*These notes relate to the Transport and Works (Scotland) Act 2007 (asp 8) which received Royal Assent on 14 March 2007*

# TRANSPORT AND WORKS (SCOTLAND) ACT 2007

## EXPLANATORY NOTES

### THE ACT – SECTION BY SECTION

### Part 1 – Orders Authorising Works Etc.

### Power to make orders

#### *Section 1: Orders as to transport systems and inland waterways*

8. Section 1(1)(a) gives the Scottish Ministers a power to authorise, by order, the construction and operation, or matters connected with the construction and operation, of the transport systems specified in the section. Section 23 provides a definition for each of the transport systems.

9. Section 1(1)(b) gives the Scottish Ministers a power to authorise, by order, the construction and operation of an inland waterway. An inland waterway is defined in section 23 as including both natural and artificial waterways and therefore may include rivers, lochs and canals.

#### *Section 2: Subject-matter of orders under sections 1*

10. Section 2 provides details of the matters that can be contained within an order to provide the necessary authority to give effect to a proposed development.

11. Subsection (1) introduces schedule 1 which contains a non-exhaustive list of matters that may be contained within an order. Any matter within the proposed order would have to fall within the legislative competence of the Scottish Parliament (see section 29 of the Scotland Act 1998).

12. Subsection (2) allows an order to be made in relation to more than one scheme, system or mode of transport. This means that an order could contain details of matters that might need to take place at a number of locations in order for, for example, the creation of a system. The subsection also permits an order to contain provisions relating to more than one mode of transport.

13. In order to give effect to a particular proposal in a particular location it may be necessary to modify or amend other legislation. Subsection (3) provides the power to modify, amend or exclude any enactment relating to the purpose of the order. The provision in question under an order must be within devolved competence (see section 54 of the Scotland Act 1998) and therefore it may not be possible to modify the law on reserved matters such as the law relating to health and safety.

14. Subsection (4) enables the Scottish Ministers to include within an order any provision that they believe is necessary or expedient to give effect to an order or relevant earlier legislation.

15. Subsection (5) confirms that provision can be made in respect of fixed penalty notices for discharging liability for offences. Subsection (6) provides a definition of "fixed penalty notice".

16. Subsection (7) means that a right of way cannot be extinguished unless either an alternative right of way has been or will be created, or there is no requirement for an alternative right of way.

### *Section 3: Crown land*

17. Section 3(1)(a) enables a right over or in Crown land (not in itself being a Crown right) to be acquired through the order by compulsion with agreement from the appropriate authority. The right over or in Crown land may, for example, relate to a third party right of access over Crown land to provide access to a private dwelling. A right in Crown land can be acquired compulsorily if the interest is owned other than by the Crown as stipulated under subsection (3) and if the relevant Crown interest agrees, as set out in subsection (4).

18. Subsection (1)(b) allows a right belonging to the Crown to be affected by any provision in the Act or an order made under the Act with agreement from the appropriate authority (excluding compulsory acquisition). Subsection (1)(c) enables a third party right in land in which there is a Crown interest to be affected by section 18 of the Act which enables the Scottish Ministers to grant promoters access to land for surveying purposes in relation to a transport proposal with agreement from the appropriate authority.

## Procedure for making orders

### *Section 4: Applications*

19. This section describes the process for the making of applications. Subsection (1) provides the Scottish Ministers with the power to make on application an order. The application has to be made in accordance with rules that will be made under this section.

20. Subsection (2) provides details of the matters on which the Scottish Ministers can make rules relating to the application, the documentation and information to be submitted in support of the application, the notice and publication arrangements and the conduct, scope and manner of the pre-application consultation.

21. Subsection (3) enables the rules to require the Scottish Ministers to provide an opinion on the information to be supplied with an application. This power could be exercised to scope the environmental information required in connection with a development. The subsection also covers publicity for that information.

22. Subsection (4)(a) provides that the rules under the section can require compliance with directions in relation to matters concerning relevant authorities providing information for a project and pre-application consultation. Subsection (7) provides a non-exhaustive list of those bodies who may be required to provide information.

23. The ability for the Scottish Ministers to set fees for the making of applications is contained within subsection (6).

### *Section 5: Cases where other Member States are affected*

24. This section clarifies the position in respect of the international obligations of the Scottish Ministers to ensure that other Member States of the European Economic Area (which includes the nations of the European Community plus Norway, Iceland and Lichtenstein) are notified of developments that are likely to affect them or are provided with information on request if they are likely to be significantly affected by any proposed development.

25. Subsection (1) provides the Scottish Ministers with power to make rules regarding the provision of information, the consultation process and how the Scottish Ministers will notify other Member States of matters relating to their decision.

26. Subsection (2) confirms the context for the actions of the Scottish Ministers, as described within the rules. Subsection (3) provides the reference for which states constitute a Member State.

### *Section 6: Orders made otherwise than on application*

27. This section enables the Scottish Ministers to make an order to allow them to take whatever steps they believe are necessary or expedient to address the circumstances where a promoter or operator fails to comply with the terms under which authorisation of an order has been given or a promoter or operator abandons or neglects the works subsequent to their authorisation by an order. It also allows the Scottish Ministers to get rid of spent provisions in an earlier order and to bring forward themselves an order to authorise the construction and operation of works under section 1.

28. Subsection (1) sets out the circumstances in which the Scottish Ministers may act. Subsection (2) provides powers for the recovery of any costs incurred by the Scottish Ministers in suspending or discontinuing any operations under subsection (1) or in addressing any abandonment or neglect of any works. Subsection (3) provides details of the publication arrangements to which the Scottish Ministers must adhere if they act under the powers of this section.

### *Section 7: Model provisions*

29. This section enables the Scottish Ministers to issue and publish guidance to prospective applicants on the provisions that may be incorporated within their draft orders. Subsection (2) provides that different guidance may be issued for example to reflect the different circumstances of different types of project.

### *Section 8: Objections and representations*

30. Section 8 enables the Scottish Ministers to make rules in relation to objections made in respect of an application for an order (subsection (1)(a)(i)) or when they are making an order without an application being made to them (subsection (1)(a)(ii)). The power to make rules includes the ability to make provision in relation to representations.

31. Subsections (2) and (4) provide that the Scottish Ministers must take any objection into consideration before deciding whether or not to make an order, unless they decide to hold an inquiry or hearing, in which case, they must consider the report from the inquiry or hearing before making an order. Subsection (3) enables the Scottish Ministers to disregard an objection if it is withdrawn or they consider it to be frivolous or trivial or it relates to compensation. Subsection (5) states that rules may allow the Scottish Ministers to waive some of the rules under this section which would otherwise apply. In addition, the rules may allow the Scottish Ministers to require compliance with certain rules which would not otherwise comply. Subsection (8) enables the Scottish Ministers to make rules in respect of representations.

### *Section 9: Inquiries and hearings*

32. This section allows the Scottish Ministers to hold an inquiry or hearing into an application or a proposal for an order. It obligates, under subsection (3), the Scottish Ministers to hold an inquiry or hearing if it is requested by, and there is a valid objection from, a local authority or National Park authority or Transport Partnership in whose area works would be carried out, or a navigation authority affected by any works proposed by the order, or Network Rail Infrastructure Limited (if the proposed works affect the construction or operation of a railway) or someone subject to a compulsory purchase of their interest in land.

### *Section 10: Procedure at inquiries and hearings*

33. This section allows the Scottish Ministers to make rules to regulate the proceedings of an examination, which may take the form of an inquiry or hearing.

34. Subsections (1) and (2) describe the matters which the rules may regulate. Subsections (3) and (4) ensure that for consistency of approach particular provisions of the Local Government (Scotland) Act 1973 which apply in respect of an inquiry or hearing under that Act will apply in similar circumstances to an examination carried out under the provisions of the Act.

35. Subsection (5) requires the Council on Tribunals to be consulted on the making of any rules under this section.

### *Section 11: Making or refusal of orders under section 1*

36. Subsection (1) provides for the circumstances to which this section relates namely when an application for an order has been made or there has been a proposal for an order without an application having been made.

37. Subsection (2) provides the power to make an order with or without modifications or not to make an order. Subsection (3) allows the Scottish Ministers not to make an order if they believe that there is another means by which the object of the order could be achieved. It is permissible under subsection (4) for the Scottish Ministers to make a determination to proceed with certain elements of a proposal whilst making a separate determination in respect of, or deferring consideration of, other matters within the application.

38. In those instances when the Scottish Ministers propose to make substantial modifications to an applicant's proposal the Scottish Ministers are, under subsection (5), under a duty to notify any person who is likely to be affected, to give that person a chance to make representations and to consider those representations.

39. Subsection (6) ensures that any order that is not subject to Parliamentary scrutiny comes into force when notice of the determination is published in the Edinburgh Gazette unless the order provides for a later date for its coming into force.

### *Section 12: Publicity for making or refusal of order*

40. This section sets out the arrangements for the publicity for the making or refusal of an order.

41. A duty is placed on the Scottish Ministers to give notice to the persons as specified in subsection (1) and to publicise the notice in the Edinburgh Gazette, which is the official newspaper of record in Scotland and is the primary source for a range of official notices. The information that must be contained within the notice is set out in subsection (2). Subsection (3) ensures in those instances when there is a requirement for an order to be laid before the Scottish Parliament that the notice must advise that the order cannot come into force unless the Scottish Parliament by resolution approves the order.

42. Subsection (4), where it applies, also requires the notice to cover additional matters. Those matters relate to consideration of the environmental statement, a definition of which is provided within subsection (5).

43. Subsection (6) amplifies the information that must be contained within a notice in respect of certain environmental considerations. Subsection (7), supplemented by the definition in subsection (9), states that subsection (4) applies in relation to projects in a class as listed in the European Directives on the assessment of the effects of certain public and private projects on the environment.

44. Subsection (8) transposes an element of Directive 85/337/EEC (as amended by Directive 2003/35/EC, which provides for public participation in respect of plans and

programmes relating to the environment and amends with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC) and means that any non-governmental organisation promoting environmental protection and meeting any requirements under the law shall be deemed to have an interest for the purposes of Article 10a(a) of Directive 85/337/EEC (as amended) and rights capable of being impaired for the purposes of Article 10a(b) of the Directive and shall be able to challenge the substantive or procedural legality of decisions.

45. Subsection (9) provides the appropriate references.

46. Subsections (10) and (11) direct the Scottish Ministers to send a copy of their determination notice containing such information as relates to the environmental statement to persons who made an objection, those who made a representation or those that made both a representation and an objection.

47. Subsection (12)(a) directs, in those instances where the Scottish Ministers make a determination on an application, the promoter to make arrangements to publish in a local newspaper a copy of the Scottish Ministers' determination, the reasons for the determination, the matters taken into consideration and the extent of public participation in the process prior to the decision and information as to the right of challenging the decision. Under subsection (12)(b) the Scottish Ministers are obliged to publish similar information in respect of a development which they have promoted.

48. Once an order has been made the person who applied for the order or the Scottish Ministers, if they have made an order without an application being made to them, must place with the Scottish Parliament a copy of the order and such documentation as is described in subsection (13)(a) and deposit with the local authority and the National Park authority within whose area the proposed works are to take place a copy of the order and documents as described in subsection (13)(b). Subsection (14) dis-applies subsection (13)(a) for developments of national significance or otherwise considered by the Scottish Parliament under section 13.

49. Subsection (16) places a duty on a relevant authority to make the deposited documentation available for inspection by any person, free of charge at all reasonable hours.

### *Section 13: "Developments of national significance" etc.: special procedure*

50. This section obliges the Scottish Ministers to seek an affirmative resolution for any order containing provisions which authorise a national development as designated within the National Planning Framework or if the order contains provisions which seek to amend a Private Act of the Scottish Parliament. The section also permits the Scottish Ministers to seek, if they so wish, an affirmative resolution for any order made under section 1.

51. Subsections (5) and (6) place a duty on the Scottish Ministers to publish certain information in the Edinburgh Gazette and a local newspaper once the Scottish Parliament has decided whether to approve an order.

52. Subsection (7) states that an order which seeks to amend, revoke or re-enact an instrument laid before the Scottish Parliament will be subject to affirmative procedure only if the order authorises works which constitute a different national development or amends a Private Act of the Scottish Parliament or the Scottish Ministers so direct.

## Consents etc. under other enactments

### *Section 14: Consents etc. under other enactments*

53. This section enables consents, permissions or licenses relevant to an application or proposal to be considered and dealt with through an order. Subsection (3) provides for the Scottish Ministers to make regulations in relation to consents which would not

otherwise be granted through the order under section 1. Subsections (4) and (5) set out what the Scottish Ministers may cover in the regulations.

### *Section 15: Town and country planning*

54. This section enables the Scottish Ministers by way of an order under section 1 to grant planning permission for a development. Subsection (2) makes an insertion into the Town and Country Planning (Scotland) Act 1997 so as to cover land blighted by a development pursuant to an order under section 1.

## Miscellaneous

### *Section 16: Validity of orders under section 1*

55. This section provides details of how orders may be challenged. Subsection (1) sets out the grounds of challenge and the period of time within which a challenge can be made. Subsection (2) provides details of when the challenge period starts to run. Subsection (3) describes how the Court of Session may act in relation to any challenge made and subsection (4) confirms that any challenge can only be made within the designated 42 day period as described in subsections (1) and (2).

### *Section 17: Power of certain bodies to apply for, or object to, order under section 1*

56. This section clarifies the powers of certain bodies to apply for or object to an order. Subsection (1) confirms that any body which has a current power to promote or oppose a Bill whether in the Scottish Parliament or the Parliament of the United Kingdom will also have a similar power in respect of an order made under the Act. This ensures that there is no gap in the powers of such bodies.

57. Section 17 of the Transport Act 1962 was amended by the insertion of subsection (1A) by the Scotland Act 1998 (Cross Border Public Authorities)(Adaption of Functions etc.) (No 2) Order 2000 and provides that the British Waterways Board may, with the consent of the Scottish Ministers, promote Bills in the Scottish Parliament and may oppose Bills in the Scottish Parliament. Section 17(1) makes equivalent provision in respect of the UK Parliament. Section 17(3) of the Act enables the British Waterways Board to promote or object to an order without the consent of the Scottish Ministers.

58. Subsection (4) states that any other person may apply for or object to an order. The statement clarifies that the section is merely enabling in respect of the bodies covered by it and so it does not limit the powers of other persons to apply for or oppose an order.

### *Section 18: Access to land*

59. Subsection (1)(a) permits the Scottish Ministers to set up a regime to authorise prospective applicants to access land for the purposes of informing an application for an order.

60. There are a number of matters described in a non-exhaustive list at subsection (2) that the Scottish Ministers may cover in an order providing the access regime. These matters might include establishing criteria as to whether the prospective applicant is a fit and proper person that is acting in good faith and has a genuine reason for wishing to seek access to the land; the manner and notification of application; and permitting the person who wishes to enter the land and the person whose land may be entered an opportunity to make representations.

61. The Scottish Ministers may consider under subsection (2)(a)(vi) attaching conditions and limitations to any authorisation. That is so as to ensure that the person entering land conducts their business in a safe and secure manner and that entry is planned in a manner that takes full cognisance of the interests that prevail on that land i.e. on agricultural land cropping and lambing times for instance would need to be factored into the times and

duration of entry, similarly entry to land on which rail or other operations are conducted might mean that particular conditions of entry will apply. The Scottish Ministers may make provision within the rules for statutory undertakers who are considered worthy of special protection against the prospective promoter taking access to land on which the undertakers have apparatus.

62. Under subsection (2)(a)(x) and (b)(vii) provision may be made that if the person whose land is affected refuses entry a prospective promoter may make an application to a Sheriff for a warrant to enter the land.

63. Subsection (1)(b) permits also the Scottish Ministers by order to enter land and subsection (2)(b) describes in a non-exhaustive list matters that the Scottish Ministers may contain within an order providing such an access regime.

### *Section 19: Acquisition of land by agreement*

64. This section enables a promoter, which includes the Scottish Ministers, of an order under section 1 to acquire a third party's land, provided that the third party enjoys a qualifying interest and where the use of the third party's land is or will be seriously affected by the carrying out of the construction or operation of the works authorised by the section 1 order.

65. Subsection (2) gives power to a promoter to acquire land by agreement in advance of works authorised by an order, whereas subsection (1) gives power once works or operations have commenced. Subsection (3) provides details of a qualifying interest which comprises not only an interest in domestic property but also in relevant agricultural and limited business premises. Subsection (4) states that the power to acquire land which is seriously affected by the construction of works cannot be exercised unless the acquisition begins before the project is brought into use and the power to acquire land which is affected by the use of the project cannot be exercised unless the acquisition is begun within one year of the project being brought into use.

66. Subsection (5) states that the power provided by section 19 only applies if a promoter does not already have the necessary power to acquire land by agreement.

### *Section 20: Service of notices and other documents*

67. This section provides details of how a notice or a document can be served and on whom it should be served. Subsections (1)(c) and (2) set the context within which documents can be communicated electronically. Subsection (4) describes the proper address for the serving of notices by post. In those instances where the proper address cannot be ascertained and the matter relates to an interest in, or to the occupier of, land, subsection (5) provides for a notice to be addressed to either the owner or as the case may be the occupier and left with a person resident or employed on the land or affixed to a building or object on the land.

### *Section 21 : Annual report*

68. The section places the Scottish Ministers under a duty to prepare an annual report, by 1st October each year, of the operation of the order-making process. Subsection (2) provides details of some of the matters that are to be contained within the report. Under subsection (3) a copy of the report is to be laid in the Scottish Parliament as well as being published.

### *Section 22: Orders under the Light Railway Act 1896*

69. The section ensures that an order for the purposes of constructing or operating a light railway that previously would have been made under the Light Railways Act 1896 can no longer be made by the Scottish Ministers under that Act.

### *Section 23: Interpretation*

70. The section defines terms used within Part 1.