

Executive Note
The Planning and Compulsory Purchase Act 2004 (Commencement No. 2 and
Consequential Provisions) (Scotland) Order 2006 SSI/2006/243 (C.22)

The above instrument will be made in exercise of powers conferred by section 121(4) and section 122(3) of the Planning and Compulsory Purchase Act 2004. The instrument is subject to affirmative resolution procedures in accordance with section 122(9) of that Act.

Policy Objectives

This order relates to the commencement of two aspects of the removal of Crown immunity from planning control in Scotland. Firstly, the making of urgent applications for planning permission, listed building consent or conservation area consent to the Scottish Ministers where Crown development is required urgently in the national interest. Secondly, the provisions relating to enforcement in relation to the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. The provisions to be commenced require related consequential amendments to primary legislation, hence the need for a commencement order subject to affirmative procedures.

The overall aim of this removal of Crown immunity is to subject the Crown to statutory planning provisions while recognising that the unique nature and responsibilities of the Crown mean that certain exceptions and special arrangements need to be made.

Planning is a devolved matter. However, the Town and Country Planning Acts currently do not apply to the Crown. As a result Crown bodies are not subject to planning control for development which they propose to carry out. Instead, government departments and other Crown bodies wishing to carry out development in Scotland have undertaken to comply with the non-statutory arrangements in Part IV of the Memorandum to Scottish Development Department Circular 21/84. Similar arrangements apply to such development in England and Wales.

The UK Government and the Scottish Executive sought to rectify this anomaly. Provisions to remove Crown immunity from planning controls were therefore included in the Planning and Compulsory Purchase Act 2004. This will mean that, once the proposed powers are brought into force, all Crown bodies will in future need to, for example, seek planning permission or listed building consent. The statutory requirements of the devolved planning regime will thereby be extended. This approach to the removal of Crown Immunity from planning control in the UK will, among other things, put the requirements of the European Directive on Environmental Impact Assessment in relation to Crown development on a statutory footing.

This order will commence sections 92 and 93 of the Planning and Compulsory Purchase Act 2004 in relation to urgent applications. The intention is that once Crown immunity from planning control is removed, the Crown will be able to make urgent applications for development in the national interest directly to the Scottish Ministers. This process would only be used, for example, where a developing department felt that their application for planning permission or listed building consent would be likely to be refused by the planning authority. Such a refusal would be likely to result in appeal to the Scottish Ministers. In order to save time for development required urgently in the national interest, developing

departments will basically be able to avoid this initial step of applying to the planning authority and can put the case to the Scottish Ministers in the first instance.

The Scottish Ministers will still have to apply publicity and consultation requirements along the lines of those for a normal application. As far as setting up an inquiry, the lead in time for planning inquiries on such urgent applications will be shortened. The aim is to reduce the overall time it takes to get to an inquiry leading to a decision by the Scottish Ministers on a proposal for which the planning authority is likely to refuse planning permission or listed building consent and the development is required urgently in the national interest.

Section 94(4) of the Planning and Compulsory Purchase Act 2004 introduces new section 73D to the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 on enforcement in relation to the Crown. It is included here as there is one consequential amendment to that Act as a result of this new provision. Section 73D puts certain limits on enforcement action in relation to the Crown. For example, the Crown is exempt from the provisions on offences in the 1997 Act, although application can be made to the Court of Session for a declaration of the unlawfulness of an act or omission. Similarly, powers allowing authorities to enter land for enforcement purposes are limited in relation to Crown land.

For the most part the consequential amendments relate to provisions in the Town and Country Planning (Scotland) Act 1997 and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 which refer to planning permission or listed building consents granted under the respective Acts. These provisions are amended where appropriate to include permissions and consents granted under the new “urgent application” procedures.

Section 66 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, is amended so that the new provisions on urgent applications and enforcement introduced to that Act will apply to conservation area consents as well as to listed building consents.

A previous commencement order (The Planning and Compulsory Purchase Act 2004 (Commencement No. 1) (Scotland) Order 2006) was made to commence the rule, regulation and order making powers in the 2004 Act in relation to Scotland, and this partially commenced sections 92(1) and 93(1) for the purposes of making orders and regulations respectively.

A further commencement order will commence the other provisions of the Planning and Compulsory Purchase Act 2004 relating to the removal of Crown immunity from planning control in Scotland and which do not require consequential amendments.

Further Scottish Statutory Instruments (SSIs) will be made which relate to secondary legislation required to accommodate the Crown within the planning system. These will be subject to negative resolution procedures. These SSIs will make secondary planning legislation bind the Crown and introduce amendments to that legislation necessary to accommodate the Crown and will introduce transitional arrangements to deal with the changeover from administrative to statutory planning arrangements for the Crown. There will also be rules governing the making of directions restricting public access to national security sensitive information at a planning inquiry and to the functions of special advocates appointed to address concerns of those without access to said security sensitive information.

The provisions of the Planning and Compulsory Purchase Act 2004 in question were the subject of a Sewel motion approved by the Scottish Parliament on 20 November 2003.

Consultation

This commencement and consequential provisions order simply commences provisions contained in the Planning and Compulsory Purchase Act 2004. The question of public consultation on the removal of Crown immunity from planning controls in Scotland was the subject of public consultation in the early 1990s. It is only in recent years that a suitable legislative opportunity arose to make the necessary provisions in planning legislation.

Financial Effects

With the removal of Crown immunity from planning controls, Crown bodies will have to pay planning fees to the planning authorities for planning applications, as private developers do at present. The extent of these costs will depend on the number and nature of Crown developments which may come forward in any given year. However, planning fees generally are a very small fraction of the overall costs of a development proposal. Planning authorities do not currently receive a fee for considering Crown development proposal under the administrative arrangements mentioned in the 4th paragraph above. Where the special advocate procedure applied in relation to an application involving information on national security and/or the security of any premises or property, the special advocates would be paid for by the developing department.

The Scottish Executive Development Department
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