Executive Note
The Town and Country Planning (Application of Subordinate Legislation to the Crown) (Scotland) Order 2006 SSI/2006/270

1. The above instrument was made in exercise of powers conferred by sections 26(2)(f), 30 and 31(1) of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act) and sections 98 and 122(3) of the Planning and Compulsory Purchase Act 2004 (the 2004 Act).

Policy Objectives

2. This order relates to the removal of Crown immunity from planning control in Scotland. The overall aim 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. This Order applies secondary planning legislation to the Crown with amendments to ensure the legislation applies appropriately and to make certain allowances

3. 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.

4. 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.

5. This order sets out a list of subordinate legislation which relate to the planning system and applies each one to the Crown. For a number of these statutory instruments there are amendments or modifications made in relation to Crown development and these are outlined in the explanatory note to the SSI. Before referring to some of the major modifications set out in this Order, the following paragraphs describe 2 aspects of the policy and procedures in relation to the removal of Crown immunity from planning control which underpin a number of these modifications.

6. National security sensitive information. That is information relating to 1) national security or 2) the measures taken, or to be taken, to ensure the security of any premises or property where, in either case 1) or 2), the public disclosure of that information would be contrary to the national interest. The 2004 Act allows the Secretary of State or the Scottish Ministers in consultation with the Secretary of State to direct that access to such information in relation to a planning inquiry will be restricted. This is a shared power as national security

is a reserved matter. The 2004 Act allows the Lord Advocate to appoint special representatives to act in relation to security sensitive information on behalf of those (e.g. the planning authority or objectors) whose access to it is restricted.

7. When making an application for planning permission or listed building consent, an applicant will be able to withhold information which in their opinion is national security sensitive. Withholding that information will not invalidate their application (otherwise applications for development potentially involving security sensitive information would effectively be unable to be made). In the case of such an application, if the planning authority is unable to determine the application without the withheld information, then either the case will remain undetermined or will be refused. In either case, an appeal can be made to the Scottish Ministers. Alternatively, the person (most likely a Government Department) holding the information could ask the Scottish Ministers to call-in the application for their determination. In any event, where the application comes before the Scottish Ministers, they can consider the need for a direction to restrict access to the information at a subsequent planning inquiry. If a direction is made, the Lord Advocate will appoint a representative(s), as indicated above, and the inquiry will proceed with open and closed sessions, the latter to allow consideration of the security sensitive material. If a direction is not made, then information will be able to be requested through the planning inquiry process and it will be for the applicant to consider whether to proceed or to withdraw their application.

8. It is thought unlikely that information which requires to be withheld from public disclosure would commonly be required for the purposes of applications under planning legislation, but it is possible the internal layout of a new prison or its security arrangements, for example, might be thought relevant to a planning application in particular circumstances.

9. Section 92 of the 2004 Act introduces new sections to the 1997 Act (section 242A) and to the Planning (Listed buildings and Conservation Areas) (Scotland) Act 1997 (section 73B) to allow that applications for development which the appropriate authority (i.e. the Crown body) certifies is of national importance and is required urgently can be made directly to the Scottish Ministers rather than to the planning authority. This means that where such a development was at the risk of refusal by the planning authority, which would trigger an appeal to the Scottish Ministers, the case can be made directly to the Scottish Ministers. This would cut down on the 2 month period of consideration by the planning authority (any applicant can appeal to the Scottish Ministers where a planning authority has not determined their application after 2 months – 4 months in a case involving environmental impact assessment). These time periods are of significance where a nationally important development is required urgently, and a decision on the planning merits of the case would be available that much more quickly.

10. The usual consultation and publicity arrangements will apply to these urgent cases, along with additional requirements in the 2004 Act for local advertising and consultation with the planning authority. Local interests will therefore be able to make their views known on the proposals and these will be given due consideration in determining the application.

11. The subordinate legislation to be modified or amended includes:

The Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas) (Scotland) Regulations 1975 – the modifications amend provisions to refer to planning permission granted under new section 242A of the 1997 Act on urgent applications for

Crown development in addition to permission granted under Part III of the 1997 Act; certain works to trees in relation to trunk roads which have been approved by order under the Roads (Scotland) Act 1984; similar works to trees required for national security purposes; and certain freedoms for the Forestry Commission, in line with provisions to be introduced to the 1997 Act by the 2004 in relation to the activities of the Forestry Commission.

12. The Town and Country Planning (Control of Advertisements) (Scotland) Regulations 1984 – in line with the policy in relation to enforcement generally, the provisions on offences (regulation 7) do not apply to the Crown. Certain freedoms apply under the advertisement control regulations in relation to the functional advertising of statutory undertakers, planning authorities and others and the Crown will be added to the list of bodies to benefit from these freedoms.

13. The Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Regulations 1987 – New regulation 4A provides that an application may be considered valid despite information being withheld on the grounds it may constitute security sensitive information. Without such a provision, applicants whose proposals may involve such information would be unable to make an application without risk of disclosing security sensitive material. Regulations 5, 6 and 7 are amended to apply to urgent applications made to the Scottish Ministers under new section 73B of the planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997.

14. The Town and Country Planning (General Permitted Development) (Scotland) Order (GPDO) 1992 – As the Crown is not currently covered by the statutory planning system it does not have any permitted development rights (other than those which are not specific to particular developers). New Crown permitted development rights are introduced which, for the most part, reflect those available to statutory undertakers (hence the new descriptions being introduced regarding "operational Crown land" which is akin to the "operational land" of statutory undertakers) and others. Entirely new permitted development rights are also introduced for the Scottish Ministers in relation to their trunk road works (which are already subject to statutory requirements under the Roads (Scotland) Act 1984)) – Part 26-, to the Crown in relation to Emergency Development – Part 30 – and to National Security – Part 31 – and to Historic Scotland (in relation to their functions with regard to ancient monuments) – Part 32.

15. Class 73 of Part 26 is not subject to the removal of permitted development rights under article 3 of the GPDO where an environmental impact assessment (EIA) is required as the developments in Class 73 are already subject to EIA under the roads provisions in the Environmental Impact Assessment (Scotland) Regulations 1999. Permitted development rights relating to the Scottish Ministers as Roads Authority, to Emergency development and to National Security, will not be able to be included in a direction under article 4 of the GPDO which is used to restrict permitted development rights.

16. The Town and Country Planning (General Development Procedure) (Scotland) Order 1992 (the GDPO) – New Article 3A simply requires applications in respect of Crown land to be identified. New Article 13A ensures potentially security sensitive information can be withheld from an application without invalidating it so that, if necessary, a direction specifying the information to be restricted can be made and a planning inquiry held as appropriate to consider the case. New article 28A does the same in relation to certificates of

lawful use and development. New part 3A applies the requirements of the GDPO as appropriate, to urgent applications made under new section 242A of the 1997 Act.

17. The Town and Country Planning (Hazardous Substances) (Scotland) Regulations 1993 – New Regulation 4(1A) contains an exemption for military establishments, installations or storage facilities. This is in line with the exemption for national defence in the European Directive on the Control of Major Accident Hazards involving dangerous substances, which these regulations implement in part. The remaining provisions amending these regulations relate to a transitional provision which allows Crown operators of site using hazardous substances to which the regulations apply to claim a deemed consent, which in turn applies a series of conditions to the storage and presence of such substances. The deemed consent is along the same lines as has been used in the past in relation to the private sector when the regulations were first brought in and subsequently amended. They serve to minimise disruption to activities involving the presence of hazardous substances, where these had previously been carried out legitimately without requiring consent, while at the same time applying conditions to the presence of these substances.

18. The Conservation (Natural Habitats &c.) Regulations 1994 are applied to the Crown with an amendment to ensure they apply to urgent applications made under new section 242A in addition to applications made, and permissions granted, under Part III of the 1997 Act.

19. The Town and Country (Use Classes) (Scotland) Order 1997 (the UCO) – the UCO groups uses similar in planning terms together into classes and allows that planning permission is not required for changes of use within a class. The amendments modify the UCO to make new provisions for Crown uses of land and buildings. The amendment inserts law courts into an existing class with other non-residential institutions such as museums, galleries, educational establishments, places of religious worship and the like. A new use class for secure residential institutions is also created which includes mainly Crown uses.

20. The Visiting Forces and International Headquarters (Application of Law) Order 1999 – the modification here simply replaces the provision of the Town and Country Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 which currently has definitions relating to Crown land (section 74) with a reference to a replacement provision (new section 73C) introduced by the 2004 Act. Changes are not required in relation to the provisions in the 1997 Act and the Town and Country Planning (Hazardous Substances) (Scotland) Act 1997, as the amendments to existing definitions are contained in amended versions of the existing sections in these two Acts.

21. The Environmental Impact Assessment (Scotland) Regulations 1999 – the amendment here applies the regulations to urgent applications under section new 242A of the 1997 Act to ensure the requirements of the European Directive on environmental impact assessment are met.

Consultation

22. The issue of 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. While a number of Crown bodies have been consulted on aspects of the secondary legislation, we

have not carried out a full public consultation on the secondary legislation. In light of the European infraction proceedings in relation to applying the requirements of the European Directive on environmental impact assessment to Crown development we have pressed ahead with the laying of Scottish Statutory Instruments.

Financial Effects

23. 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 3rd paragraph above. Where the procedure involving representatives appointed by the Lord Advocate applied in relation to an application involving information on national security and/or the security of any premises or property, the appointed representatives would be paid for by the developing department. Cases involving security sensitive material of national importance are likely to be very limited in number.

The Scottish Executive Development Department
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