

EXECUTIVE NOTE

THE TOWN AND COUNTRY PLANNING (SCHEMES OF DELEGATION AND LOCAL REVIEW PROCEDURE) (SCOTLAND) REGULATIONS 2008 (S.S.I. 2008/433)

1. This statutory instrument puts in place the regulatory framework required to allow the provisions in the Planning etc. (Scotland) Act 2006 (the 2006 Act) on Schemes of Delegation and Local Review Bodies to be commenced. The Act introduced significant changes to the planning appeals system in Scotland. These include:

- The introduction of a new scheme of delegation for the category of local developments;
- The introduction of a right to seek a review by the planning authority of a decision taken under the terms of the new scheme of delegation instead of a right to appeal to Scottish Ministers;
- limitations on the introduction of new material at the review stage unless it is new matter or a material consideration;
- Removal of an automatic right to appear before and be heard by a person appointed by Scottish Ministers; and
- Power for regulations to make provision for the form and procedures for any review.

2. Changes to the process of making a planning appeal to Scottish Ministers are set out in the Town and Country Planning (Appeals) (Scotland) Regulations 2008.

Policy Objectives

3. The Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2008 set out the procedures for preparing new schemes of delegation under section 43A of the Town and Country Planning (Scotland) Act 1997 (“the Act”) introduced by section 17 of the 2006 Act and the process that is to be adopted by planning authorities for reviewing decisions taken by officials under the new schemes of delegation. The intention is that the policy supports the objectives of being efficient and fit for purpose.

4. Under the new arrangements the planning authority will adopt a scheme of delegation that describes the circumstances in which officials can take decisions in respect of planning applications for different classes of local developments. Where an applicant is not satisfied with the terms of the decision taken, they will be entitled to require the planning authority to review the decision instead of appealing to Scottish Ministers. The decision of the planning authority on that review will be reached by a local review body comprising of elected members from the authority and their decision on the case will be final. The decision may be challenged in the Court of Session under section 239 of the Act as amended by section 19(4) of the 2006 Act.

5. The provisions are central to the proposals for modernising the planning system and are designed to ensure that the process is more efficient and that more local issues can be determined locally. The review will be determined by a Committee of the planning authority (the local review body) comprising at least three members of the authority and will be

decided in public. The regulations provide a framework for applicants to notify the authority of the requirement to review their case, for appropriate notification of the review to interested parties, for the review body to examine the case and to issue a decision on the review. The intention is that the review process should not be adversarial. The regulations provide a framework within which the review body can accommodate a hearing of oral evidence where they consider that to be appropriate. The review body may also seek further information from parties, or take advice as they consider necessary.

6. It is an objective of planning reform that the process is front-loaded so that the relevant information supporting a planning proposal is available for people to see and consider at the outset rather than late in the process. The 2006 Act restricts the extent to which new information can be introduced as part of a review unless it is new, there are exceptional circumstances why it could not have been provided when the application was considered or raises material considerations. The process requires the authority to review the material that was before the appointed person during the planning process along with other representations and information supplied in the course of the review process in a straightforward way.

7. It has been a supporting objective of planning reform that planning authorities delegate applications effectively to increase efficiency in the planning process. The provisions for the new schemes of delegation apply only to planning applications within the category of local developments. 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, or consent to display advertisements. These other forms of permission retain their rights of appeal to Scottish Ministers for the foreseeable future.

Consultation

8. The Scottish Government consulted on the proposed approach to promoting schemes of delegation and the introduction of local review bodies in the 2005 White Paper Modernising the Planning System. In February 2008 a public consultation was carried out on draft regulations and the analysis of consultation responses subsequently published. <http://www.scotland.gov.uk/Publications/2008/12/02095250/1> Scottish Government officials also discussed the proposals in workshops and other meetings with key stakeholders including the SSDP, the Faculty of Advocates, SOLAR, representatives of the development industry, Planning Aid for Scotland, the Administrative Justice and Tribunals Council Scottish Committee and the Standards Commission.

9. The draft regulations for schemes of delegation set out a range of proposals that should not be delegated for decision by officials and which should, instead be determined by elected members. These included 7 categories including all applications subject to Environmental Impact Assessment; those the subject of an unresolved objection from a statutory consultee; applications by the planning authority or a member of the authority; those significantly contrary to the terms of the development plan or the subject of a substantial body of objection. A number of respondents offered the view that the draft regulations (overall) were complex and that the proposals on schemes of delegation would not increase the amount of delegation to officials that takes place under existing arrangements.

10. The finalised regulations now provide a simpler approach to drafting and approving the new schemes of delegation. Greater scope is now available for planning authorities to draft schemes that are appropriate for their circumstances. The regulations now only prohibit delegation of local planning applications that are made by the planning authority or a member of the authority, or where the authority have a financial or ownership interest in the land. The procedure now provided in the regulations for adoption is more straightforward, consisting of notification of the scheme to Scottish Ministers and approval by them.

11. In consultation a range of stakeholders (including the Law Society, the Faculty of Advocates and the Administrative Justice and Tribunals Council Scottish Committee) raised concerns about the principle of local review bodies and the potential for them not to work effectively. Some of these concerns relate to the extent to which a local review will provide a fair or independent hearing, whether it will demonstrate impartiality or provide a process that the general public will have confidence in.

12. Scottish Government remains of the view that the local review is part of a process that complies with the European Convention on Human Rights. The regulations are intended to provide a framework of procedure that is fair and transparent whilst enabling planning authorities scope to adopt procedures that they consider appropriate to local circumstances. The regulations now require a local review body to comprise a minimum of three members but no longer set a maximum. The means of further examination of a review will be for the review body to determine, consistent with the approach on appeals made to Scottish Ministers.

Regulatory Impact and Financial Implications

13. A Regulatory Impact Assessment accompanies the regulations. Planning authorities currently adopt schemes of delegation under the Local Government (Scotland) Act. Delegation of certain decisions to officials is recognised to be an important means of adding efficiency to administrative processes enabling over 80% of planning applications to be determined under these powers. The 2006 Act requires a new (additional) type of scheme of delegation that links to the review process for decisions on local developments. Any associated costs are not considered to be an additional burden, and the RIA concluded that the financial impact would be largely neutral, or generate a very small saving.

14. The 2006 Act and regulations introduce local reviews which are a new, additional, requirement. Each planning authority will be required to establish a local review body which will operate as a committee of the Council. There will be additional roles for those elected members sitting as part of the review body and those officials who support the administrative process. While there will be additional costs, these are likely to be directly linked to the frequency with which the review body meets and with the method they choose to examine each case. Because of that, it is not possible to predict the level of local reviews that will be carried out since this is linked to the planning authority's own scheme of delegation. There is also some read across to other changes being made to the appeal process to Scottish Ministers. Planning authorities will contribute to fewer appeals to Scottish Ministers as a result of the changes overall and for those where they have a role, there should be some saving as a result of the more proportionate approach to determination. These changes will also result in some savings for Government. However, planning authorities will have additional costs as a result of setting up and servicing the local review body. The RIA is not able to provide a clear figure on the likely financial impact to planning authorities given the

variety of factors involved. The financial impact on business and the voluntary sector is likely to be neutral.

Directorate for the Built Environment

REGULATORY IMPACT ASSESSMENT

1. Title of Proposal

1.1 The proposed measures to which this RIA relate are:-

- The Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2008; and
- The Town and Country Planning Appeals (Scotland) Regulations 2008

A holistic approach to assessing the impact of both sets of regulations has been adopted given their interrelated nature.

2. Purpose and Intended Effect

Objectives

2.1 The Regulations are required to implement sections 17 to 19 of Part 3 of the Planning etc. (Scotland) Act 2006¹, regarding schemes of delegation, local reviews and appeals.

2.2 The proposals are intended to make the process for challenging planning decisions more efficient without losing the high quality of service provided under present arrangements. The Government's intention is for the planning system to be fit for purpose and for its response to applications or appeals to be proportionate. Accordingly we need to ensure that the appeal process avoids unnecessary complexity or lengthy procedures that do not add value to the quality of decision.

2.3 The objectives of the regulations are:

- To provide for increased delegated decision making by planning officials for local developments to promote efficiency and expediency in the planning system.
- To set out types of local developments that should continue to be determined by elected members.
- To link decisions on delegated local development applications to a local review process rather than by appeal to Scottish Ministers, to promote the principle of local decision making and efficiency.
- To allow the Local Review Body to determine the most efficient and appropriate way of dealing with particular reviews, and ensure the review system is fair and transparent operating to high standards and principles.
- To provide for planning appeals and 'called in' planning applications to be handled more efficiently in Scotland.
- To promote faster decision making by requiring planning appeals to be front loaded providing the necessary information upfront.
- To allow the decision maker to determine the most efficient and appropriate way of dealing with particular appeals and called-in cases, with the powers to decide on the most appropriate and fit for purpose procedures.

Background

¹ The Planning etc. (Scotland) Act 2006

http://www.opsi.gov.uk/legislation/scotland/acts2006/pdf/asp_20060017_en.pdf

2.4 The White Paper *Modernising the Planning System*² signalled the intention to reform the planning system and the Planning etc. (Scotland) Act 2006 now provides the primary legislative framework for change.

2.5 The White Paper underlined the need for planning decisions to be made quickly so that the Scottish economy is not disadvantaged. It also highlighted the importance of allowing those wishing to make their views known to do so without being intimidated by the process. It proposed that the right to examination by formal inquiry process should be restricted to those issues where the subject matter could not be addressed through less formal procedures such as by a hearing or by written submissions.

2.6 The White Paper also set out the need to curb the tendency for proposals to change during the planning and appeal process and for justification for them to alter without reference to the local community. This is consistent with the principle of front-loading the planning system.

2.7 The Government Economic Strategy³ (November 2007) identifies five Strategic Priorities required to deliver increasing sustainable economic growth. The Strategic priority relating to Infrastructure Development and Place sets a number of key strategic approaches which the Scottish Government will pursue including " *A planning and development regime which is joined up, and combines greater certainty and speed of decision making within a framework geared towards achieving good quality sustainable places and sustainable economic growth*". Effective schemes of delegation and appeals and review procedures support the overall objective of promoting sustainable economic growth.

Rationale for Government intervention

2.8 The regulations are required by the Planning etc. (Scotland) Act 2006. Sections 17(1), 17(4), 17(10) and 19(5) of Part 3 of the 2006 Act give Scottish Ministers powers to make regulations covering schemes of delegation, local reviews and appeals. The expectation among stakeholders is that these powers will be used, and the regulations are required to make it clear how the system should operate in practice.

3. Consultation

Within Government

3.1 The regulations have been the subject of discussion and internal consultation with the Directorate for Planning and Environmental Appeals. Various individual points have been discussed with other relevant parts of the Scottish Government including Civil Justice, Law Reform and International Division and the Public Service Reform Directorate.

Public Consultation

3.2 Discussions have taken place with a number of organisations and bodies, including:

² White Paper *Modernising the Planning System* (2005)
<http://www.scotland.gov.uk/Publications/2005/06/27113519/35231>

³ The Government Economic Strategy (November 2007)
<http://www.scotland.gov.uk/Publications/2007/11/12115041/0>

- Scottish Committee of the Council on Tribunals/ Administrative Justice and Tribunals Council (AJTC)
- The Standards Commission for Scotland
- The Law Society
- The Faculty of Advocates
- Society of Local Authority Lawyers and Administrators in Scotland (SOLAR)
- Scottish Society of Directors of Planning (SSDP)
- COSLA
- Local authorities
- Homes for Scotland
- Scottish Property Federation

3.3 The *Modernising Planning Appeals* consultation paper⁴ set out detailed proposals for change to the planning appeals system, including three sets of draft regulations on schemes of delegation, local review and appeals procedures. Also included were a series of 15 consultation questions relating to these regulations and other elements of the consultation paper. These formed the basis of the consultation exercise conducted between February and May 2008, to which a total of 106 responses were received. Over the course of the summer some in-depth discussions and workshops took place looking at the detail of the regulations. These involved representatives from planning authorities, SSDP, the Scottish Property Federation, the AJTC and the RTPI.

3.4 More details on the responses to each of the three subject areas are provided below, and the full analysis report is available online⁵.

4. Schemes of Delegation

Background

4.1 The intention is for greater use of delegation to officials, particularly for applications classed as local under the planning hierarchy allowing elected members to focus attention on the proposals that involve greater economic benefits or environmental impacts.

4.2 Planning authorities already have delegation schemes in place under powers from the Local Government (Scotland) Act 1973 and generally about 83 -85% of all applications each year are delegated to officers. This equates to 44,000-47,000 applications each year across Scotland. The rate for householder applications is slightly higher and increasing (over 90%) as shown in the table below.

	2004-05		2005/06		2006-07	
	Decided	% Delegated	Decided	% Delegated	Decided	% Delegated
Householder	28276	91.6	25756	92.4	25707	93.8
Minerals	56	48.2	44	59.1	85	55.3
Dwellings (Major)	980	40.6	1104	39.0	1014	38.3

⁴ Modernising Planning Appeals: Consultation Paper (Feb 2008)

<http://www.scotland.gov.uk/Publications/2008/02/13104117/0>

⁵ Modernising Planning Appeals: Consultation Paper: Analysis of Consultation Responses (Dec 2008)

<http://www.scotland.gov.uk/Publications/2008/12/02095331/0>

Dwellings (Minor)	9219	69.5	8645	68.4	9103	71.7
Business & Industry (Major)	404	61.1	482	62.7	451	55.7
Business & industry (Minor)	3438	78.8	3802	80.8	3876	83.4
Telecoms Developments	278	59.4	622	60.6	646	78.6
All other Development (Major)	598	43.8	572	56.8	479	48.2
All Other Development (Minor)	6877	79.9	5709	80.0	6107	81.4
LBC	3614	84.6	3583	85.7	3679	86.2
Advertisement Consent	2282	93.3	2422	91.7	2740	93.2
Hazardous Substances Consent	16	56.3	20	90.0	15	60.0
Other Consents	825	83.2	630	88.9	695	80.7
SCOTLAND	56720	83.5	53391	83.7	54597	85.3

[Statistics from returns collated by the Scottish Government from local authorities⁶]

4.3 Use of delegation frees up committee time and can enable decisions to be issued on straightforward cases more quickly. Currently many schemes of delegation limit decisions to approvals. The intention is for the full range of decisions to be available to officials dealing with applications within the category of local developments, including refusals of permission.

4.4 The new schemes of delegation under the 2006 Act have direct links to local review procedures. Where applicants are dissatisfied with a decision delegated to an officer, they will be entitled to seek a review of the decision by the planning authority, a local review body (LRB) rather than by appealing to Scottish Ministers. The regulations prevent officers from determining under a section 43A scheme of delegation local authority or member interest cases.

Consultation

4.5 There was strong support following the White Paper for this proposal which was seen as extending practices that most stakeholders were already familiar with. Respondents highlighted the need for clarity to manage the delegation process in an open and transparent way.

4.6 Respondents raised concerns about the scope for different interpretations of terms such as "significant or substantial bodies of objection" and "significantly contrary to the development plan". Some considered that there should be national guidelines and criteria, others argued for more flexibility. In response to this the final regulations do not refer to these types of exclusions and provide flexibility for local authorities to develop their own

⁶ Planning Performance Statistics 2004-2007
<http://www.scotland.gov.uk/Publications/2008/01/31114430/0>

scheme of delegation which they consider to be appropriate in their areas. In relation to the removal of the reference to "significantly contrary to the development plan", the aim for a plan led system is not undermined given the statutory requirement in the primary legislation for decisions to be made in accordance with the development plan unless material considerations indicate otherwise.

4.7 There were also alternative views that some developers would prefer elected members to make decisions. A professional body felt that decisions should only be delegated to professionally qualified planners and suggested the potential for delegation in national parks should be considered.

4.8 The consultation on the draft regulations asked stakeholders whether;

- they agreed with the scope of schemes of delegation;
- there were other categories of decision which should not be delegated to officials;
- planning authorities should be required to undertake local consultation on their proposed scheme of delegation;
- they agreed with the proposed approach to preparing and adopting schemes.

4.9 Views expressed in relation to the draft regulations on schemes of delegation were broadly positive. Most agreed with the broad scope proposed in the consultation document, although comments in the responses to suggest specific modifications to criteria for delegation were relatively common.

4.10 In terms of the practical implementation of schemes, respondents were divided on the extent to which local consultation should be required - planning authorities tended to be opposed to consultation on schemes of delegation, frequently noting they were not required to consult on the schemes they currently prepare. Although a fairly common suggestion was that this could be recommended as good practice.

4.11 Most broadly agreed with the proposed approach to adopting schemes, although again, a number of specific issues and suggestions were raised, including around the prescribed timescales and set procedures.

Options

Option 1 Do Nothing

4.12 The Do Nothing option is not considered realistic. The provisions on schemes of delegation are a core element of the 2006 Act as part of the drive to increase efficiency and speed up the planning system. The Act requires that as soon as practicable after the coming into force of section 17 of the 2006 Act planning authorities prepare a scheme of delegation. The regulations are necessary to make provision for the form and content, and procedures for preparing and adopting a scheme of delegation.

Option 2 Draft Regulations – February 2008

4.13 The draft regulations included seven different sets of circumstances in which applications would be prevented from being delegated to officers under a section 43A scheme of delegation. These were where applications are significantly contrary to the development plan; involve EIA development; have attracted a significant body of objections; where there

is an outstanding objection from a statutory consultee; where the planning authority has a financial interest and where the application is made by the planning authority or a member of the planning authority. It was not proposed to require public consultation on the preparation of schemes.

4.14 The draft regulations set out detailed processes for the adoption of schemes and approval by Scottish Ministers, including setting out details of timescales. It was proposed that local authorities would have to submit their draft schemes to Scottish Ministers, who would in turn provide comments on the scheme. The authority would then be obliged to demonstrate whether they had taken on board these comments and, if not, provide reasons why. Scottish Ministers would have the power to prevent the authority from adopting the scheme.

Option 3 Final Regulations – December 2008

4.15 The final regulations have been shortened and simplified and are less prescriptive. The scope for planning authorities to develop schemes of delegation reflecting their own local circumstances has been increased. The intention is that the full range of planning decisions should be capable of being delegated to officers. The restrictions preventing cases from being delegated have been reduced from seven to two, which are that planning authorities may delegate any application from the category of local developments unless there is member or an authority financial interest in the application.

4.15 The procedure for adoption of a scheme of delegation has also been simplified in comparison with the draft regulations. In terms of presentation the regulations have been combined with the Local Review Procedure regulations, reducing the number of statutory instruments which will aid usability.

Costs and Benefits

Sectors and groups affected

Public Sector

4.16 The schemes of delegation regulations will mainly impact on local authorities, who will have to develop and adopt schemes, make them available for inspection and use them in processing applications for 'local' developments. Under the regulations local authorities will be required to prepare schemes of delegation at intervals of no greater than every 5 years and whenever required to do so by Scottish Ministers.

4.17 The intention is that local developments which are neither complex nor controversial should be delegated for decision by officials to promote efficiency. While the majority of authorities already operate effective delegation systems, an increase in the level of delegation is thought to assist authorities in meeting time targets for the determination of applications. This is primarily by avoiding difficulties in timing and scheduling of applications within the normal committee cycle and the Officer input in applications at Committee.

4.18 Scottish Ministers will have a role in the approval of schemes which each local authority will be required to review at least every five years.

Business

4.19 The manner in which local authorities prepare and adopt a scheme of delegation, for their internal processes will not have a significant impact on business interests. The schemes will be available online and within local areas which will allow businesses to access the scheme should they wish.

Voluntary sector

4.20 There were some concerns, from the voluntary and community sectors, that officers were less likely to take community views into account than their members, and that the process was open to abuse by developers. There is already a high level of delegation operating successfully across Scotland.

General

4.21 Greater rates of delegation could lead to faster decisions for all groups of applicants.

Costs

4.22 The costs of preparing the scheme are not anticipated to be an additional burden on local authorities since they already prepare schemes of delegation under local government legislation. In that respect there is no difference between options 2 and 3. The schemes will enable local authorities to deal with planning applications effectively and efficiently. Local authorities will be required to make copies of the scheme available for view at the planning office, local libraries and on the internet; there are not expected to be significant financial costs resulting from these requirements which are in the interests of transparency and providing access to information.

4.23 Marginal savings to the planning service may arise either through a reduced case officer burden in preparing and presenting to committee and also from shorter/fewer committees. However, given additional changes proposed through removing minor applications from planning control it is not possible to accurately quantify overall savings. If, however, the reduced burden of Committee workload were to translate into an modest average time-saving of one hour per week for one FTE Manager of the Planning Service when considered across the system as a whole then this would equate to an estimated cost saving of £134,150⁷. However, this is unlikely to result in an 'actual' cost saving (i.e. budget/staff cuts) but would be felt through increased productivity and turnaround of applications.

4.24 The schemes of delegation as proposed in the regulations will not result in additional costs to business.

Benefits

4.25 In finalising the regulations the intention has been to ensure they are as simple and straightforward as possible. The regulations provide greater flexibility to local authorities to

⁷ Planning Reforms: An Impact Assessment (December 20, 2005)
<http://www.scotland.gov.uk/Publications/2005/12/1694823/48239>

develop schemes which are most appropriate for their areas - local solutions for local areas. The removal of various restrictions on the ability for local authorities to delegate has the benefit of allowing more applications to be delegated, increasing efficiency and the speed of decisions. Removal of some of the terms from the draft regulations (option 2 version) which were felt to be open to interpretation avoids the potential for different interpretations to be made.

4.26 Simplifying the procedures for Ministerial approval of schemes has the potential to allow schemes to be approved and implemented faster without compromising Ministers approval powers.

4.27 Where businesses apply for planning permission their case may be delegated through a section 43A scheme of delegation, delegation to officials could mean that the application is processed more quickly, as soon as the officer is able to reach a determination rather than having to wait to fit in with planning committee cycles. Where a case is delegated in this way it would affect the route the applicant would have open to them to challenge the decision in which case it would be to require a local review rather than appealing to Scottish Ministers.

5 Local Review Bodies

Background

5.1 Where an applicant is dissatisfied with the decision taken by an officer under a new scheme of delegation they will be entitled to require the planning authority to review the case. This is a significant change to existing arrangements where such appeals are currently made to Scottish Ministers.

5.2 To carry out reviews each authority will need to establish a local review body (LRB) with a minimum of three elected members. It is expected that the LRB will be supported by officials who were not involved in reaching the decision under review. The majority of reviews of local developments would be determined quickly and locally, recognising that local authorities are best placed to take decisions on such local issues.

5.3 We want to ensure that local review bodies operate to a high standard and processes for reviewing decisions locally ensure the highest standards of fairness, independence, transparency and customer care. Elected members will continue to have regard to the Standards Commission's Councillor's Code of Conduct, and its key principles, when carrying out the function of a local review body.

Consultation

5.4 The responses to the White Paper raised some concerns about local review bodies and these have been reiterated in recent stakeholder discussions. Concerns include the independence of the review body, the need for training, resources and about the potential for further appeals.

5.5 The majority of respondents, across all respondent groups, raised concerns about the potential independence and likely competence of the proposed LRBs. Many observations queried how the LRB was to be constituted and indicated some concern over a panel

composed entirely of local members, with concerns about potential for bias, undermining public confidence in the system.

5.6 Some concerns were raised about the resource implications of the proposal with views expressed that there would be a substantial increase in member and officer workloads. There were queries regarding the availability of planning advice (with some specific concerns about architectural and ecological matters) to the LRB, since officers involved in the decision reviewed may not be involved in the review. Some considered that there would be a greater need for planning consultants, others that local authority lawyers could do much of the work. There was a strand of opinion which felt that the distinction between reviewing the decision and considering the proposal afresh may be difficult to maintain in practice.

5.7 There was no consensus amongst respondents as to whether the proposed arrangements would speed up or slow down the process. Some considered that the proposals would merely move a burden of casework from Directorate for Planning and Environmental Appeals to the local authorities, who were already "overburdened and understaffed". The alternative view was that for the vast majority of straightforward applications it would provide a quicker and less problematical route to a decision.

5.8 Respondents were broadly in favour of the proposed local review body size, although it was suggested that regulations should permit greater flexibility for planning authorities to set this. The final regulations have removed the cap on numbers of elected members who may be on the local review body, adding flexibility. Review timescales were also broadly supported, although again some suggested some degree of modification flexibility in the timescales for various stages in reviews has been added, providing more discretion.

Options

Do Nothing

5.9 The Do Nothing option is not considered realistic. The 2006 Act contains provisions for regulations to make provision as to the form and procedures of local reviews. Scottish Ministers are committed to implementing the Act to reform the planning system.

Draft Regulations – February 2008

5.10 Where an applicant is dissatisfied with a delegated decision, or the failure to take one, they will be entitled to require that the planning authority review the case. This is a significant change to the current position and is one which must not reduce the quality of examination.

5.11 The draft regulations set out detailed procedures for applicants to require a review. A 3 month timescale for requesting review was proposed, and the information that should be provided in making the review were also set out. Third parties would not be invited to make additional comments to those made during the course of considering the planning application. It was proposed that each review body should comprise between 3 and 5 elected members and suggested that a wider pool of trained elected members should be available when conflicts of interest arise and timescales for coming to a decision have been altered. Procedures for the determination of reviews were also detailed and the content of decision notices prescribed.

Final Regulations – December 2008

5.12 The final regulations for local reviews have not been reduced in length but have been re-ordered to read more clearly and to reduce repetition. They are now in the same statutory instrument as schemes of delegation given the close linkages between the two areas. Provisions in the final regulations cover

- Composition of review body and meeting in public -the cap of 5 on the number of elected members who could be on a local review body has been removed, to allow flexibility for local authorities to put in place structures which they find most appropriate for their areas.
- Process for seeking review and notifying interested parties – the regulations require reviews to be made on a form obtained from the planning authority.
- Procedure for local review body – rather than requiring various stages to be carried out within prescribed timescales, there is more discretion for the local review body to determine the schedule, as Scottish Ministers have powers to do on appeals.
- Decision notices and electronic communication
- Schedule on Hearing Session Rules

5.13 The regulations set out a clear process about key steps to be followed, but allow the local review body to use some discretion over the type of procedure they think is appropriate in individual cases and allowing them power to set timescales for the provision of documents and further information and in setting up and giving notice of hearing sessions and site inspections. This reflects the Scottish Ministers approach for appeals.

Costs and Benefits

Sectors and groups affected

Local authorities

5.14 Each local authority will be required to establish a local review body to deal with the reviews it receives. This will be a new function for authorities to deliver. The frequency in which they hold review sessions will depend on the level of review requests they receive from applicants dissatisfied with a delegated decision. In 2007/08 householder developments, single dwellings, dwellings of 2-9 units, non-householder developments to alter or change a building, accounted for 745 appeals to Ministers these are some of the types of cases suitable for consideration through a section 43A Scheme of delegation if the individual scheme allowed in the particular circumstances which could be subject to later review. It should be noted that some householder and other minor developments will no longer require planning permission under forthcoming proposals to extend permitted development rights. The Review of the General Permitted Development Order 1992 research⁸ carried out by Heriot-Watt University, Brodies LLP and Scott Wilson Scotland Ltd indicates extending permitted development rights could reduce by 38% the annual number of householder applications submitted to planning authorities. The removal of these cases from the planning application system may also remove a proportion from the appeals and now reviews systems.

5.15 There will be roles for both elected members and from them to be serviced by officials potentially from the legal department, particularly in preparing and issuing the final written decisions.

5.16 However it will mean they need expend fewer resources in appeals to Scottish Ministers.

Business / Applicants

5.17 Rather than appealing to Scottish Ministers where they are unhappy with a delegated decision, applicants will be able to require the planning authority through the local review body to review the case. This will allow decisions to be reviewed locally without the involvement of Scottish Ministers. Some applicants may find this easier and more convenient to them. As local reviews are not intended to be adversarial processes, applicants may feel more comfortable representing themselves as they will not face formal inquiry situations. Some sectors of industry and applicants may however question the independence of reviewed decisions.

⁸ Review of the General Permitted Development Order 1992: Research Findings
<http://www.scotland.gov.uk/Publications/2007/03/29102830/1>

Voluntary

5.18 The proposed changes to the appeals system including making it less adversarial may make engagement less time consuming/ difficult and so easier for those who are giving of their time to support the process.

Costs

5.19 There are some cost implications on local authorities associated with establishing local review bodies. Given the potential for variation in the approach on local review bodies costs may vary across planning authorities. The resource cost of local review bodies is likely to depend on the membership level/composition of each body, the number of local review bodies an authority establishes, the frequency/demand for meetings and the level of preparatory work required for each meeting. Costs will relate to the committee time of the review body and the administrative costs in servicing it and drafting decisions. Members on local review bodies should receive training to ensure they have the necessary skills, in chairing sessions and holding tribunals and planning matters. The review will focus on material already before the authority when the application was originally considered. While the body may occasionally consider cases where oral representations need to be managed it is anticipated that in the majority of cases consideration of the issues will not involve complex process or lengthy procedure. Staff requirements are likely to vary on a case-by-case basis according to the need for planning or other specialist input but it appears that associated costs would not be greater than those associated with any other committee of the Council. Costs are likely to be the same for options 2 and 3.

Benefits

5.20 Some efficiencies may be made in making reviews of local developments the responsibility of local authorities. Cases being processed at local review will reduce the need for officials to contribute to appeals to Scottish Ministers including preparing for some hearing and inquiry sessions.

5.21 Local review procedures may make the review procedure locally accessible for members of the public, unhappy with the outcome of the decision on a minor planning matter, rather than having to appeal to Scottish Ministers. It would also avoid the possibility of facing adversarial inquiry processes in procedures relating to planning permission for a local development.

5.22 Important efficiencies overall can be made in making the review of local developments the responsibility of local authorities. This also emphasises the importance of local democracy and accountability.

6. Appeals

Background

6.1 Applicants for planning permission currently have 6 months from the date of the decision within which to appeal to Ministers against refusal of planning permission or against the conditions subject to which permission is granted. In light of concerns about uncertainty

during the length of this period of it is proposed to reduce the time period allowed for appeals to 3 months.

6.2 When an appeal is made to Scottish Ministers it should be accompanied by full grounds of appeal and any supporting documentation. The planning authority will be required to provide any additional material as was before it and taken into account in reaching its decision. This reinforces the principle that the appeal examines the same proposal considered by the planning authority. In acting in this way we are responding to the concern that the development proposal mutates during the life of the application and appeal process so uncertainty is reduced and those involved are faced with a cycle of submissions and rebuttal.

6.3 There are currently three methods by which planning appeals can be determined - written submissions, hearings or inquiry. The current appeal system allows the principal parties to select the appeal method, which means a party can insist on an inquiry or a hearing even for the least complex of appeal cases. It is intended to provide more powers for the appointed person to direct the manner in which to carry out the examination of the case and how best to arrive at a decision.

6.4 We propose that Scottish Ministers will take into account the principal parties' preferred method of determination. However, the decision on which method is used will be made by Scottish Ministers. In some instances this will mean an appeal can be decided based on the material submitted and without further reference to parties. The existing right to be heard will therefore be removed, avoiding the need to hold hearings or inquiries where these are not necessary to fully examine the issues.

6.5 The inquiry process will thus be reserved for those issues where cross-examination is needed. Generally a combination of the methods outlined above will be applied. We propose that the appeal process should become more proportionate without reducing the quality of decision.

6.6 Over 90%⁹ of the Directorate for Planning and Environmental Appeals' casework is dealt with by the exchange of written submissions. Under this procedure a structured and timetabled series of written exchanges takes place involving the appellant, the planning authority and any other persons who have indicated their interest. These are considered by the reporter, who inspects the site, generally in the presence of the parties, and then issues his or her decision or a report and recommendation.

6.7 The figures¹⁰ for the last year show that for planning permission appeals there was the same success rate of 40% whether cases were considered by written submissions or by public local inquiry or hearing.

⁹ DPEA Review of the Year 2007-2008

<http://www.scotland.gov.uk/Publications/2008/09/30095851/0>

¹⁰ DPEA Review of the Year 2007-2008 Table 4A

<http://www.scotland.gov.uk/Publications/2008/09/30095851/0>

Consultation

6.8 The (then) Scottish Executive carried out a consultation on Modernising Public Local Inquiries in 2003 in response to which there was significant support for changes being introduced to improve efficiency. More recently, in the responses to the White Paper, some concerns were expressed about how decisions on the method of examination might be reached

6.9 Overall, views were evenly balanced in terms of support for and opposition to reducing the timescale for lodging an appeal but different stakeholder groups tended to take different positions on the issue. Local authorities and the voluntary sector broadly supported the proposed arrangements whereas businesses and professional bodies were generally opposed. Those who object to this element of the proposals refer to a lack of time to fully consider objections and options, including submission of a revised planning application.

6.10 The consultation paper on the draft regulations asked three specific consultation questions around the invitation of additional comments from third parties, whether there was agreement that Ministers should seek to use the method of examination that best fits the circumstances of the case and whether the framework set out in the draft regulations reflect the more proportionate appeals regime envisaged in the White Paper.

6.11 There was general agreement with proposals for Ministers to determine the method of examination, although safeguards were suggested to demonstrate that appellant and planning authorities' preferences are considered. Most felt that the overall approach to appeals was more proportionate although again some suggested modification or raised issues. There was a common view that additional comment should be permitted where appellants introduce new material. Transparency and fairness were key themes. There were some concerns that reducing the time period for lodging appeals could increase the volume of appeals that are lodged to Ministers.

6.12 The core objection to preventing schemes from being amended after an appeal was lodged was the fact that it would potentially prevent the consideration of an improved scheme and that an appeal could therefore be sustained on an earlier, inferior development application. Some responses reflected that the proposal may encourage planning applications to attempt to provide all information that could potentially be later required as evidence to an appeal, this could increase planning officer workloads and was felt to be neither practical nor efficient.

6.13 Finer details of the regulations have been discussed with key stakeholders over the course of the summer.

Options

Option 1 Do Nothing

6.14 This option is not considered feasible. There has been a long standing drive to modernise the appeals system, to ensure it avoid unnecessary complexity or lengthy procedures that do not add value to the quality of decision.

Option 2 Draft Regulations – February 2008

6.15 A reduction of the timescale for submitting an appeal to 3 months was proposed. The method of examination for an appeal would be decided by Ministers, and the introduction of new material restricted to frontload the system and to ensure that the information at appeal stage is largely that which was before the planning authority when the original determination was made. While precognitions will be retained they will be restricted to a length of no more than 2,000 words.

Option 3 Final Regulations – December 2008

- 6.16 The final regulations cover
- The notice of appeal and the planning authority's response
 - Notification to interested parties
 - Provisions to determine without further procedure
 - Provisions for further procedure, site visits and new evidence
 - Schedules on Hearing and Inquiry session rules.

6.17 The finalised appeals regulations are slightly longer than the consultative draft but now also include provisions for other types of planning appeals, other than in relation to planning permission. The final regulations include provisions for appeals against enforcement notices, against amenity notices, against section 168 notices and against refusal of certificate of lawful use or development. It is felt to be of benefit to users of the system to collate different appeals provisions together and in line with the drive for clarity and efficiency.

Costs and Benefits

Sectors and groups affected

6.18 The appeals regulations have an impact on appellants including developers and their agents and representatives, local authorities, Scottish Ministers and other interested parties to particular appeals such as objectors.

Costs

6.19 Some respondents indicated that a reduced period for submitting an appeal could result in an increase in planning appeals being lodged. South of the border a similar timescale reduction was held to have resulted in an increase in the number of appeals being made, and the timescale reverted. However our changes are part of wider reforms to the appeals system and have been widely publicised. This would need to be considered against other measures to restore balance and fairness in the appeal system and there is no indication that costs overall

would increase. It is anticipated that a reduction in the timescale would be cost neutral or result in saving for local authorities.

6.20 Given the restrictions on the ability for appellant to revise the scheme which was refused by the planning authority and take it to Scottish Ministers on appeal –where an appellant wishes to alter proposals following a decision by the planning authority a revised planning application should be submitted to the planning authority. This may attract a fresh planning fee to be paid to the planning authority, although the applicant may benefit from being able to submit an application without paying a fee, if the application is for the same character or description of development on the same site.

6.21 It is still likely that at least the Case Officer, and possibly any specialist appeals staff or Management would want to attend any appeal hearing if that were the chosen form for resolution. This is likely to be less time consuming than current hearing or inquiry cases. In the case of written submissions, the time impact to the authority would be negligible on the basis that existing material would be used to determine the appeal

6.22 The costs associated with this proposal are assumed to be minor to negligible depending on the form the appeal hearing takes, and the effect of other proposals on the overall level of appeals. Appeal work (also including Enforcement) was estimated in the Impact Assessment of Planning Reforms¹¹ to cost almost £6.4m across the planning system. A significant proportion of the appeal component of this cost could be reduced under these proposals.

6.23 Costs to business may be less than in old-style appeals given that inquiries and the associated representation appellant may seek will not be required in every case.

Benefits

6.24 Reducing the timescale open to applicants to lodge a planning appeal would reduce the period of uncertainty among communities and local authorities as to whether an appeal and the final decision had been made.

6.25 Compared to current practices that involve significant document review and preparation, a greater focus on review of the material before the planning authority could present time/resource savings, particularly at Case Officer level, although it is not possible at this stage to quantify that.

6.26 Providing for Scottish Ministers to decide on the method of examination may mean fewer cases are considered as a whole at inquiry, inquiry procedures will not always be appropriate or where they are required they could be used in conjunction with other methods such as written submissions or hearings. This may deliver time savings for all parties to an appeal as a result, as appeals become; more efficient, faster and less adversarial.

6.27 The principles of front-loading the system apply to appeals to Scottish Ministers as they do to the rest of the planning process. Section 47A of the Act restricts the ability of parties to introduce matters that were not before the planning authority at the time the proposal was considered by them. An appellant wishing to introduce new material into the

¹¹ Planning Reforms: An Impact Assessment
<http://www.scotland.gov.uk/Publications/2005/12/1694823/48259>

appeal process will be required to demonstrate either that the material could not have been made available earlier in the process or that it is being produced in consequence of exceptional circumstances. Whilst the proposed changes do not reduce the responsibility on those making determinations under the Planning Acts to take account of all material considerations and to have regard to the provisions of the development plan, the appeal process should not be used as an opportunity to significantly change proposals or to produce supporting material that should properly have been made available to the planning authority and the community earlier in the process.

7.0 Small / Micro Firms Impact Test

7.1 The existing appeal system often demands a significant outlay of time and funds, so the use of simpler, faster and more transparent procedures should reduce costs for all businesses, and mean that small companies are not disadvantaged in comparison with better resourced firms.

8. Legal Aid Impact Test

8.1 The impact of these regulations on the legal aid system should be minimal. Civil legal aid will not be available for legal representation at planning examinations. It will remain available for appeals to the Court of Session on points of law but there is nothing to suggest that the regulations will increase the likelihood of that. Initial Advice and Assistance under Legal Aid will still be available to enable eligible individuals to receive advice from a solicitor concerning a planning matter. The new planning examination system is, however, intended to be less legalistic and adversarial in operation. Proposed changes should not, therefore, increase the requirement for legal advice for individuals engaging with it.

9. "Test Run" Of Business Forms

9.1 The draft regulations do not contain business forms. Those seeking a review of a delegated decision will be required under the regulations to do so on a form obtained from the planning authority and in the case of those seeking to appeal to Scottish Ministers they will have to serve their notice of appeal on a form obtained from Scottish Ministers. The exact format of the forms is not prescribed in the regulations.

10. Enforcement, Sanctions and Monitoring

10.1 The regulations will have the strength of law and so the proper exercising of the proposed duties contained in them can ultimately be tested in the courts.

10.2 Under the terms of the 2006 Act, planning authorities are required to keep their Scheme of Delegation under review, and are to prepare a scheme whenever required to do so by the Scottish Ministers.

10.3 The regulations are part of the wider modernisation of the planning system. We will be monitoring the way planning authorities implement the changes resulting from the 2006 Act and associated secondary legislation including the Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2008 and the Town and Country Planning (Appeals) (Scotland) Regulations 2008. The intention is to review the policy after its first year of operation with a targeted consultation with those using the policy.

The Directorate of the Built Environment also liaises closely with local authorities and representatives of the business community, and so the Government will be made aware of any dissatisfaction with the way the new appeals and reviews procedures are operating.

11. Implementation and delivery plan

11.1 The regulations will be laid in Parliament in December 2008. The intention is for the regulations on schemes of delegation to come into force on 6th April 2009, providing for local authorities to meet the commitment in the Common Statement *[Delivering Planning Reform](#)*¹² to produce a scheme of delegation by end June 2009. The remaining parts of the regulations on local reviews and appeals will come into force on 3rd August 2009. Draft Circulars will be available in advance and will be finalised in line with the coming into force of the Regulations, the Circulars are designed for use by both regulators and businesses.

11.2 The primary responsibility for the operation of the planning system lies with local and national park authorities. Scottish Ministers have a role in approving schemes of delegation and with the Directorate for Planning and Environmental Appeals also have a role in determining planning appeals and called-in applications. The Scottish Government will work with Local Government to raise awareness of the contribution planning reform can make to sustainable economic growth, and publicise the modernised legal framework including the new regulations on schemes of delegation, local reviews and planning appeals and called-in applications. Agencies, the private sector and the RTPI will also participate actively in this programme of work in delivering reform and culture change.

12. Post-implementation Review

12.1 These regulations are part of the wider modernisation of the planning system. *[Delivering Planning Reform](#)* sets out the commitment that the Scottish Government will provide opportunities where issues with the new system can be discussed and solutions identified and communicated more widely. The intention is to review the policy through targeted consultation with those using the policy after its first year of operation to ensure it is delivering the intended benefits, is fostering good partnership working, and no administrative or legal barriers are reducing the effectiveness of its impact. We will continue to monitor its effectiveness after that. Major new regulations have to be monitored within three years of coming into force.

¹² Delivering Planning Reform (Nov 2008)
<http://www.scotland.gov.uk/Publications/2008/11/05100742/0>

13. Summary and recommendation

Summary

13.1 The changes to the appeals system are intended to make the process for challenging planning decisions more efficient without reducing the high quality of determination. The Schemes of Delegation and Local Review Procedure Regulations set out the processes for the preparation, content and adoption of new schemes of delegation, to increase efficiency, and to ensure that the procedures for requiring a local review and how they are run are clearly set out. Similarly the Appeals Regulations prescribe procedures for making appeals and around the determination of appeals.

Recommendation

13.2 It is recommended that for each of subject areas; schemes of delegation, local reviews and appeals that option 3 be implemented and the finalised regulations be laid and brought into force. This option supports the Scottish Government’s aim for a modernised planning system. The regulations are necessary to ensure there are clear

13.3 In view of the above, it is recommended that the Regulations are introduced into Scottish law.

14. Declaration and Publication

I have read the Regulatory Impact Assessment and am satisfied that the benefits justify the costs.

Signed

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Date

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Stewart Stevenson MSP
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