policy	x		
	(Ss 51, 52 & 81(6))	24	Decisions on applications for Conservation Grant which are contrary to policy		x	
	(Ss 60,65)	25	Decision as to whether proposal would affect the character or appearance of a Conservation Area or the setting of a Listed Building, thus determining the arrangements for publicity and representations.	x		
	(Ss 61,62, 64)	26	Decision to carry out survey work in connection with the designation of Conservation Areas	x		
	(Ss 61,62, 64)	27	Decision to designate, vary or cancel the designation of a Conservation Area )			x
(S63)	28	Decision to formulate proposals for the preservation or enhancement of any Conservation Area	x			

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning B o a r d	Council
Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997	(S63)	29	Decision to publish proposals for the preservation or enhancement of any Conservation Area		x	
	(S63)	30	Decision to adopt, following a public meeting, proposals for the enhancement of Conservation Areas		x	
	(S76)	31	Decision to authorise any person to enter land for the purposes specified in the Act	x		
	(S79)	32	Decision to seek interdict to restrain a breach of listed building or conservation area control		x	
	(S79)	33	Decision to seek interdict to restrain a breach of listed building or conservation area control in a case of urgency following approval of the action by the Executive Director Infrastructure Services	x		
Planning (Hazardous Substances) (Scotland) Act 1997	(Ss 7,8,11-14,16 & 17)	1	Decision to grant, to refuse to grant, to revoke or to modify Hazardous Substances Consent.	x		

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
The Countryside (Scotland) Act 1967	(S21)	2	Decision to report to the Procurator-Fiscal any contravention of hazardous substances control	x		
	(S25)	3	Decision to seek interdict to restrain a breach of hazardous substances control		x	
	(S25)	4	Decision to seek interdict to restrain a breach of hazardous substances control in a case of urgency following approval of the action by the Executive Director Infrastructure Services	x		
	(S33)	5	Decision to authorise any person to enter land for the purposes specified in the Act	x		
	(Ss 10-29)	1	Decision to enter into any access agreement, enforce any such agreement, or acquire land in connection with access provision		x	
	(Ss 30-31)	2	Decision to create, by order or agreement, a public path		x	
	(S45)	3	Decision to authorise the erection of stiles, gates or other works on a right of way	x		
	(S46)	4	Decision to take legal action to assert, protect and keep open any public right of way		x	
	(S46)	5	Decision to take steps, short of legal action, to assert, protect and keep open any right of way		x	
		6	Decision to deviate Right of Way	x		
	7	Decision to divert Right of Way where the schedule and procedures for diverting the right of way have been followed and there have been no objections			x	
	8	Decision to divert right of way where there have been objections (which in the opinion of the Head of Planning cannot be resolved and will result in a				x

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
	(S 52)	9	Decision to undertake works to help people enjoy the countryside, environmental improvement or regeneration (where the works are not included in the Development Plan or other approved council strategy or programme) provided that the expenditure to be incurred is within the appropriate budgets for such work and that no invoice for any item of expenditure exceeds the amounts prescribed by Standing Orders H2 (a) and (b) which, in this Scheme, includes any amendment or replacement of such Standing Orders, from time to time;	x		
Part 1 of the Land Reform (Scotland) Act 2003		1	Decision to assert, protect and keep open an access route (this includes the sanctioning of improvements to that route to facilitate better access including the provision of stile, gates and bridges etc)	x		
		2	Decision to establish the Access Forum		x	
		3	Decision to develop the Access Strategy	x		
		4	Decision as to the finalisation Core Path Plan for Shetland		x	
		5	Decision as to the entering into a path agreement with landowner and tenants		x	
		6	Decision as to the creation of a path order		x	
		7	Decision for the temporary removal of access rights from land	x		
		8	Decision as to the permanent removal of access rights		x	
The Coast Protection Act 1949	(S4 and onwards)	1	Decisions as to the policies to be operated in connection with the coast protection functions of the authority, including the level of financial resources to be made available for these functions			x
	(S4 and onwards)	2	Any decision to proceed with, to permit or to offer financial assistance with, any works where such a decision would be contrary to Council policy			x
	(S4 and onwards)	3	Decisions to approve or to vary any programme of work to be carried out under the Council's coast protection functions provided that, in the opinion of the Head of Planning, that programme or any variation of it is in accordance with the Council's policies and the financial resources made available by the Council for such purposes		x	
	(S4 and	4	Decisions required in connection with the implementation of any programme	x		

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
			of named coast protection projects approved by the Planning Board, provided that such decisions are in accordance with that programme and the Council's policies and the expenditure proposed to be incurred on each project does not exceed the amount allocated to that project in the approved programme			
	(S4)	5	Decisions to offer grant assistance to any person proposing to undertake coast protection work where the proposal is in accordance with Council policy and the grant assistance to be offered is within the limits for the time being determined by the Council for this purpose	x		
	(S12)	6	Any decision to serve a notice requiring the owner to maintain or repair coast protection works		x	
	(S12)	7	Any decision to carry out urgent works in the circumstances specified in the Act following approval of the action by the Executive Director Infrastructure Services	x		
	(S13)	8	Any decision to recover from the landowner the cost of repair or maintenance work carried out by the Authority in the circumstances specified in the Act			x
	(Ss 4, 14)	9	Any decision to acquire land in connection with the Authority's coast protection functions, whether compulsorily or by agreement			x
	(S16)	10	Decision to serve a notice requiring the removal of unauthorised coast protection works		x	
	(S16)	11	Decision to recover expenses from an owner when the Council has removed unauthorised works on his or her land			x
	(S16)	12	Any decision to permit the undertaking of coast protection works by persons other than the Council where the decision to be taken about the works is in accordance with Council policy but an objection has been received		x	
	(S16)	13	Decisions to permit the undertaking of coast protection works by persons other than the Council where the proposed works are in accordance with Council policy and no objections have been received	x		
	(S16)	14	Decision to report to the Procurator-Fiscal the carrying out of any coast protection work without the written consent of the Council	x		
	(S26)	15	Decision to require occupiers of land to provide information about their	x		

			interest in land			
	(S27)	16	Decision to obtain compulsorily a right of passage over land in connection with coast protection work			x
	(S27)	17	Decision to obtain by agreement a right of passage over land in connection with coast protection functions			x
<b>Legislation/ Subject Matter</b>	<b>Section(s)</b>	<b>No.</b>	<b>Decision</b>	<b>Head of Planning</b>	<b>Planning Board</b>	<b>Council</b>
Flooding Prevention and Land Drainage (Scotland) Act 1997		1	Decision submit the Biennial Flood Report		x	
		2	Decision to undertake assessment of watercourses	x		
		3	Decision to undertake works to a watercourse that will reduce the flooding of non agricultural land		x	
		4	Decision to prepare a flood prevention scheme		x	
<b>Environmental Assessment (Scotland) Act 2005 and the Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004</b>			Decision relating to the procedures to be applied in undertaking strategic environmental assessment of any plan, policy or programme being developed by the Planning Service	x		
<b>The Environmental Impact Assessment (Scotland) Regulations 1999</b>			Decision on the opinion to be given, on receipt of a request in writing, as to whether a proposed development would require an environmental impact assessment and as to the content of an environmental statement, and all other decisions ancillary thereto	x		
Electricity Act		1	Decisions relating to the procedures to be applied in handling applications,	x		

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notifications and pre-applications under relevant regulations, the notification, publicity and consultation arrangements to be made, and expenditure on any advice or survey necessary to the making of any decision or the preparation of any recommendation provided that the total cost of such advice or survey in relation to any one application does not exceed the amounts prescribed by Standing Orders H2 (a) and (b)

2 Decision on content of response to an application to the Scottish Ministers for consent. x

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
Consultations from external bodies on proposed changes to legislation, guidance, advice etc. under various Acts			Content of response where these consultations cover areas delegated to the Head of Planning i.e. procedural matters	x		
Consultations from external bodies on proposed changes to legislation, guidance, advice etc. under various Acts			Content of response where these consultations cover areas which may result in future changes to policy		x	
The Building (Scotland) Acts 1959 and 1970	(S4)	1	Decision to refuse a Relaxation of the Building Standards Regulations		x	
	(S4)	2	Decision to approve a Relaxation of the Building Standards Regulations	x		
	(S4)	3	Decision on an appeal against refusal of a Relaxation of the Building Standards Regulations by the Building Control Sub-Committee		x	
	(S6)	4	Decision to issue, or to refuse to issue, a Building Warrant	x		

<b>Legislation/ Subject Matter</b>	<b>Section(s)</b>	<b>No.</b>	<b>Decision</b>	<b>Head of Planning</b>	<b>Planning Board</b>	<b>Council</b>
	(Ss6, 9)	5	Decision to report to the Procurator-Fiscal any contravention of the Building Acts	x		
	(S9)	6	Decision to issue, or to refuse to issue, a Certificate of Completion	x		
		7	Decision to issue, or to refuse to issue, a 'letter of comfort'	x		
	(Ss10, 13)	8	Decision to issue a Notice relating to a contravention of the Building Regulations	x		
The Building (Scotland) Acts 1959 and 1970	(Ss10, 13)	8	Decision to issue an Order relating to a contravention of the Building Regulations		x	
	(S13)	9	Decisions necessary to safeguard the public and property, including decision to appoint contractor to undertake repairs or demolition	x		
The Building (Scotland) Act 2003	(S9)	1	Decision to grant, or refuse to grant, a building warrant	x		
	(S12)	2	Decision to refer an application to the Scottish Ministers for a View	x		
	(S18)	3	Decision to accept, or to reject the submission of a completion certificate	x		
	(Ss22,23)	4	Decision to impose, discharge or vary continuing requirements	x		
	(S25)	5	Decision to serve, withdraw or vary a building regulations compliance notice	x		
	(S26)	6	Decision to serve, withdraw or vary a building continuing requirement enforcement notice	x		
	(S27)	7	Decision to serve, withdraw or vary a building warrant enforcement notice	x		
	(Ss28,29)	8	Decision to serve, withdraw or vary a defective or dangerous building notice	x		
	(S29)	9	Decision to carry out urgent work to prevent access and reduce or remove the danger	x		
	(Ss25, 26, 27, 28, 30)	6	Decision to carry out the work necessary when a notice has not been complied with		x	

<b>Legislation/ Subject Matter</b>	<b>Section(s)</b>	<b>No.</b>	<b>Decision</b>	<b>Head of Planning</b>	<b>Planning Board</b>	<b>Council</b>
	(S42)	11	Decision to evacuate buildings	x		
The Building (Scotland) Act 2003	(S47)	12	Appeals under Section 47(1) (a) decision under s.3 refusing a dispensation or relaxation (b) decision under s.9 refusing to grant a building warrant or amendment (c) decision under s.14 refusing to extend the period of a limited life building (d) decision under s.18 rejecting a completion certificate (e) decision under s.22 imposing continuing requirements (f) decision under s.23 refusing to discharge or vary a continuing requirement (g) a building regulations compliance notice, a continuing requirement enforcement notice, a building warrant enforcement notice, a defective building notice and a dangerous building notice	x		
	(S48)	13	Decision to report to the Procurator-Fiscal any contravention of the Building Acts	x		
The Building (Scotland) Act 2003		14	Decision to issue, or refuse to issue, a 'letter of comfort'	x		
The Theatres Act 1968		1	Decision to issue a Licence	x		
		2	Decision to refuse to issue a Licence		x	
The Cinemas Act 1985		1	Decision to issue a Licence	x		
		2	Decision to refuse to issue a Licence		x	
The Hypnotism Act 1952		1	Decision to issue a Licence	x		
		2	Decision to refuse to issue a Licence		x	



## Marine Based Developments (except Aquaculture)

**Note:** this section should be a copy of that at land/marine aqua planning.

### Notes:

- 1 Any decision involving the interests of a member of staff in the Marine Management Department must be taken by the Planning Board or the Council. Any decision involving the interests of the Coastal Zone Manager must be taken by the Council, advised by the Executive Director Infrastructure Services.
- 2 Applications subject of this Scheme in which the Council has an interest and where there are objections will be referred to the Planning Board for a decision.  
SEDD Planning Advice Note 82 states that there are different ways in which local authorities might have an "interest" in a development, and therefore stand to benefit in some way from development proceeding. For example:
  - o Where the council, as well as being the planning authority, is also the developer.
  - o Where the council is the landowner, and so would gain a capital receipt for sale or lease of its land.
  - o Where the authority is working in partnership with other bodies.
  - o Where the authority is likely, in future, to enter into a contract or be a future operator in relation to the development.
  - o Where the developer is financially supported or sponsored by the local authority.
- 3 In circumstances where the decision will be within policy, and the only objections are either non-material considerations, minor in nature or number, or can be dealt with by condition, delegated powers shall be granted to *Head of Planning*, after consultation with the Chair of the Planning Board or his / her nominee.
- 4 *Head of Planning* includes his/her nominee.

## Marine Based Development

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
The Zetland County Council Act 1974 (as amended*) (powers in connection with Works Licences)	(S11)	1	Decision to approve or amend policy relating to the licensing of works in the coastal area			x
	(S11)	2	Decision to approve or refuse the granting of a Works Licence or any variation or transfer of an existing licence when such a decision would be, in the opinion of the Head of Planning, contrary to or not covered by Council policy			x
	(S11)	3	Decision to approve or refuse the granting of a Works Licence or any variation or transfer of an existing licence where the proposed decision is, in the opinion of the Head of Planning, within Council policy where an objection has been received		x	
	(S11)	4	Decision to approve or refuse the granting of a Works Licence or any variation or transfer of an existing licence where the proposed decision is, in the opinion of the Head of Planning, within Council policy and no objection has been received	x		
	(S12)	5	Decision to approve or refuse the granting of a Licence to Dredge or any variation or transfer of an existing licence when such a decision would be, in the opinion of the Head of Planning, contrary to or not covered by Council policy			x
	(S12)	6	Decision to approve or refuse the granting of a Licence to Dredge or any variation or transfer of an existing licence where the proposed decision is, in the opinion of the Head of Planning, within Council policy where an objection has been received		x	
	(S12)	7	Decision to approve or refuse the granting of a Licence to Dredge or any variation or transfer of an existing licence where the proposed decision is, in the opinion of the Head of Planning, within Council policy and no objection has been received	x		

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
The Zetland County Council Act 1974 (powers in connection with Works Licences) (continued)	(S14)	8	Decision to report to the Procurator-Fiscal any alleged breach or contravention of the provisions of the Act	x		
	(S11)	9	Decision to revoke a Works Licence where there are no objections to doing so	x		
	(S11)	10	Decision to revoke a Works Licence where there are objections to doing so		x	
	(S13)	11	Give effect to any requirement made by Scottish Ministers under subsection 4 following appeal of Council decision on works licence application	x		

The Town and Country Planning (Marine Fish farming)(Scotland) Order 2007 amends the ZCC Act such that works licences shall not be granted for fish farm developments. For such developments the Scheme of Delegation in relation to planning applications shall apply with any necessary modifications in light of the 2007 Order.

Legislation/ Subject Matter	Section(s)	No.	Decision	Head of Planning	Planning Board	Council
The Environmental Impact Assessment (Scotland) Regulations 1999*	Reg 5	1	Decision on the opinion to be given, on receipt of a request in writing, as to whether a proposed development would require an environmental impact assessment and as to the content of an environmental statement, and all other decisions ancillary thereto	x		
	Reg 7	2	Decision that an application for planning permission cannot be granted until the Council has considered environmental information	x		
	Regs. 10, 13*, 14 & 19	3	Decisions relating to the scope of environmental information, procedures to be applied in response to the submission of environmental information accompanying an application for planning permission, including decisions relating to the publicity and consultation arrangements to be made, expenditure within an approved budget and of no more than the amounts	x		

prescribed by Standing Orders H2 (a) and (b) on any advice necessary to judge the environmental information; and decisions relating to the completeness, or otherwise, of the environmental information; and decisions relating to the charges to be made for providing copies of an environmental statement

\*As amended by the Town and Country Planning (Marine Fish Farming)(Scotland) Order. Preparation of guidance notes and additional information will be delegated to the Head of Planning



## **15.0 Planning Board**

### **Terms of Reference**

The Planning Board will undertake functions delegated to it by the Council in connection with the operation of the Town and Country Planning (Scotland) Acts, the Building (Scotland) Acts, the Zetland County Council Act 1974 and other legislation related to the functions of the Council as Planning Authority.

In addition the Planning Board will undertake the functions of the Local Review Body delegated to it by the Council in accordance with the provisions of sections 43A and 43B of the Town and Country Planning (Scotland) Act 1997, and The Town and Country Planning (Schemes of Delegation and Local Review Procedure)(Scotland) Regulations 2008.

### **Delegated Authority**

**The detailed Planning Service Scheme of Delegation is attached as Supplement 1 to this Scheme.**

Except as otherwise provide in the detailed Scheme, the Board will be confined to operating within Council policy and approved budgets.

The Board will report in each cycle of Council business to the Council by submission of its minutes and reports to ensure that:

- a) The Council remains knowledgeable of the actions which are carried out in its name;
- b) Decisions on policy are secured from the Council; and
- c) Any proposed decisions which would lie out with delegated authority, as referred to in the detailed Scheme, will be referred to the Council through the minutes of the Board, for decision..





## **REPORT**

**To: Special Planning Board**

**Date 15 July 2009**

**From: Head of Planning  
Infrastructure Services Department**

### **PLANNING BOARD – REVISED TERMS OF REFERENCE AND SCHEME OF DELEGATION AND IMPLEMENTATION OF LOCAL REVIEW BODY**

#### **1 Introduction**

- 1.1 This report recommends the acceptance of the attached appendix 1 to be submitted to the Scottish Ministers for approval. The appendix contains the proposed revised Scheme of Delegation for the Planning Board and Planning Service.
- 1.2 The report also includes details of the implementation of the Local Review Body, with some details on procedures.

#### **2 Links to Council Priorities**

- 2.1 The framework within which Council business will be carried out contributes to the aim of developing a Council that is organised, efficiently run and sustainable and meets statutory requirements.

#### **3 Background**

##### Hierarchy of Development

- 3.1 The hierarchy is at the heart of the modernised planning system. The [Planning etc. \(Scotland\) Act 2006](#) (the 2006 Act) introduced the hierarchy of development in primary legislation. The hierarchy will help deliver Scottish Ministers' aim that the planning system should respond in a more proportionate and efficient way to proposals that come before it.
- 3.2 It will ensure that applications are dealt with in a way commensurate to their scale and complexity, allowing decisions to be taken at the most appropriate level. Part 3 Section 5 of the 2006 Act inserts a new section 26A into the Town and Country Planning (Scotland) Act 1997 (the 1997 Act) which defines the three categories in the hierarchy of development to which all developments will be allocated:-

- national development;

- major development; and
  - local development.
- 3.3 The Act prescribes that it is Scottish Ministers who are to describe classes of major and local development. There is no scope for local interpretation of what constitutes a major development or local development either by planning authorities, by applicants or by other stakeholders in the planning system
- 3.4 Planning authorities currently ensure that certain decisions can be taken by officials under powers delegated to them instead of being considered by elected members of the authority at Committee. Provisions for authorities to do this are currently available under the Local Government (Scotland) Act 1973. Delegation to officials is an important means of adding efficiency to administrative processes and the Government wants to encourage an appropriate level of delegation to officials to support modernising of the planning system.
- 3.5 The Act now makes provision for different levels of decision making based on the type of development proposed, and the process must be specified in a scheme of delegation for each Planning Authority.
- 3.6 At present, an applicant may appeal to the Scottish Ministers should they be aggrieved at a decision taken by the planning authority in respect of any application for planning permission. In future, where a decision on an application for planning permission for a local development (as defined in the Hierarchy of Development) is taken, or could be taken by an officer under delegated powers, the applicant will no longer be entitled to appeal to Scottish Ministers. Instead, they may require the planning authority to review the decision.
- 3.7 The new requirements apply in instances where the application for planning permission has been refused, granted subject to conditions, or where the application has not been determined within the period prescribed in regulations. The 2006 Act inserts these new provisions into section 43A and 43B of the Town and Country Planning (Scotland) Act 1997.
- 3.8 They do not relate to other types of planning applications (for example those in the category of major or national developments) or to other types of permission, such as listed building consent, hazardous substances consent, conservation area consent or consent to display advertisements. These other forms of permission will retain their existing rights of appeal to Scottish Ministers. However, they do apply to aquaculture developments
- 3.9 It is the Government's intention that where future opportunities arise to review the primary legislation governing these other permissions, that steps may be taken to ensure that appeals arrangements can align with those now contained in the 2006 Act's amendments to the 1997 Act.

## 4 Scheme of Delegation

- 4.1 Decisions made by an officer (the appointed person) under the new scheme of delegation have the same status as other decisions taken by the planning authority other than the arrangements for reviewing the decision. Sections 43A(8) to (16) of the 1997 Act remove the right of appeal to Scottish Ministers and put in place arrangements for the planning authority reviewing these decisions instead.
- 4.2 The existing Scheme of Delegations has been made under general local government legislation allowing a local authority to delegate decision making to committees and officers of the authority. This has been revised to take account of the implementation of the Planning etc. (Scotland) Act 2006.
- 4.3 Section 17 of the 2006 Act (inserting a new section 43A into the 1997 Planning Act) sets out a particular requirement for a scheme of delegation to be prepared by planning authorities by which applications falling within the category of local developments are to be delegated to appointed officers. Regulations have been made which supplement the provisions of the 2006 Act and set out provisions as to the content of a scheme of delegation, and the procedure to be followed for preparation and adoption of the scheme. In terms of these requirements a proposed scheme is to be submitted for approval by the Scottish Ministers before it can be adopted by the planning authority. The proposed revised Scheme of Delegation identifies the appropriate level of decision making to ensure compliance with the Act, minimising time taken to deal with applications. Subject to approval of the recommendation in this report, and the approval by Scottish Ministers, the revised scheme would be implemented from 3 August 2009 to tie in with forthcoming regulatory changes.
- 4.4 The revised scheme of delegation was accepted by the Planning Board on 22 April 2009, and subsequently approved by Full Council on 20 May 2009 for submission to Scottish Ministers for approval. At the same time, the Scottish Government indicated the intention to publish a circular to try and remove the grey areas which have been causing some debate and consternation in planning and legal circles, and amongst politicians. A draft set of circulars emerged in the first week of June.
- 4.5 After reviewing the latest information, I would like to propose an amendment from the previously approved scheme of delegation to allow for a hearing when the recommendation from the Head of Planning is approval and an objection has been received from a defined consultee in the process - namely Scottish Natural Heritage, the Scottish Environment**

**Protection Agency, the Health and Safety Executive, Historic Scotland, Scottish Water and the Community Council.**

4.6 One area where there is potential for confusion concerns **the person appointed** by the planning authority, in accordance with section 43A(1), to determine an application instead of the planning authority. The Regulations require the scheme of delegation to describe the classes of development to which the scheme will apply and to set out which applications are to be determined by an appointed officer. The scheme should include provision that prohibits an appointed officer from determining an application for planning permission in the circumstances set out in Regulation 3(4) (e.g. member or financial interest cases). There is no requirement to explain in the scheme which officer is to be appointed to determine individual applications and while some authorities have clearly found it helpful to do this the implications need to be kept in view.

4.7 Where an individual officer is identified in the scheme as the person appointed by the planning authority to determine applications instead of the planning authority, the expectation is that he/she will determine all applications within the scope of the scheme. There is no power for an appointed person to then appoint further officers as he/she sees fit. This issue should be considered carefully since determining the application goes beyond simply signing a decision notice. While it is for planning authorities to consider how to frame their schemes of delegation, some options might include:-

- The scheme simply focusing on the range of applications that will be delegated by the planning authority to a person appointed.
- The scheme including provision for how persons who are to determine applications under the scheme are to be appointed, eg by the Head of Planning.
- The scheme indicating that a range of postholders may be appointed to determine cases, or different classes of cases, under the scheme.

I have opted to recommend the latter option and the appointed officer for decision making on local decisions will be set at Head of Planning, Service Manager and lead officer levels.

Section 43A (6) of the 1997 Act also enables a planning authority to determine themselves an application which would otherwise fall to be determined under delegated powers. Where it is decided that members of the authority would take a decision on the planning application, section 43A (7) of the 1997 Act requires the authority to provide the applicant with a statement giving their reasons for deciding to determine the planning application themselves. This “call in” facility allows an element of flexibility in the scheme.

#### 4.8 Scheme of Delegation - Key Changes

From 3 August 2009 the key changes affecting the Council are that

- Major developments require to be referred to the Planning Board for determination.
- The Planning Board can determine all major applications with the exception of those which are deemed significantly contrary to the local development plan. In the latter case there can be a pre-determination hearing by the Planning Board but only the full Council can make the decision.
- Appeals against decisions of the Planning Board will be referred to Scottish Ministers.
- Most local developments will be determined at officer level with appeals and final decisions to the Local Review Body.
- Recommendations for approval attracting objections from statutory consultees will be reported to the Planning Board for decision.
- Appeals against delegated decisions require to be heard by the Local Review Body.

**It is important to note that the more decisions are delegated to officers, the more final decisions will be taken at a local level.**

### 5 **Local Reviews**

5.1 Where an application for planning permission relates to a proposal in the category of local developments and has been determined at officer level under the new s43A scheme of delegation, the applicant will be entitled, within a three month period, to seek a review of the decision from the Local Review Body. Similarly in situations where the application has not been determined within the prescribed period (two months) but is of a class of application that falls within the scope of the scheme of delegation, the applicant may also seek a review under new section 43A(8) of the Act. The regulations set out the procedures for requiring a review and the process that should then be followed.

#### 5.2 The Local Review Body

5.2.1 Membership of the local review body and administrative arrangements for supporting the review process will be for the planning authority to decide and so are not set out in the regulations. The Scottish Ministers expect that arrangements put in place by planning authorities to review decisions will follow a process that is demonstrably fair and transparent. Members participating in review cases should

receive appropriate training in planning issues and in holding hearing sessions.

5.2.2 Planning authorities will have to ensure that the local review body is supported by appropriate administrative and legal advice to ensure that Members are guided on the review process. Section 43B of the 2006 Act restricts the ability of parties to introduce new material at the review stage. The focus of the review should therefore be on that material which was before the appointed officer during the planning process, including any report of handling. Where the local review body considers it necessary to take further advice before reaching a decision on the review it will be for the planning authority to arrange that. Scottish Ministers expect that all administrative arrangements required to support the review process locally should respect the principles of fairness and transparency that must underpin operation of the new system.

### 5.3 Process

Latest guidance confirms that decisions may be reached:

- Without debate.
- After a meeting on how to proceed – Members can decide at the first meeting either to hold a further meeting on procedural matters (a pre-examination meeting) or to seek further information by one, or a mixture of, the following methods:
  - Using additional written submissions.
  - Site visits.
  - Oral representations at hearings.

Should the LRB choose to hold a pre-examination meeting to determine how to proceed, this should also be a public meeting and the LRB can determine whether they wish to hear the parties to the review on next procedural steps. However, it is unlikely that a meeting of this complexity will be necessary in the vast majority of reviews. Such meetings may form part of scheduled LRB meetings which are considering other reviews.

### 5.4 Local Review Body Issues

5.4.1 Concerns have been expressed that Local Review Bodies (LRBs) may not be compliant with, in particular, Article 6 of the European Convention on Human Rights, as a LRB decision amounts to a local authority acting as an appellate body for its own, delegated, decisions. However, guidance from CoSLA and the Improvement Service is that authorities should proceed on the basis that the process overall is capable of being Article 6 compliant. At the same time, authorities should have in mind when designing individual processes and procedures for LRBs, the need to comply with

Article 6 requirements as well as common law principles of equity

- 5.4.2 Similar concerns have been expressed about councillors who are members of planning committees also sitting on LRBs. However, the CoSLA and the Improvement Service felt on balance that LRBs can be populated by existing Planning Committee members. Clearly, there are advantages in councillors experienced in planning matters being a part of the LRB.
- 5.4.3 Regulations allow for an adviser/assessor and this post has led to much debate. The draft circular anticipates that the “Technical Assessor” role assisting the Review Body would not have been involved in the Appointed Officer’s decision making process on the particular Application before the LRB. However, this is perhaps impractical in respect of a small authority like Shetland dealing with a complex application where all the officers of sufficient rank and experience, who could provide the support required to the LRB, will have been involved in the assessment of the application at some stage.
- 5.4.4 One option is that another service, other than the Planning Service supports the Local Review Body. It is intended that Legal and Admin Services provide guidance and support including legal clerking to the LRB. This input will be crucial to guide elected Members, and will assist in avoiding challenges of ‘perception’ of inequality of treatment.
- 5.4.5 Preparations of reports, invitations to the meetings etc. will still be undertaken by the Planning Service, as happens with the Planning Board at present.
- 5.4.6 It should be noted that LRBs can use the general powers of any committee to have any advisers they consider necessary present.
- 5.4.7 The decision of the LRB will be issued on behalf of the LRB by the Planning Service, with decision signed by the Head of Planning as happens at present with the Planning Board.

## 5.5 Membership of the LRB

- 5.5.1. I consider that the most appropriate way forward is for the Planning Board to undertake the functions of the Local Review Body. This will have least impact administratively and financially, and the high level of experience and knowledge already existing in the Board will be best utilised in this way.

## 5.6 Participation in the LRB meeting

5.6.1 Members of the LRB can meet to decide how reviews will take place, who will participate and when the meeting will be held. This meeting would be a public meeting with all the associated requirements of agenda management, including financial and time resources. I propose that the default position is that all appeals to the LRB be held in a similar manner to the current Planning Board, with oral representations by all sides.

The current process has raised concerns, for example where community councils cannot be heard as objectors because they are currently defined as consultees. I therefore recommend that when a review is to take place, ALL parties involved in the process are invited to make oral representations to the LRB.

## 5.7 Key Points on the Local Review Body

- The Planning Board will sit as the Local Review Body when necessary.
- The default position will be a public hearing for all LRB decision making.
- Legal and Admin Services will provide guidance and assistance if necessary.
- the LRB can ask for advice and guidance from any appropriate person or body.

5.8 The regulations require a review of the Scheme of Delegation every five years, but it is my intention to review the process after the first year.

## **6 Shetland Islands Council Terms of Reference**

6.1 The changes to the Planning Service Scheme of Delegation and the extension of the remit of the Planning Board to include undertaking the functions of the Local Review Body will require amendment to the Planning Board Terms of Reference. Appendix 2 of this report sets out the replacement to Part 15 of the existing Council Scheme of Delegation.

## **7 Financial Implications**

7.1 None.

## **8 Policy and Delegated Authority**

- 8.1 The Planning Board has delegated authority to make decisions on all matters within its remit, and as described in Section 15.0 of the Council's Scheme of Delegation. However, as this report proposes a variation to the existing Scheme of Delegations and the alteration of the remit of the Planning Board to include the functions of the Local Review Body, a Council decision is required.

## **9 Recommendation**

- 9.1 The Planning Board recommends to the Council that the Council's Scheme of Delegations be updated with the changed Scheme of Delegations for the Planning Service (set out in the Appendix 1) of this report, and that the proposed revised Scheme is submitted to the Scottish Ministers for approval. Subject to Ministerial approval, the Scheme will be implemented from 3 August 2009.
- 9.2 The Planning Board recommends to the Council that the Council extend the remit of the Planning Board to include undertaking the functions of the Local Review Body.
- 9.3 The Planning Board recommends to the Council that the Council approves the amended Terms of Reference (appendix 2) to replace the existing part 15 of the Council Scheme of Delegation

Report Number: PL-32-09-F





## **REPORT**

**To: Special Shetland Islands Council**

**15 July 2009**

**From: Head of Legal and Administration**

### **Viking Energy Limited Windfarm Consent Application – Resolving Conflicts of Interest**

**Report Number: LA-21-F**

#### **1. Introduction**

- 1.1 The purpose of this report is to identify and where possible reconcile conflicts of interest affecting Shetland Islands Council's handling of an application for consent for the siting of a major windfarm development in Shetland.

#### **2. Background**

- 2.1 On 27 May 2009 Shetland Islands Council received notice of an application, as statutory consultee, under section 36 of the Electricity Act 1989. The application was submitted on behalf of Viking Energy Limited, a company originally established with the involvement of the Council to take forward a proposal for a development of this nature.
- 2.2 As this is an application for a major windfarm development proposed for Shetland with a generating capacity exceeding 50 mega watts, the final decision to grant or refuse consent rests with the Scottish Ministers on the basis of advice from their Energy Consents Unit. Any such consent granted would carry with it deemed planning permission so local planning authorities are cited as statutory consultees within the consenting process.
- 2.3 In the normal course of events, planning authorities process such applications in much the same manner as would be applied to an ordinary planning application except that at the end of the procedure Members would have a debate and decide on a recommendation to make to Ministers.

#### **3. Conflicts of Interests**

- 3.1 Questions have arisen on the existence or potential for conflicts of interest by Shetland Islands Council. This is on the basis of being the

original promoter of the project or because we are one of the land owners liable to benefit from the occupation of parts of Busta Estate which is owned and managed by Shetland Islands Council. Also considered are conflicts of interest affecting individual Councillors in their role as charities trustees for Shetland Charitable Trust which has latterly taken over the shares of Viking Energy Limited with the explicit objective of profiting for the benefit of the community from this major development taking place in Shetland.

3.2 It is the latter stage of the handling of the process by the Planning Authority which is attracting expressions of concern. This is the stage at which the amassed information, studies, reports contributions from other consultees, objectors etc are assimilated by the Planning Service and submitted to Members for a debate on the recommendation to be made to Ministers. The latter stage would require to be in the context of a formal meeting. However, some of the public concerns voiced, recognise that Members would have to declare interests at that stage and determine whether or not to participate in the debate to follow. The assumption that most would conclude that they could not participate, has led to comment regarding the adequacy of ward representation and the usual expectation, whether appropriate or not, that Members could be contacted or lobbied by the public in advance of a final determination of any ordinary planning application.

3.3 Evidence of these concerns are found in the following:

3.3.1 A press statement by our MP and MSP in relation to representations they had received in the early stages of the application at both their local and parliament offices. Without exploring the nature of the conflicts of interests in detail the press comments highlighted the potential for a “ward representation deficit”.

3.3.2 Representations in Shetland Times articles and readers columns.

3.3.3 Expressions of concern on Shetland News Agency Website and contributed items.

3.3.4 Questions/observations put to “You tell wis”, “Public platform” and a dedicated “Speak easy” all programmes featured by BBC Radio Shetland.

3.3.5 Representations made directly to Councillors and to Community Councils.

3.3.6 A large number of telephone calls and also written and emailed expressions of concern to the Energy Consents Unit. So far they have been able to delay responding to allow the Council to consider the issues at this meeting.

- 3.3.7 Two formal letters of complaint to the Scottish Public Services Ombudsman's Office listing concerns regarding future decision making by the Council in this process.
- 3.4 In the latter of these cases, the two letters of complaint have been referred back to the complainants by SPSO on the grounds of prematurity [a meeting of the Council to consider the application having not yet been held and the Council's own complaint procedure requiring to be exhausted prior to a referral to the Ombudsman's Office]. SPSO have also advised that if any of the grounds of complaint relating to conflict of interest of Councillors, in the performance of their duties, are properly made, they would fall within the domain for investigation and decision of the Chief Investigating Officer for Scotland and the Standards Commission for Scotland, respectively. The complainants have been advised to refer their complaints to those offices at the appropriate time, accordingly.
- 3.5 The references to the nature and type of conflicts which could arise have on occasion been confusing and it's not helpful when that confusion leads to an assumption that any one or all of the conflicts are of equal importance. However a single thread, rightly or wrongly concludes that in the presence of any of these conflicts the reaction of the individual Councillors should be to declare an interest and take no part in debates or decisions concerning Viking Energy.
- 3.6 To give a clarity of focus to the real issues where conflicts could be seen to arise, I prepared a briefing note for Councillors and have been encouraged by some Councillors to include the advice as part of this report. Accordingly I have attached the relevant provisions as Appendix one.
- 3.7 Appendix one having considered the range of possible conflicts concludes, perhaps somewhat surprisingly, that the corporate conflicts and any suggestion of individual conflicts arising therefrom, in relation to the Council's promotion of the development or potential future benefit, are not conflicts which would prevent Councillors from participating in a debate or indeed a final decision where there is a planning application. However, I was unable in the giving of that advice, nor have I been directed subsequently to any compelling arguments to the contrary which would enable me, to conclude that Members acting in the ex-officio capacity as Trustees of Shetland Charitable Trust can adequately deal with the conflict that creates. The conflict arises because the Trust is a regulated charity and as such an independent body from the Council. The individual Trustees have a statutory requirement to act in the charity's best interest notwithstanding the functions that Councillors otherwise have to discharge as Councillors. This leaves it difficult if not indeed impossible to reconcile their position as charities Trustees in a manner that would allow them to objectively debate and comment on an application for those then to be submitted to the Scottish Ministers.

- 3.8 In view of this it is my recommendation that the Council devise a process for handling this application for consent which so far as it possibly can minimises the occasions that would involve Members requiring to declare their interests and thereafter determining not to take part in the matter at hand. The consequence in such circumstances would be that any meeting, for example, would quickly become inquorate and any business before the meeting could not be transacted.
- 3.9 My advice note goes on to offer a suggestion that the submission to the Scottish Ministers should be based on a report output from the Planning Service which in substance and content would be the same as a report that would otherwise be presented to Members. This would instead be the submission made directly to the Scottish Ministers. However, to also meet the concern that there needs to be an adequate level of ward representation, a suggestion first mooted by the Executive Director of Infrastructure at a meeting with the Energy Consents Unit Personnel earlier this year but latterly also voiced by a number of Councillors is a proposal that Members participate in one or more hearings to be held in Shetland of an informal nature but designed to capture expressions of support, comment or objection. It is also proposed that those hearings be effectively transcribed and the output submitted as an underpinning document with the Council's report from its Planning Service.
- 3.9 In commenting to me on the merits of such a hearing process, a number of Members have emphasised certain key components as follows:-
- 3.9.1 The hearing(s) would be facilitated by an independent co-ordinator experienced in handling similar events, for example an ex-reporter of the Scottish Government Directorate of Planning and Environment Appeals, while applicants and objectors and members of the public with comments and observations will all be given an opportunity to put forward their points. The informal hearings would differ from the hearings conducted by the Planning Board in that Members would also be able to make their contributions for or against or both for and against but their contribution would be in the role of "advocates" and be in the same form as representations made by the public. In particular the set up of the hearing would not have Members seated as if they are prepared to participate in debate but sitting instead alongside the public they represent.
- 3.9.2 The hearings should not be confined to Lerwick and a suggestion has been made of there being a hearing in Lerwick or somewhere central, and others such as in Brae, Aith and Dunrossness. Although consideration yet has to be given to the format of such extended hearings, it would not be unreasonable to involve Community Councils in the preparations for and conduct of the hearings as a number of Community Councils have approached the Council in the

pursuit of advice on the role that they can undertake in assisting the public in expressing their views in this process.

#### **4. Financial Implications**

- 4.1 There are no financial implications arising immediately from the principal recommendation of this report namely a conclusion at this stage that a formal debate will not be held at the end of the Council's handling of the consent application. The further recommendation on this report, to receive a report on conducting informal hearings will have some costs identified and those are expected to be met from existing budgets and in part augmented by the fees receivable from the Energy Consent Unit as part of the processing of the consent application. Any such costs and the means of funding them will be identified in the report to follow.

#### **5 Policy and Delegated Authority**

- 5.1 Delegated Authority has not been granted to any Committee to specifically handle processes affecting collective and individual conflicts in relation to the Council's ethical responsibilities under the "Ethical Standards in Public Life (Scotland) Act 2002". In the circumstances this special meeting of Shetland Islands Council has been called in order to receive the advice contained in this report and make a decision on the process to follow.

#### **6 Conclusions**

- 6.1 It is my advice and conclusion that an irreconcilable conflict arises for individual Councillors in the handling of the Viking Energy Windfarm Consent application at a point in time when a recommendation requires to be framed to be made to the Scottish Ministers. In the circumstances and recognising the practical consequences of such a conclusion, it is submitted that the Council should at this stage determine that there will not be a formal meeting of the Council and determination by Councillors in connection with the consent. This is on the basis of a further recommendation, that a report be called for proposing the holding of one or more hearings at which Members will be permitted in line with the Councillors Code of Conduct to "advocate" on behalf of ward interests in a way that does not compromise their position as Councillors or their position as charities Trustees given that the undertaking of that role is in the performance of a function recognised by the said Councillors Code of Conduct.

#### **7 Recommendation**

- 7.1 I recommend that the Council
- (a) accept the advice that in this matter there exists a conflict of interest held by individual Councillors in their role as Trustees of Shetland Charitable Trust;

- (b) therefore, confirm that the processing of the current consultation will not include a Council meeting prior to a report prepared by the Planning Service being signed off by the Council's Chief Executive for onward submission to the Scottish Ministers; and
- (c) agree that in substitution of such formal meeting a hearing(s) be held in a form, sequence and method to be determined in a report to the next Council meeting detailing costs, venue and other options.

Head of Legal and Administration

**Advice Note**

To: All Councillors

Dear Council Member,

**Conflicts of Interest - Viking Energy Proposal**

I have indicated, in the past, that I would appreciate an opportunity to brief all of you on issues concerning real or perceived conflicts that you may have in undertaking your responsibility as Planning Authority in relation to the consent process which will culminate in a decision eventually by The Scottish Ministers in relation to the proposed development in Shetland.

As you are no doubt aware, consenting to such a large scale windfarm development is a matter reserved to The Scottish Ministers and the granting of consent by them amounts to deemed planning permission meaning that there is no alternative local planning decision required in respect of the development. However, recognising the importance of local determinations, the legislation establishes the Council as a statutory consultee and the accepted practice is that planning authorities will follow processes broadly in line with their consideration of ordinary planning applications. This would end with a debate at the appropriate level, at either the Planning Board or a meeting of the full Council from which would emerge a recommendation for approval by Minister's, supplementary comments, or the submission of an objection. In the latter case this could be supported by a request for a local inquiry.

As owner of the Busta Estate and, in that capacity landlord of many of the crofting units that would be susceptible to a large scale windfarm development, the Council from the early stages was engaged in supporting the bringing forward of the application which has now been lodged. Although other landowners are involved early negotiations were fronted by the Council on the basis that ownership of the Estate would reap some compensation and there would be a requirement for consent from the Council's tenants, taking matters forward. The history behind setting up of Viking Energy Limited, the Council's shares therein and the subsequent transfer of those shares to Shetland Charitable Trust is well known to all of you. I mention that so that the two areas of corporate interest that the Councillors had in this project can also be addressed in this advice note although the consideration of those and the other interest Members hold as Trustees of Shetland Charitable Trust, which is a different and distinct form of conflict, can be properly addressed.

Turning first to the Council's conflicts in relation to its corporate functions, The Scottish Government planning guidance contained in PAN82: Local Authority Interest Developments, which enables a Planning Authority to still consider an application coming before them even where such an interest exists. Within that advice note the types of "interest" which are given as examples include the following:

- Where the Council, as well as being the Planning Authority, is also the developer;
- where the Council is the landowner, and so would gain a capital receipt for sale or lease of its land;

- where the Authority is working in partnership with other bodies;
- where the Authority is likely, in future, to enter into a contract or be a future operator in relation to the development; and
- where the developer is financially supported or sponsored by the Local Authority.

[planning gain: this describes a situation where the Local Authority may obtain some benefit from a developer providing other forms of infrastructure seen as amounting to a benefit to the Local Authority]

In view of the factual circumstances, any or all of these bullet points may apply in relation to our Council. The important point however is that that so called “interest” is one corporately held by the Council and therefore it would be permissible, in line with the guidance for the Council to continue to act as Planning Authority notwithstanding the existence of that interest. What the PAN guidance then goes on to advise is that in certain circumstances where these interests exist, although it is appropriate for the Planning Authority to consider the application, there are circumstances that justify the application being referred to Scottish Ministers enabling the application to be called in. In this instance, given that determination of this application is outwith the planning system and the final decision in any event rests with Ministers, the question of calling in is not an issue. Essentially what the guidance ensures is that even where there is an interest the Local Authority can still take a significant hand in determining applications

under the planning regime. So the debate which is unfolding regarding Member's conflict is largely resolved by the existence of this guidance in relation to the matters addressed above except that the shares now held by the Shetland Charitable Trust creates a different form of conflict which I will now go on to describe.

Given that the Charitable Trust is now the holder of a significant share of interest in Viking Energy Limited, and it is anticipated that in exchange for further financial contribution, significant returns may be generated for the benefit of the community and in meeting the objectives of the Trust, there is little doubt that the Charitable Trust itself again at a corporate level has an interest in this development proceeding and would therefore be desirous of the consent being granted by Scottish Ministers.

In your capacity as Charity Trustees you will have been advised by the Charitable Trust Advisers regarding your general duties under Section 66 of the Charities and Trustee Investment (Scotland) Act 2005. For the purposes of this application, the important element of the general duties is the requirement that a Charity Trustee must act in the interests of the charity and more particularly where there is a possible conflict between the charity and any person responsible for the appointment of the charity trustee "put the interests of the charity before those of the other person". There may be an argument as to whether the Council would be classed as the "person responsible for the appointment" either in the framing of the Trust Deed in the Council's original capacity as Truster or because the appointment is that of an *ex officio* office but one which derives directly from election to the Council.

In view of the requirement to treat the interests of the Trust as paramount and that the obligation under the Charities Act makes that a personal responsibility of each Trustee, I consider that these are personal interests (albeit I recognise that it is an interest shared by all Members) and the nature of that interest would in terms of the Councillors Code of Conduct place a responsibility on each Councillor to declare their individual interest and then take no part in whatever meeting either at the Planning Board or at the Council that was required to determine the response which the Council should make in relation to the performance of its statutory duties under the Electricity (Scotland) Act, Section 36. I have looked at the possibility of pursuing dispensation for Councillors to enable that role still to be performed but in discussion with the Secretariat of the Standards Commission and also informally with the Chief Investigating Officer, I am of the view that that approach would provide little by way of solution. The reason I say that is because within general and specific dispensations that would allow Members to participate in issues coming before the Local Authority from which they would otherwise be debarred as a result of a conflict, such dispensation specifically exclude from their ambit dealings in relation to regulatory matters such as, for example, planning applications.

I can well understand the argument which suggests that in the performance of a representative role and given any shared interest between the Council and Shetland Charitable Trust in relation to the economic value that the proposal would generate for the community leading in turn to investment in the delivery of the other functions of each body, the existence of that shared corporate benefit seems not to provide an adequate answer to the existence of the personal conflict Members hold in their role as Charity Trustees.

As Members, you will be aware of the specific advice contained in Section 7 of the Code of Conduct and in the interpretation of those provisions Members needs to be careful about making statements which show a level of predisposition towards a particular outcome. Failure to do that leaves Members vulnerable to a challenge of being in breach of the Code of Conduct. Although there exists a debate as to whether mere predisposition and opposed to predetermination is what the Scottish Councillors' Code of Conduct prescribes, if we look to the Courts for an indication of precedent in cases where decisions are deemed to be illegal arising from findings of prejudgement (bias) we will find that the test is narrower requiring a finding of "a closed mind" before a decision will be overturned as having been made ultra vires.

Given the statutory obligation on individual Trustees to put the interests of the Trust first I believe a very strong case could be made that any participation and debate regarding the development by Councillors would be to act in circumstances where it was relatively easy for a challenger to claim that the Councillor had a "closed mind". The PAN guidance, in my opinion, offers no safe haven because in this instance the nature of the conflict held by each Councillor is an individual conflict and not one that can simply be explained as arising from the corporate interests of either of the two organisations.

A long story, but as each and every one of you will have to explain the conclusion I felt it was necessary to develop it at some length so that you can appreciate the various facets. What can we do about this situation?

The applicant, and I must say also the Energy Consent Unit Civil Servants, have each advocated the possibility of Members openly disclosing their position including the existence of the conflict and then proceeding nevertheless to comment in the performance of their role as statutory consultee. The premise under which such a proposal is based is that the openness and transparency coupled with the fact that the Council is not the final determinant of the application in some way alleviate the obligation that Members would normally have when having declared an interest being required to leave the Chamber. I am not confident, however, that approaching this question from that vantage point can protect Members from the type of complaints which would come from those that felt that their representations had not been given a sufficient airing in the Chamber or been adequately taken into account in the course of the Council making its own submission to the Ministers. I think that at both an individual and a corporate level that is not a safe approach for Councillors to adopt.

I have a suggestion of a way forward and would like your views on this before I prepare a report to be considered by the Council.

Planning Officials have a responsibility to their respective professional bodies, not to engage in performing their role where any conflicts would affect that professional reputation. They are not affected by the interests held by Shetland Charitable Trust nor indeed those held by individual Councillors. That being the case, our Planning Officials are currently engaged in processing the application now before them and in the normal scheme of things will prepare a report detailing all of the representations received, all planning considerations in relation to the proposal and their planning conclusions. Absent any conflicts at the level where the Council could make its

submission following a debate in the Chamber, a report prepared by the Planning Officials would also contain a recommendation to Members. My suggestion is that the Planning Department be allowed to continue the process right up to the stage where the matter would ordinarily come before Members but in substitution of that debate for the reasons I have specified above, the Council hold a public hearing in order to capture expressions of support or dissent/objection to the proposal. Assuming there is acceptance that the conflict held prevents a debate by Members sitting as Planning Authority, I would also submit that the Council could openly declare to the community that Members free from any requirement to engage in the regulatory role can fully perform a representative role, and at the aforesaid hearing could advocate on behalf of their constituents and/or the Charitable Trust or the developer without the constraint of being required to participate in any debate.

The "Hearing" I would further suggest should be chaired by somebody independent of the Council, but familiar with planning hearings- either a senior planner of another Authority, retired former Reporter from the Government Reporters Unit etc.

The transcript of the hearing would be submitted as part of the Councils Submission along with the Head of Planning's report and that would end the Councils participation but without any compromise to Members as Councillors or Charity Trustees.