

Draft Order laid before the Scottish Parliament under section 28(4) and (5) of the Transport and Works (Scotland) Act 2007, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2008 No.

TRANSPORT AND WORKS

TRANSPORT

CANALS AND INLAND WATERWAYS

**The Transport and Works (Scotland) Act 2007 (Access to Land
by the Scottish Ministers) Order 2008**

Made - - - - 2008

Coming into force - - 2008

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SCHEDULE — FORMS OF NOTICE

The Scottish Ministers make the following Order in exercise of the powers conferred by sections 18(1)(b) and (2)(b) and (c) and 28(6) of the Transport and Works (Scotland) Act 2007^(a) and all other powers enabling them to do so.

^(a) 2007 asp 8.

In accordance with section 28(4) and (5) of that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

Citation and commencement

1. This Order may be cited as the Transport and Works (Scotland) Act 2007 (Access to Land by the Scottish Ministers) Order 2008 and comes into force on the day after the day on which it is made.

Interpretation

2. In this Order (unless the context otherwise requires)–

“the Act” means the Transport and Works (Scotland) Act 2007;

“authorised land” means the relevant land, or such part of the relevant land, which the Scottish Ministers may enter by virtue of a determination;

“determination” means a determination under article 8(1)(a);

“expiry date for representations” means the date, being a date not less than 28 days after the date of the notice to be served under article 5(1), which the Scottish Ministers specify in that notice as the final date for making representations;

“in writing” includes electronic transmission;

“owner”, in relation to any land, means any person who under the Lands Clauses Acts would be enabled to sell and convey the land to the promoters of an undertaking; and

“relevant land” means the land which the Scottish Ministers propose to enter by virtue of a determination.

Access to land

3.—(1) On–

- (a) making a determination; and
- (b) having obtained any other consent, permission or licence required under any other enactment,

the Scottish Ministers may enter authorised land for such of the purposes set out in paragraph (2) as fall within that determination.

(2) Those purposes are–

- (a) in connection with construction, operation or works to which an order made by virtue of section 6 of the Act (orders made otherwise than on application) would relate–
 - (i) inspecting and surveying authorised land or any other land;
 - (ii) searching or boring on and in the authorised land to ascertain for the purposes of the survey the nature of the subsoil; and
 - (iii) carrying out archaeological and environmental investigations and assessments on and in the authorised land; and
- (b) obtaining passage over authorised land to enable the activities in sub-paragraph (a) to be undertaken on and in other land.

(3) Entry to authorised land under paragraph (1) shall include the entry of such persons, vehicles, plant, materials and apparatus as may be required for the purposes falling within the determination.

(4) Entry to authorised land pursuant to this article is subject to–

- (a) the provisions of this Order;
- (b) the terms of the determination and any conditions or limitations in relation to it; and

- (c) the terms of any agreement between the Scottish Ministers and any person with an interest in the authorised land regarding the Scottish Ministers' entry to the authorised land.

Pre-conditions

4. The Scottish Ministers shall not serve or publish notice under article 5 unless they—
- (a) are considering publishing a notice of a proposal to make an order by virtue of section 6 of the Act; and
 - (b) have attempted to obtain entry to the relevant land with the agreement of the owner and (where their agreement is also required) of every tenant and occupier of that relevant land.

Notice of proposal to enter land

5.—(1) Where the Scottish Ministers propose to take entry to land under this Order they shall serve a notice in (or as nearly as may be in) the form of Form 1 in the Schedule upon—

- (a) the owner and every tenant and occupier of the relevant land to which the proposal relates; and
- (b) any other person that they consider appropriate.

(2) Where the Scottish Ministers propose to take entry to land under this Order they shall also publish in at least one newspaper circulating in the locality, or each of the localities, in which the relevant land to which the proposal relates is situated, a notice in (or as nearly as may be in) the form of Form 2 in the Schedule.

(3) The notice to be published for the purposes of paragraph (2) may be combined with the newspaper notice of any other proposal by the Scottish Ministers to enter other relevant land.

(4) If any person makes a request for further details as to the relevant land to which a proposal relates which is received by the Scottish Ministers on or before the expiry date for representations, the Scottish Ministers shall provide to that person, free of charge, further details sufficient to identify that relevant land.

(5) The Scottish Ministers may comply with their obligation under paragraph (4) by providing the person making the request with a plan showing the relevant land.

Representations

6.—(1) Any representations made in relation to a proposal by the Scottish Ministers to take entry to land shall only be representations for the purposes of this Order if—

- (a) subject to paragraph (2), received by the Scottish Ministers on or before the expiry date for representations;
- (b) made in writing;
- (c) they state the grounds of the representations;
- (d) they indicate who is making the representations; and
- (e) they provide an address to which any correspondence relating to the representations may be sent.

(2) The Scottish Ministers may in any particular case where they consider it appropriate to do so allow further time for making any representations beyond the expiry date for representations.

(3) The Scottish Ministers may send a copy of any representations they have received to any person and invite comments, in writing, from that person within such period as the Scottish Ministers may specify.

(4) The Scottish Ministers may, upon request, provide any person with a copy of any representations made by others.

(5) The Scottish Ministers may send a copy of any comments they have received pursuant to this article to any person and may invite any further comments, in writing, from that person within such period as the Scottish Ministers may specify.

Hearing

7.—(1) The Scottish Ministers may give to a person who has made representations an opportunity of appearing before and being heard by a person appointed by the Scottish Ministers for the purpose.

(2) The persons entitled to appear at a hearing are—

- (a) the Scottish Ministers; and
- (b) any person whose representations are to be dealt with at the hearing.

(3) Nothing in paragraph (2) shall prevent the person appointed by the Scottish Ministers to hold a hearing from permitting any other person to appear at a hearing.

(4) Any person entitled or permitted to appear at a hearing may do so on that person's own behalf or be represented by counsel, a solicitor or any other person.

(5) The Scottish Ministers shall notify any person whose representations are to be dealt with at a hearing of the arrangements for the hearing not less than 28 days before the date on which the hearing is to take place.

(6) The Scottish Ministers may vary the arrangements for a hearing and shall give such notice of any such variation as appears to them to be reasonable.

(7) The Scottish Ministers shall also, not later than 14 days before the date on which the hearing is to take place (or by such later day as the Scottish Ministers may consider reasonable), publish a notice of the hearing in at least one newspaper circulating in the locality, or each of the localities, in which the relevant land to which their proposal relates is situated.

(8) The person appointed by the Scottish Ministers to hold a hearing shall determine the procedure at a hearing and shall state at the commencement of a hearing the procedure that person proposes to adopt subject to consideration of any submission by any of the persons specified in paragraph (2).

(9) Subsections (6), (7) and (8) of section 210 of the Local Government (Scotland) Act 1973 (expenses of inquiries)(a) apply to a hearing held under this article as they apply to a local inquiry under that Act.

Consideration of the proposal

8.—(1) The Scottish Ministers shall, after consideration of any representations, any comments pursuant to article 6 and paragraph (5) and the report of any person appointed under article 7(1), determine—

- (a) to take entry to the relevant land to which their proposal to enter relates and, if so, the purposes in article 3(2) for which entry may be taken; or
- (b) not to take entry to that relevant land.

(2) A determination under paragraph (1) may determine to take entry to part of the relevant land to which the proposal to enter relates but not to take entry to the remainder.

(3) A determination may be subject to such conditions and limitations as the Scottish Ministers consider appropriate.

(4) Without prejudice to the generality of paragraph (3) the conditions and limitations to which a determination may be subject include—

- (a) requiring prior notice before entry is taken;
- (b) the period during which entry may be taken and restrictions as to the timing of entry including as to the days on which it may be taken;

(a) 1973 c.65; section 210 was relevantly amended by the Housing and Planning Act 1986 (c.63), Schedule 11, paragraph 39.

- (c) restrictions as to the timing of undertaking any activity including as to the days on which it may be undertaken;
- (d) restrictions on entry to particular parts of the authorised land or for particular purposes;
- (e) requirements applying before, during or after entry is taken;
- (f) enabling the attendance of the owner or any tenant or occupier or their representative, if the owner or any tenant or occupier should wish it, at all times or at certain times or when performing a particular activity;
- (g) requiring notice to, and the agreement of, specified persons before undertaking a particular activity;
- (h) provision as regards the persons, vehicles, plant, materials and apparatus to which article 3(3) applies;
- (i) requiring a survey or audit of the condition of the authorised land to be completed and recorded prior to entry for the purposes permitted by the determination, or to entry for any specified purpose, commencing; and
- (j) requiring the making good of any damage done in entering or in consequence of entering the authorised land.

(5) Where a determination may be subject to conditions or limitations in the event of the determination being made, the Scottish Ministers may, where they consider it appropriate to do so—

- (a) serve a copy of those conditions or limitations on the persons likely to be concerned; and
- (b) invite comments, in writing, from those persons within such period as the Scottish Ministers may specify.

(6) As soon as practicable after making a determination under paragraph (1) (including for these purposes where the Scottish Ministers determine not to take entry to all or part of the relevant land), the Scottish Ministers shall give notice of the determination, together with the reasons for it, to the owner and every tenant and occupier of the land to which the determination relates or would have related in the case of the Scottish Ministers determining not to take entry to land.

(7) Where the determination is to enter all or part of the relevant land the notice under paragraph (6) shall—

- (a) include a copy of the determination (including any conditions or limitations in relation to it);
- (b) give information regarding the right of appeal to the sheriff under article 9; and
- (c) state that an offence may be committed if entry is obstructed and the sheriff has by warrant authorised the Scottish Ministers to enter the authorised land.

(8) A determination shall have no effect—

- (a) before the expiry of the period within which an appeal to the sheriff under article 9(1) may be made; or
- (b) where an appeal under that article has been made, before the appeal is withdrawn or otherwise disposed of.

Appeal to sheriff

9.—(1) Any person who is aggrieved by—

- (a) a determination; or
- (b) the terms of any condition or limitation in relation to it, or the omission of a particular condition or limitation in relation to it,

may, by summary application, appeal to the sheriff within 28 days of the giving of the notice required by article 8(6).

(2) The sheriff in whose sheriffdom the authorised land or any part of it is situated has jurisdiction to hear an appeal under this article.

- (3) The decision of the sheriff in an appeal under this article may—
- (a) dismiss the appeal;
 - (b) declare the determination to be of no effect in respect of all or part of the authorised land;
or
 - (c) modify a determination or modify or remove a condition or limitation in relation to the determination or provide that the determination is subject to a condition or limitation.
- (4) The sheriff's decision on such an appeal is final.

Compensation

10.—(1) Where in the exercise of the power of entry of the Scottish Ministers—

- (a) damage is caused to land or corporeal moveables; and
- (b) that damage has not been made good by the Scottish Ministers,

any person having an interest in the land or moveables may recover compensation in respect of that damage from the Scottish Ministers.

(2) Where in consequence of the exercise of the power of entry of the Scottish Ministers any person is disturbed in their enjoyment of land or corporeal moveables, that person may recover compensation from the Scottish Ministers in respect of the disturbance.

(3) Any dispute as to the amount of any compensation payable by virtue of this article shall be referred to and determined by the Lands Tribunal for Scotland.

(4) Sections 9 and 11 of the Land Compensation (Scotland) Act 1963 (procedure on reference to the Lands Tribunal and expenses)(a) shall apply in relation to the determination of any such dispute as if—

- (a) the reference in section 9(1) of that Act to section 8 of that Act was a reference to paragraph (3);
- (b) in section 9(3) of that Act the words from “except that” to the end were omitted; and
- (c) references in section 11 of that Act to the acquiring authority were references to the Scottish Ministers.

Warrant

11.—(1) If it is shown to the satisfaction of the sheriff, on evidence on oath, that entry to authorised land has been refused, or that refusal is apprehended, the sheriff may by warrant authorise the Scottish Ministers to enter the authorised land in accordance with article 3.

(2) A warrant granted under paragraph (1) shall continue in force until the time when the purposes for which the warrant is granted are satisfied.

Offence

12. A person who wilfully obstructs the Scottish Ministers, or any person falling within article 3(3), where the Scottish Ministers have been authorised to enter authorised land by virtue of a warrant under article 11 is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(a) 1963 c.51; section 9 was amended by the Local Government, Planning and Land Act 1980 (c.65), Schedule 33, paragraph 7(2).

Saving

13. The ability of the Scottish Ministers to obtain entry to land by virtue of the provision in this Order is in addition to any other power to obtain entry to land under any other enactment.

St Andrew's House,
Edinburgh

2008

Authorised to sign by the Scottish Ministers

SCHEDULE

Article 5

FORMS OF NOTICE

Form 1

Article 5(1)

The Transport and Works (Scotland) Act 2007

The Transport and Works (Scotland) Act 2007 (Access to Land by the Scottish Ministers) Order 2008

NOTICE OF PROPOSAL OF THE SCOTTISH MINISTERS TO ENTER LAND

To: *[owner/tenant/occupier/other person as the case may be]*

The Scottish Ministers give notice under article 5(1) of the Transport and Works (Scotland) Act 2007 (Access to Land by the Scottish Ministers) Order 2008 that they propose to take entry pursuant to that Order to *[details of the land to which entry is required and a plan may be attached where this would be helpful]* for the purposes of *[details of purposes]* in respect of a proposed project to *[the purpose of the project]*.

In the event that the Scottish Ministers determine to take entry to the land following the proposal, article 3(4)(c) of the Transport and Works (Scotland) Act 2007 (Access to Land by the Scottish Ministers) Order 2008 provides that such entry is subject to the terms of any agreement between you and the Scottish Ministers regarding entry to the land. *[Delete this paragraph if no such agreement has been entered into between the Scottish Ministers and the recipient of the notice]*

Any representations about the proposal should be sent to the Scottish Ministers, c/o Transport and Works Unit *[postal and e-mail address]*. Representations MUST (i) be received by the Scottish Ministers on or before *[expiry date for representations being a date not less than 28 days after the date of the notice]*, (ii) be made in writing (whether sent by post or e-mail), (iii) state the grounds of the representations, (iv) indicate who is making the representations, and (v) give an address to which any correspondence relating to the representations may be sent. (If you are sending your representations by e-mail, please also provide a postal address).

The Scottish Ministers may make complete copies of the representations public.

Signed _____

Name: _____

A member of the staff of the Scottish Ministers

Date: _____

The Transport and Works (Scotland) Act 2007**The Transport and Works (Scotland) Act 2007 (Access to Land by the Scottish Ministers)
Order 2008****NOTICE OF PROPOSAL OF THE SCOTTISH MINISTERS TO ENTER LAND**

The Scottish Ministers give notice under article 5(2) of the Transport and Works (Scotland) Act 2007 (Access to Land by the Scottish Ministers) Order 2008 that they propose to take entry pursuant to that Order to land situated at [*locality of the land to which entry is required*] for the purposes of [*details of purposes*] in respect of a proposed project to [*the purpose of the project*].

Further details as to the land to which the proposal to take entry relates may be requested from the Scottish Ministers at [*contact and email address*] provided that request is received by the Scottish Ministers on or before [*expiry date for representations being a date not less than 28 days after the date of the notice to be served under article 5(1)*].

Any representations about the proposal should be sent to the Scottish Ministers, c/o Transport and Works Unit [*postal and e-mail address*]. Representations MUST (i) be received by the Scottish Ministers on or before [*expiry date for representations being a date not less than 28 days after the date of the notice to be served under article 5(1)*], (ii) be made in writing (whether sent by post or e-mail), (iii) state the grounds of the representations, (iv) indicate who is making the representations, and (v) give an address to which any correspondence relating to the representations may be sent. (If you are sending your representations by e-mail, please also provide a postal address).

The Scottish Ministers may make complete copies of the representations public.

Signed _____

Name: _____

A member of the staff of the Scottish Ministers

Date: _____

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes provision as regards entry to land by the Scottish Ministers, where they are considering publishing under section 6 of the Transport and Works (Scotland) Act 2007 a notice of a proposal to make an order under section 1 of that Act, to inspect and survey land for purposes connected with construction, operation or works to which such an order would relate. An order under section 1 of that Act relates to the authorisation of transport systems and inland waterways. This Order prescribes the procedure for the making and consideration of representations in relation to a proposal for entry and the procedure for enforcing access where, subsequent to a determination to take entry, access is prevented.

Article 3 provides that, if they so determine, the Scottish Ministers may enter land for such purposes as may be specified in the determination.

Article 4 provides the pre-conditions that the Scottish Ministers have to fulfil before proceeding to seek entry to land pursuant to this Order.

Article 5 (with the Schedule) provides for the service by the Scottish Ministers of notice, on specific persons, of the proposal to enter the land pursuant to this Order and for a newspaper notice.

Article 6 makes provision relating to representations including the validity of representations.

Article 7 makes provision in relation to any hearing held to consider representations on any proposal to enter land pursuant to this Order.

Article 8 sets out provision regarding the Scottish Ministers determination on their proposal to enter land, the noticing arrangements and in the case of a determination to enter land provision as to the date on which that determination shall have effect.

Article 9 sets out the procedures for an appeal to the Sheriff by any person aggrieved by a determination to enter land.

Article 10 sets out the circumstances where compensation can be recovered from the Scottish Ministers. It also prescribes that any dispute shall be referred to and determined by the Lands Tribunal for Scotland.

Article 11 provides the circumstances in which the sheriff may grant a warrant and article 12 sets out the offence that a person commits in wilfully obstructing entry which has been authorised by virtue of a warrant.

A Regulatory Impact Assessment has been prepared in respect of this Order. A copy can be obtained from the Scottish Government Transport Directorate, Victoria Quay, Edinburgh EH6 6QQ.

