THE PUBLIC SERVICES REFORM (PLANNING) (LOCAL REVIEW PROCEDURE) ORDER 2013

Explanatory Document

Laid before the Scottish Parliament by the Scottish Ministers under Section 25(2) of the Public Services Reform (Scotland) Act 2010.

Contents

Introduction

1. This Explanatory Document has been prepared in respect of the draft Public Services Reform (Planning) (Local Review Procedure) Order 2013 ("the Order"), which is made in exercise of powers conferred by section 17 of the Public Services Reform (Scotland) Act 2010 ("the 2010 Act"). The Order is subject to the affirmative procedure.

2. This document has been prepared for the purposes of section 25(2)(b) (procedure).

3. In accordance with section 26 of the 2010 Act, a copy of the proposed explanatory document was laid before the Scottish Parliament as part of the consultation process along with a copy of the proposed draft Order

4. The explanatory document now includes the details required by section 27(1)(f) of the 2010 Act, which relate to the consultation undertaken in accordance with section 26 and the representations received as a result of the consultation and the changes (if any) made to the Order as a result of those representations.

6. The Order amends section 43A of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act") which was inserted by the Planning etc. (Scotland) Act 2006 ("the 2006 Act"), namely:

- Section 43A(8)(c) enables an applicant to require the planning authority to review the case if the person appointed to determine the application has not done so within the period prescribed by regulations made under that section. The amendment will allow the applicant and the appointed person to extend that period by agreement.

Background and Policy Objective

7. The 2006 Act introduced the concept of local review to the planning system (the changes came into force in 2009) . Prior to this, where a planning authority decided to refuse an application for planning permission, grant permission with conditions or failed to issue a decision on the application within the specified statutory period, the applicant could appeal to the Scottish Ministers. The new local review process replaced the right of appeal in those cases where the application was for "local development" and was delegated to an appointed person for decision (rather than being considered by, for example, members of the authority sitting on a planning committee).

8. "Local developments" are those which are neither categorised as "national developments" (as specified in the National Planning Framework) nor "major developments" (as specified in the Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009 with reference to descriptions of various developments at or above certain threshold sizes). The "appointed person" is usually an officer of the planning authority.

9. Section 47 of the 1997 Act provides for appeals to Scottish Ministers where the planning authority has not issued a decision on a planning application within a period to be prescribed (normally two months for local developments) or "…within such extended period as may at any time be agreed upon in writing between the applicant and the authority". These are known as appeals on the grounds of non-determination and these must be made within three months of the end of the prescribed period or agreed extension. After that three month period the applicant would have to wait for the authority to determine the application.

10. The ability to agree an extension means that the applicant can preserve the three month period for making an appeal on the grounds of non-determination while in effect agreeing to allow the planning authority longer than the prescribed period to determine the application.

11. Section 43A(8) makes similar provision for seeking local reviews of decision by the appointed person on applications or their failure to issue such a decision within a prescribed period. However, no provision to agree extensions was included. In more complex cases applicants may choose to seek a local review on the grounds of non-determination rather than risk waiting much beyond the statutory period for determination and risk losing the right to seek such a review.

12. We propose therefore to amend section 43A(8) of the 1997 Act to allow the applicant and the appointed person to agree an extension to the prescribed period for determination.

Section 17 of the 2010 Act

13. Section 17 provides that the Scottish Ministers may by order make any provision which they consider would remove or reduce any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation. A burden in this context could be a financial cost, an administrative inconvenience, an obstacle to best regulatory practice, an obstacle to efficiency, productivity or profitability, or a sanction, criminal or otherwise, which affects the carrying on of any lawful activity.

14. The current situation means that, unless an applicant was willing to forego the right to seek a local review on the grounds of non-determination, they would normally have to seek such a local review within five months of the application being made, even where they would otherwise be content to await the decision of the appointed person.

15. The current provisions on cases subject to appeal recognise this possibility and provision is made to allow extensions to be agreed. This avoids the administrative inconvenience of cases being moved into the appeal stage just to avoid losing the right to appeal on the grounds of non-determination, and avoids the costs associated with processing such appeals by the applicant and the Scottish Ministers and the potential delays in getting a decision having started a separate decision making procedure.

16. We believe this same flexibility should be provided in relation to cases eligible for local review as well as in relation to cases subject to appeal procedures, and avoiding the inconvenience and cost of starting down another decision making procedure unnecessarily.

The Proposal

17. Section 43A(8)(c) enables an applicant to require the planning authority to review the case if the person appointed to determine the application has not done so within the period prescribed by regulations made under that section. The intention is to amend section 43A(8) to allow applicants and appointed persons to agree an extension to that period. This will put these applications on a similar footing to those applications eligible for appeals to Scottish Ministers.

Preconditions – Section 18(2) of the Public Services Reform (Scotland) Act 2010

18. This explanatory document is required to explain why these changes comply with the preconditions set out in section 18 of the 2010 Act.

(a) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means

19. With agreeing extensions to determination periods, guidance could not override the statutory timescales involved. For example, once the statutory periods of two months to determine an application and three months to seek a review on the grounds of non-determination have elapsed, a local review on the grounds of non-determination would be time barred legally.

(b) the effect of the provision is proportionate to the policy objective

20. The intention is to allow flexibility into the system where the applicant and the planning authority are both willing to agree to an extension to the period for determination and avoid entering the local review process unnecessarily. This change is the minimum necessary to allow this to happen.

(c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it

21. The ability to extend the statutory period for determining an application will require the agreement of both the applicant and the planning authority. If either feels it is not appropriate to have such an extension, then the statutory time periods will apply. More generally, it should avoid cases entering the local review procedures unnecessarily, allowing resources to be focused on those cases for which local review is genuinely necessary. There are unlikely to be parties adversely affected by such an extension of time. While third parties to an application, e.g. statutory consultees or members of the public, may be concerned about such extensions, it could in some cases be the planning authority that initiates discussion of an extension in order to allow time for further consideration of such parties' views.

(d) the provision does not remove any necessary protection

22. The changes do not remove any protection nor affect rights of review or appeal under planning legislation or general rights to pursue matters in the Courts.

(e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

23. As (d) above.

Section 27(1)(d)(ii) - include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens (within the meaning of that section).

24. We do not have figures on the costs and benefits of this change or the number of applications which might be affected. The change would avoid any unnecessary requests for local review on the grounds of non-determination

made because the applicant was concerned about being time barred from seeking such a review.

Consultation

25. The main public consultation on Miscellaneous Amendments to the Planning System, of which this is one, received 94 responses in total. It was sent to just short of 11,000 addresses registered on our Planning e-mail alert list (which includes the planning authorities, statutory consultees, business organisations and members of the public). Respondents willing to have their responses made public are listed in the Annex to this document). The response regarding the Order is summarised below. Copies of the responses to the general consultation, "Miscellaneous Amendments to the Planning System 2012", (in so far as respondents were willing to have them released) and of the full analysis of responses and summary of consultation findings can be viewed via the following web links:

http://www.scotland.gov.uk/Publications/2012/08/1764 - Responses to the Consultation

http://www.scotland.gov.uk/Publications/2012/09/9618 - Main Analysis report

http://www.scotland.gov.uk/Publications/2012/09/3111 - Consultation Findings

Table 1: Consultation respondents, by respondent category

Group Type	Number	Percentage
1. Planning authorities	29	31%
2. Community councils and community groups	11	12%
3. Professional bodies	6	6%
4. Statutory bodies	4	4%
5. Consultants	6	6%
6. Developers	28	30%
7. Other organisations	5	5%
8. Individuals	5	5%
Total	94	100%

26. Respondents were asked whether they agreed or disagreed with the proposal to allow extensions to be agreed and to comment on their answers. A total of 74 respondents responded to the question: most replied to both parts of the question and a few to just the first or second part

27. Table 7 from the analysis of responses report (see below) sets out the responses to the first part of the question. It indicates there were very high levels of agreement with the proposal from all sectors: some 67% of all respondents and 90% of those who responded to the question agreed with

the proposal; and just seven respondents specifically indicated that they disagreed.

Table 7: Question 8 This section proposes a change to allow an extended period for the determination of an application to be agreed upon between the applicant and appointed person where local review procedures would apply. Do you agree or disagree with this change?

Groups	Agree	Disagree	No Response	Total
1. Planning authorities	26		3	29
2. Community councils and community groups	4	1	6	11
3. Professional bodies	4	2	0	6
4. Statutory bodies	1		3	4
5. Consultants	6		0	6
6. Developers	18	3	7	28
7. Other organisations	3		2	5
8. Individuals	1	1	3	5
Overall Total	63	7	24	94
Overall Percentage	67%	7%	26%	100%

28. While a number of those agreeing with the proposals simply re-stated their agreement, the most common reason given was that it resolves an anomaly in the planning system. There was some reference to even local developments being of a scale and complexity that meant the 2 month period could be too tight and that there might be a reduction in local reviews as a result of the change.

29. A few respondents (from the community council and developer sectors) who agreed with the proposal explicitly qualified their support. They were particularly concerned that extensions should be arranged only when the case requires it; and stressed that straightforward and minor cases should be dealt with quickly.

30. Notably the main issue raised by those who opposed the proposal was that it would lead to time inefficiencies. To what extent these respondents appreciated that both developer and planning authority would have to agree to an extension is not clear.

31. As part of the Business and Regulatory Impact Assessment (BRIA) process we spoke to 10 businesses about the package of changes to the planning system: Banks Group; Calachem; Mactaggart & Mickel; Sainsbury's; Scottish Land & Estates; Scottish Power; Scottish Property Federation; Tesco; Turley Associates; and Walker group. None had particular comments about this aspect of the package of changes.

32. The proposed draft Order was laid before Parliament, as required by the Public Services Reform (Scotland) Act 2010. The Subordinate Legislation Committee agreed on 24 April that no points arose on the proposed draft Order.

33. The Local Government and Regeneration Committee held a round table session on 30 May to consider the proposed draft order and other planning issues. Representatives from: the Scottish Government Planning and Architecture Division; Royal Town Planning Institute, CoSLA, Heads of Planning Scotland; Homes for Scotland, CBI Scotland; Planning Aid for Scotland; Planning Democracy and Scottish Environment Link attended. No points were raised in relation to this proposed draft Order.

Impact Assessments

34. Copies of the finalised BRIA and Equalities Impact Assessment (EqIA) in so far as they relate to amendments to the 1997 Act are attached. The 2012 consultation sought views on draft versions of these documents. There was a very low response in this regard. The vast majority of those responding to the BRIA indicated that they had nothing else to add to the information and analysis and information in the draft. Responses on the EqIA indicated that the analysis undertaken thus far was comprehensive or that they envisaged no equalities impacts.

35. The BRIA does not see any additional costs being imposed on business as a result of this particular change. The EqIA does not foresee any discrimination against equality groups arising form this change.

36. The legislative changes were pre-screened in relation to requirements on strategic environmental assessment (SEA) and it was concluded there was no requirement for SEA.

Conclusion

37. This change will add flexibility for applicants in particular and avoid the possibility of cases proceeding to local review unnecessarily and allow for more efficient decision making on applications. There are no apparent cost implications imposed on parties nor discrimination against equality groups.

38. We conclude that we should proceed with the Order as originally drafted.

Planning and Architecture Division
November 2012

ANNEX

THE PUBLIC SERVICES REFORM (PLANNING)(LOCAL REVIEW PROCEDURE) ORDER 2013

Explanatory Document

List of Respondents to Consultation

Planning authorities

Aberdeen City Council
Aberdeenshire Council
Angus Council
Argyll and Bute Council
Cairngorms National Park Authority
City of Edinburgh Council
Clackmannanshire Council
Comhairlenan EileanSiar
Convention of Scottish Local Authorities (COSLA)
Dumfries and Galloway Council
Dundee City Council
East Ayrshire Council
East Renfrewshire Council
Fife Council
Glasgow City Council
Inverclyde Council
Loch Lomond and the Trossachs National Park Authority
North Ayrshire Council
North Lanarkshire Council
Orkney Islands Council
Perth and Kinross Council
Renfrewshire Council
Scottish Borders Council
South Lanarkshire Council
West Dunbartonshire Council
West Lothian Council

Community councils and community groups

Brightons Community Council
Dowanhill, Hyndland and Kelvinside Community Council and Friends of Glasgow West (Combined Response)
Gorebridge Community Council
Greengairs Community Council and Planning Democracy
Hillhead Community Council
Killearn Community Council
Kirkhill&Bunchrew Community Council
Newtonhill, Muchalls&Cammachmore Community Council
Old Aberdeen Community Council
Rhu Shandon Community Council
Thornhill and Blairdrummond Community Council

Professional bodies

Chartered Institute of Architecture Technologies
The Law Society of Scotland
Royal Incorporation of Architects in Scotland
Royal Town Planning Institute Scotland
Society of Local Authority Lawyers and Administrators
The Stirling Society of Architects

Statutory bodies

The Coal Authority
Scottish Environment Protection Agency
Scottish Natural Heritage
Scottish Water

Consultants

Arcus Renewable Energy Consultants
GVA Grimley Ltd
Halliday Fraser Munro Planning
Keppie Planning and Development
Paull& Williamson LLP
Savills

Developers

ATH Resources plc
Banks Group
Colliers International
Confederation of UK Coal Producers (CoalPro)
EDF Energy
GVA Grimley Ltd on behalf of Aldi Stores Ltd
Infinis
LXB Manager LLP
McCarthy & Stone Retirement Lifestyles Ltd
Mobile Operators Association
Persimmon Homes West Scotland
RES UK & Ireland Limited
Sainsbury's Supermarkets Ltd
Scottish Coal
Scottish Grocers' Federation
Scottish Land and Estates
Scottish Property Federation
Scottish Retail Consortium
Scottish Renewables
Springfield Properties PLC
SSE Group
The Trinity Group
Walker Group (Scotland) Ltd
Wallace Planning Limited on behalf of CalaChem, Fujitsu, HW Coates and Syngenta "Chemical Cluster Companies" in the Grangemouth Chemical Complex
West Coast Energy Ltd
Westminster (Scotland) Ltd

Other Organisations

The Cockburn Association

Community Land Advisory Service
Planning Aid for Scotland
Regulatory Review Group
Royal Society for the Protection of Birds Scotland

Individuals

There were responses from five individuals.

Confidential responses

There were also five responses from organisations which did not give permission for their response to be published

FINAL BUSINESS AND REGULATORY IMPACT ASSESSMENT (BRIA)

MISCELLANEOUS AMENDMENTS TO THE PLANNING SYSTEM – CHANGES TO THE TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997

Purpose and Intended Effect

Objectives

1. The objective is to ensure that statutory planning procedures are proportionate, efficient and effective. In particular those that relate to the development management procedures and planning appeals introduced in August 2009.

2. This BRIA relates to that part of the package of miscellaneous amendments to the planning system which involves amendments to the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act") and related consequential changes to planning regulations. Further elements of the package of miscellaneous amendments will be included in regulations to be laid before Parliament at a later date.

Background

3. The proposed changes come as a result of the findings from our review of the first 12 months of the modernised planning system and forums involving various stakeholders on a range of aspects of the modernised system, as well as responses to the consultation papers on amendments to the modernised planning system issued in October 2010 ("the 2010 Consultation") and March 2012 ("the 2012 Consultation"). The proposed amendments covered by this BRIA relate to the following specific elements:-

- Pre-Application Consultation with Communities (PAC)

- Amendments regarding applications with a right to local review

Pre-Application Consultation with Communities (PAC)

4. Concerns have been expressed by applicants and planning authorities that the requirements for 12 weeks of pre-application consultation can often be disproportionate where an application for planning permission is required for a change of a condition(s) on an existing permission (known as Section 42 Applications) for a major or national development.

5. The requirements to have carried out PAC prior to making a planning application for a major or a national development came into force on 3 August 2009. From that date to the end of June 2012 1,472 planning permissions for major developments were granted. That means there are at least that many permissions where the applicant or developer might conceivably wish or need to seek an amendment to a condition on such a permission.

6. We do not have accurate figures for the numbers of Section 42 Applications affected or which may have been discouraged (or the developments which may have been discouraged) by the PAC requirements on such applications. Officials surveyed planning authorities and a number of planning consultancies in late 2010/ early 2011 on the number of Section 42 Applications where PAC was required during the period from August 2009 to September 2010. We also sought information on the costs of PAC and views of how proportional existing requirements were. There were 17 responses: six consultancies and 11 planning authorities. Some who responded had no cases to report. The consultancies identified 11 cases and the planning authorities 13 cases.

7. We had a similar survey in 2012 covering the period 3 August 2009 to and the end of April 2012. We received responses from 16 planning authorities and 11 companies/bodies from the development industry. Ninety-six Section 42 Applications requiring PAC were identified – 69 by planning authorities and 44 by developers, with 17 cases identified by both groups. Five of the planning authorities and one of the developer bodies had responded to the previous survey for 3 August 2009 to 30 September 2010.

8. The downturn in economic activity in recent years may have reduced the number of Section 42 Applications coming forward, as developers are not following up on their original permissions. However, these figures may give some indication of the level of activity of concern, rather than the number of permissions granted for major development. Of more significance is likely to be the individual importance of a particular major or national development to the area or indeed the nation, and the need to ensure the planning requirements on it are proportionate.

9. The costs of complying with PAC requirements can run into thousands of pounds. A number of the responses estimated the costs of conducting PAC, which mainly fell into the range £1,000 - £10, 000. Such costs are in addition to being unable to submit an application for such changes for 12 weeks. The survey and direct discussions with business on impacts gave a number of estimates in terms of costs of delays: one developer cited a case where such cost was £92,400, another cited £610, 000 per week in one case, another estimated £106,000 per month of delay.

10. It is unlikely that there is a “typical” cost of such delay, which will depend on a number of factors such as the nature of the development, the change of condition and the what stage the development is at (e.g. is it built and operating or has development yet to be started).

Amendments regarding applications with a right to local review

11. When provisions were drafted so that appeals to Ministers in certain cases were replaced by local reviews by the planning authority, certain provisions of the 1997 Act were not appropriately amended to include reference to local reviews.

12. In particular, provision exists to extend by agreement the period after which an appeal on the grounds of non-determination can be made, allowing more time for a decision on the application to be reached while preserving the applicant's right to appeal on the grounds of non-determination; but no such provision for such extension was made for local review cases.

13. The absence of such provision may mean local reviews on the grounds of non-determination are sought prematurely, for fear of losing that right, or the right is lost by waiting for a decision that is thought to be imminent. Also, given that whether an appeal or local review procedure applies depends on the content of an individual authority's scheme of delegation, there may be some confusion as to whether an extension can be agreed in an individual case.

14. We propose to make an amendment to allow the agreement of such extensions in local review cases.

15. There are a number of other points in the 1997 Act where the absence of provision means it may be unclear how the 1997 Act applies to applications to which a right of local review applies. A Planning etc. (Scotland) Act 2006 (Supplementary and Consequential Provisions) (Scotland) Order (the Consequential Provisions Order) is proposed to address these omissions is also part of the package of planning changes. Unlike the changes in paragraph 14, these amendments are unlikely to affect the day to day running of the planning system and are more legal/technical in nature.

Rationale for Government Intervention

16. These changes relate to making public services more responsive and contribute to making Scotland wealthier and fairer and to assist in contributing to sustainable economic growth. The changes should streamline the statutory requirements on applicants for planning permission and planning authorities. The technical amendments in relation to cases to which the right to a local review apply are about the proper operation of the planning system and ensuring various planning mechanisms apply to such cases and/ or make clear how they apply in such cases.

Consultation

17. The issue of reducing PAC requirements and some options in that regard were the subject of a three month public consultation exercise starting in October 2010 – "Amendments to the Modernised Planning System: Consultation Paper" ("the 2010 Consultation"). A specific legislative proposal in this regard and an amendment regarding agreeing extensions to period after which a local review on the grounds of non-determination can be sought were included in a 3 month public consultation, "Consultation on Miscellaneous Amendments to the Planning System" ("the 2012 consultation"), which started in March 2012.

18. The earlier 2010 consultation, responses and analysis of responses can be viewed using the following links:

http://www.scotland.gov.uk/Publications/2010/10/20093159/0 - 2010 consultation paper.

http://www.scotland.gov.uk/Publications/2011/03/04164803/0 - 2010 consultation - copies of responses

http://www.scotland.gov.uk/Publications/2011/12/21145052/0 - 2010 consultation analysis of responses

19. The 2012 consultation "Miscellaneous Amendments to the Planning System" and responses and analysis can be viewed at:

http://www.scotland.gov.uk/Topics/Built-Environment/planning/publications/consult

Within Government

20. Prior to the 2010 Consultation we discussed with planning authorities the issues regarding the removal of PAC from Section 42 Applications and possible ways to alleviate the problems using existing regulation making powers and guidance. They also highlighted the issue of agreeing extensions to the period after which a local review on the ground of non-determination can be sought.

Public Consultation

PAC

21. Prior to the 2010 Consultation the concerns around PAC had been discussed with a representative from the Association of Scottish Community Councils.

22. The 2010 consultation received 92 responses, mostly from planning authorities (25) and developers (26). Other responses were received from consultants (9), community groups (9), statutory consultees (4), natural heritage groups (4), professional bodies (3), individuals and other groups (3 and 9 respectively).

23. The 2010 consultation sought views on whether change was needed regarding PAC and the following options:

- Option 3(1) - Remove PAC requirement for Section 42 Applications
- Option 3(2(a)) – Reduce the 12 week minimum period for PAC
- Option 3(2(b)) - Reduce the minimum period of 12 weeks for PAC for Section 42 Applications
- Option 3(3) - Take power to specify types of application or applications in certain circumstances where PAC doesn't apply

24. Seventy-four respondents answered the question about the need for change, with 90% agreeing change was needed. Developers, agents and planning authorities were in favour of change. Some of the natural heritage and community respondents were against any reduction in PAC.

25. On the question about a preferred option, of those who answered this question: over a third (38%) favoured Option 3(1); 20% in favour of Option 3(2(b)); 12% favouring regulations specifying the types of application to which PAC (Option 3(3)) should apply; and 5% favouring Option 3(2(a)). Some 25% of those replying to this question did not pick one of the options suggested: for a third of these it was simply that they had no outright preference and about half referred to a mix of the options (often a mix of Options 3(1) and 3(2(a)). A couple specifically referred to not wanting any change.

26. Planning authorities and developers favoured Option 3(1). Individuals, community groups, natural heritage groups and statutory consultees tended to favour the least significant change (i.e. Option 3(2(b)) or no change). The views expressed, together helped us to narrow down the options to a specific legislative proposal, namely Option 3(1), on which to consult.

27. The 2012 consultation contained various miscellaneous amendments to the planning system, including specifically removing PAC from Section 42 Applications. There were 94 responses, mainly from planning authorities (29) and developers (28) with a smaller numbers of responses from community groups (11), consultants (6), professional bodies (6), statutory bodies 4, other groups and individuals (5 in each).

28. Eighty-eight percent (67 out of 76) of those who responded on removing PAC from Section 42 Applications agreed with the proposal. Some of the community groups in particular (7) were concerned about any loss in public consultation, though some of these at least did not seem to appreciate that there would still be an application for planning permission (Section 42 Application) which would be subject to publicity and consultation requirements and where the public would have a chance to make representations to the planning authority before a decision was made.

Agreeing extensions to the period after which a local review on the ground of non-determination can be sought

29. This is mainly a technical change and there was no extensive consultation prior to the 2012 consultation, although planning authorities had flagged it up as an issue. The 2012 consultation saw 74 responses on this particular issue and 94% agreed with the proposed change. Some respondents were concerned about time inefficiencies, although the proposals would only allow an extension where both the applicant and the planning authority agree. The main aim is to allow applicants to retain their right to local review on the grounds of non-determination and avoid premature local reviews.

Business

30. Prior to the 2010 consultation the issues around PAC were discussed with representatives from the minerals, housing and retail sectors, the legal profession and planning authorities. For the purposes of the BRIAs for the package of planning changes, we spoke to the following businesses and bodies:

Banks Group
Calachem
Mactaggart & Mickel
Sainsbury's
Scottish Land & Estates
Scottish Power
Scottish property Federation
Tesco
Turley Associates
Walker Group

31. On removing PAC, responses ranged from those appreciating the general benefit of the change, even though it would not affect their business, to those seeing significant benefits for their activities, in terms of costs of carrying out PAC, preventing delays and allowing more flexibility of programming work. In terms of the costs of running PAC, the figures they suggested were in line with the range of mainly £1,000 - £10,000. In terms of costs of delays while going through 12 weeks of PAC for a change of condition, an example of £106,000 per month was cited by one developer.

32. On being able to agree extensions to the period for determining applications subject to local review, they had no significant views.

Pre-Application Consultation with Communities (PAC)

Options

Option 1 – Do Nothing

33. The Scottish Government does not consider the do nothing option to be appropriate. We recognise that having to do 12 weeks of PAC for relatively minor changes to conditions on permissions for major developments could make the difference between a project going ahead or not proceeding or at least involve unnecessary delay and cost.

Option 2 – Use Guidance or Existing Regulation making Powers to try to Alleviate the Problem

34. Discussions with stakeholders indicated that preparing guidance or using existing regulations would not be effective.

35. While the Scottish Ministers can make regulations which specify the types of 'development' to which PAC requirements apply (currently all major and national developments), they do not have powers to specify the types of 'application' to which PAC applies, e.g. PAC requirements, including the 12 week minimum period for PAC, would apply to all major developments whether the application was for permission for an entirely new proposal or for a change of conditions on an existing permission for a proposal (i.e. a Section 42 Application).

Option 3 – Change the Requirements of the 1997 Act

36. The 2010 Consultation paper explored the following options for amending the 1997 Act to address this issue:

- Option 3(1) - Remove PAC requirement for Section 42 Applications
- Option 3(2(a)) – Reduce the 12 week minimum period for PAC
- Option 3(2(b)) - Reduce the minimum period of 12 weeks for PAC for Section 42 Applications
- Option 3(3) - Take power to specify types of application or applications in certain circumstances where PAC doesn't apply

Sectors and Groups Affected

37. PAC provisions affect any prospective applicant for planning permission whose proposal constitutes a major development or national development. National developments relate to national infrastructure projects described in the National Planning Framework. Major developments are those which meet or exceed the thresholds in The Town and Country Planning (Hierarchy of Development) (Scotland) Regulations 2009. While the latter have specific size thresholds for certain types of development, e.g. house building, energy generation and marine fish farming projects, there are also general size thresholds. PAC provisions also affect the communities and planning authorities in whose areas major and national developments are proposed.

Benefits

Option 1 – Do Nothing

38. Prospective applicants should benefit from constructive, better informed communities engaging constructively with proposals at an early stage. Where the consultation discloses significant community resistance, then developers will be aware of the issues that concern affected communities. Applications submitted to authorities would be more considered, taking into account community views, thereby leading to faster decisions and better outcomes. Communities will have the opportunity to interact with prospective developers, to assist them in understanding views and objections, to refine proposals and to mitigate negative impacts. However, the view is that any benefits of this in relation to applications to change conditions on a planning permission do not justify the costs.

Option 2 – Use Guidance or Existing Regulation making Powers to try to Alleviate the Problem

39. Some unnecessary PAC could be avoided where in future planning authorities avoid, where possible, using rigid conditions that require to be amended by a Section 42 Application. However, the ability to frame conditions more flexibly would not necessarily be related to the (lack of) need for PAC. Also, some of the statutory requirements regarding PAC could be reduced. However, there would still be the minimum 12 week period for any PAC and it is still almost inevitable that there would be some conditions that would need to be changed on the planning permission for a major or national development.

Option 3(1) - Remove PAC requirement for Section 42 Applications

40. This straightforward change is likely to create certainty. It would mean a removal of the costs for the developer and should avoid communities being involved in numerous PAC on relatively minor issues.

Option 3(2(a)) – Reduce the 12 week minimum period for PAC

41. Prospective applicants could have a much reduced delay and could submit an application once they had complied with statutory PAC requirements and those, if any, of the planning authority.

Option 3(2(b)) - Reduce the minimum period of 12 weeks for PAC for Section 42 Applications

42. This is similar to 3(2(a)) but would apply to a smaller group of prospective applicants, i.e. only those applying under section 42 of the 1997 Act.

Option 3(3) - Take power to specify types of application or applications in certain circumstances where PAC does not apply

43. Prospective applicants would, where appropriate, no longer have to do PAC. This could apply to a wider range of applications than Option 3(1).

Costs

Option 1 – Do Nothing

44. The costs associated with carrying out PAC vary depending on the proposal, its location, and any further consultation requirements specified by the planning authority. We have previously estimated that the cost might be in the region of £20,000 for an individual PAC for planning permission for a major development. The responses received to our survey of consultants suggested the costs of running PAC to be mainly in the range of £1, 000 - £10, 000. There were some estimates by developers of the costs of delays in particular cases, one citing £92,040, another £610,000 per week and another £106,000 per week. It seems unlikely there is a typical cost for such delay, which will be dependant on a number of factors (see paragraph 10 above)

45. For communities and community groups, there will be marginal costs in preparing for, travelling to and contributing to pre-application consultation events. The biggest cost might be in terms of excessive expectations, i.e. in having a PAC in relation to a Section 42 Application, communities may not realise that only the conditions are open to consideration, not the whole of the development.

Option 2 – Use Guidance or Existing Regulation making Powers to try to Alleviate the Problem

46. Such changes can only address some of the cases where PAC would be triggered unnecessarily. In those instances where a PAC would be required the costs described for Option 1 would apply.

Option 3(1) - Remove PAC requirement for Section 42 Applications

47. The costs described under Option 1 would be saved for Section 42 Applications. However, communities and community groups would not be able to contribute their views prior to the submission of an application to alter a condition and may therefore raise their concerns during the formal processing of the Section 42 Application.

Option 3(2(a)) – Reduce the 12 week minimum period for PAC

48. Prospective applicants would still face the costs of PAC and, in some cases, unjustifiable delay. Some communities might feel the process is being rushed and become disillusioned with PAC generally.

Option 3(2(b)) - Reduce the minimum period of 12 weeks for PAC for Section 42 Applications

49. Applicants would have to undertake a PAC and incur the associated costs. Any disillusionment with the process among communities might be less in that the reduced timescale applies to a smaller group of cases, but might still occur in relation to the PAC being solely related to changes in conditions and not to the development as a whole.

Option 3(3) - Take power to specify types of application or applications in certain circumstances where PAC doesn't apply

50. This approach means a loss in the benefits of PAC. It would also be difficult to define clearly and simply those cases which would be exempt from PAC, which would introduce a lack of clarity about which procedures might apply to a particular application. Avoiding complexity and uncertainty is a key aim.

Amendments regarding applications with a right to local review

51. The proposed amendments are mostly technical. They either ensure the legislation applies various, existing planning mechanisms to cases which are

eligible to local review, rather than a right of appeal to Ministers, or clarify how such mechanisms apply. There are no options as such, it is a question of making these technical amendments or not. The amendments relate to:

i) Section 43A(8) – This section of the 1997 Act specifies, amongst other things, the applicant's right to seek a local review on the ground that the authority has failed to determine it within the specified period. There is a time limit of 3 months for seeking such a local review. This is similar to cases where the applicant has a right of appeal to the Scottish Ministers, except that, in the latter, the applicant and planning authority can agree an extension to the period for determination and preserve the 3 month period for an appeal on the grounds of non-determination. This ability to agree an extension was not included in relation to local review cases. The result is applicants may lose their right of local review on the grounds of non-determination if they wait too long for a decision, or that they may prematurely seek a local review when a decision was imminent.

ii) Section 39 on declining to determine applications. This section of the 1997 gives planning authorities the discretion to decline to determine subsequent similar applications in certain circumstances – in effect returning them to the applicant. Basically, this is about planning authorities being able to refuse to consider a repeat application for the same development where there have been previous refusals and nothing in the development plan or any other material considerations have changed. Part of this provision relates to the circumstance where earlier applications may or may not have been subject to an appeal to Ministers, but makes no provision for where the case is subject to a right of local review, i.e. where there is no right of appeal to Ministers.

The amendment basically substitutes references to appeals and appeal decisions with references to local reviews and review decisions in relevant cases.

iii) Section 43A makes provision for schemes of delegation for applications relating to local development and triggering rights to local reviews instead of to appeals to Ministers. There are a number of amendments to this:

a) Additional provisions of the Act are applied to appointed persons dealing with delegated cases, in particular as the latter need not necessarily be an officer of the planning authority e.g. varying applications (section 32A), call-in and other directions apply (sections 43(1) and (2) and 46)) and the ability to direct on the duration of permission (sections 58, 59 and 60).

b) Make clear the right to local review on the grounds of non-determination (i.e. where the officer has not issued a decision within a specified period) does not apply where the appointed person has declined to determine the application under section

39 or Scottish Ministers have called-in the application for their determination under section 46.

iv) Section 46 relates to the call-in of applications by Scottish Ministers for their determination. This section is being amended to make clear that such powers apply in relation to applications subject to local review.

v) Section 59 specifies the time period within which development granted planning permission in principle must be started and when applications for approval of matters of detail required by conditions must be made. In respect of the latter, the current provisions specify one period in relation to when a previous application for approval was refused on appeal to Ministers, and this amendment makes clear it applies in relation to such applications refused on local review.

vi) Section 218(1)(c) refers to applications for planning permission deemed to have been made when an appeal against enforcement action is made on the grounds that planning permission should be granted. This ground of appeal against enforcement action has been removed and so section 218(1)(c) is being deleted.

Sectors and Groups Affected

52. Applicants for planning permission for local development where the application is delegated to an officer for decision. Local Developments are those which are neither national nor major developments (see paragraph 37 above).

Costs and Benefits

53. Amendment i) should allow more flexibility in the system. Amendments ii) to vi) simply ensure the proper operation of the system, e.g. time limits under section 59 should apply to cases eligible for local review as with any other; where an application has been called-in by Ministers for determination, it makes no sense for the applicant to be able to seek a local review on the grounds of non-determination. Amendment ii) would make it clear how the discretion for planning authorities to decline to determine applications applies where local reviews are involved. In blocking any loophole in this regard this may look like an additional cost where it is applied; however, use of such powers is thought to be rare and we see no justification for applicants in some cases being able to, for example, wear down opposition by making repeat applications for the same development

Scottish Firms Impact test

Pre-Application Consultation with Communities (PAC)

54. During the 2010 Consultation and 2012 Consultation we sought information from planning authorities and consultants on the instances of PAC on Section

42 Applications. Paragraphs 9-10 above give an indication of the potential savings to firms in not having to carry out PAC in such cases.

55. Our face to face discussions with firms as part of the BRIA process (see paragraphs 30-32 above) indicated support for the change, but did not have significant further information to add to that already gleaned from the surveys.

Amendments with regard to applications with a right to local review

56. The majority of these are legal/ technical amendments which simply ensure the proper operation of the planning legislation in relation to such cases. The one which perhaps represents a more significant change, at least in terms of the day to day operation of the system, is that allowing extensions to the period after which a local review can be sought. This change simply introduces a degree of flexibility in these cases and puts them on the same footing as cases to which a right of appeal applies.

57. None of our face to face discussions raised particular issues in this regard.

Competition Assessment

58. The planning system can affect any business in any market. The aim is to ensure procedures are proportionate and clear to avoid planning creating unnecessary barriers to business and competition.

59. The proposals on PAC will affect those carrying out major developments, though as this is de-regulatory and is about ensuring planning requirements are proportionate.

60. The changes in relation to applications where a right of local review applies will affect those carrying out local developments. However, the changes are about allowing more flexibility and/or ensuring the requirements of the planning system with regard to the applications in question are clear and operate appropriately.

61. There is no indication of any restriction on competition arising from the changes; no direct or indirect limitation on the number or range of suppliers; no additional limitation on the ability of suppliers to compete or reduction in their incentives to compete.

Test run of Business Forms

62. There are no new business forms required as a result of proposals.

Legal Aid Impact Test - Pre-Application Consultation with Communities

63. The changes do not introduce new procedure or right of appeal to a court or tribunal.

Enforcement, Sanctions and Monitoring

64. These proposed amendments relate to the changes in process in the existing planning system and do not involve additional enforcement, sanction or monitoring procedures. We will continue to liaise with our stakeholders as to the operation of the planning system.

Implementation and delivery plan

65. The amendments to remove PAC from Section 42 Applications and to allow the applicant and authority to agree an extension to the period after which a local review can be sought for non-determination will, subject to Parliamentary approval, come into force on 2 February 2013. These two changes are being made by separate orders under the Public Services Reform (Scotland) Act 2010 (PSR Orders). Consequential amendments arising from these changes will be included in a separate instrument, the Town and Country Planning (Miscellaneous Amendments) (Scotland) Order 2012, which will come into force on the same date.

66. E-mail alerts will be issued to stakeholders and planning authorities when the Orders and regulations are laid and when they have completed their Parliamentary procedures. These alerts will contain links to the legislation and guidance.

67. We intend to produce consolidated regulations, which will also include other elements of the package of amendments to the planning system. These will be laid before Parliament subsequently in 2013. Accompanying the consolidated legislation will be revised guidance in consolidated Scottish Government Circulars.

68. Most of the technical amendments in the Consequential Provisions Order (listed at paragraph 51 ii) to vi)) will also come into force on 2 February 2011. These are unlikely to have significant immediate effects as they address legal/ technical issues rather than the mechanisms of the planning system in day to day use.

69. We will address the effects of all of these changes in our regular liaison with our stakeholders on the effects of these changes.

Summary and recommendation

70. In response to our consultations, most parties were supportive of the changes regarding PAC and agreeing extensions to the period after which a local review on non-determination can be sought. Some community bodies responding to the 2010 and 1012 consultations were concerned about any drop in consultation in relation to PAC.

71. As indicated in paragraphs 6 to 10 above we also surveyed planning authorities and a number of developers and their representatives regarding information about PAC and Section 42 Applications.

72. Having considered the responses to our consultations, the costs and benefits of the options, we have concluded that removing PAC from Section 42 Applications represents a simple and proportionate response to this issue. There will continue to be applications for planning permission in such cases (i.e. the Section 42 Applications itself) which come with publicity and consultation requirements and allow parties to make representations which planning authorities will have to take into account before deciding the application. While Option 3(3) looks like the best way to target PAC to appropriate applications, the difficulties in actually defining legally which are the appropriate cases at all and in a way that is clear cut for all stakeholders effectively rules it out.

73. We recommend that:

- Option 3(1) be adopted, i.e. removal of PAC requirements from Section 42 Applications. This is a proportionate, clear and simple change to address concerns about excessive requirements for PAC on changes to planning conditions.

- Applicants and planning authorities should be able to agree an extension to the period for determination whilst retaining the applicant's right to local review on the grounds of non-determination of the application. This allows a degree of flexibility and consistency across the planning system.

- The legal/ technical changes in the Consequential Provisions Order (see paragraph 51 items ii)-vi)) are pursued in order to clarify the legal position with regard to cases where the right to local review applies.

Summary costs and benefits table

PAC

Option	Benefits	Costs
1 – Do Nothing	• Full public engagement prior to application being made. • Public concerns taken onboard in applications • Fewer objections at application stage • Developer and planning authority view is generally any such benefit negligible in relation to changes to	• Costs of running PAC – developers indicate costs £1000-£10,000 • Delay in getting a change in condition – developer examples £92K, £610K per week, £106K per month • Costs disproportionate to any benefit which might be gleaned • Public disillusioned

	conditions	or confused where PAC only relates to changes in conditions not to the whole development.
Option 2 Use Regulations or Guidance	• Could remove or reduce the costs of PAC and remove delays identified in Option 1 in some cases. • Benefits of Option 1 in some cases	• This would not necessarily remove PAC where it is unnecessary • Costs in Option 1 could still be incurred unnecessarily in many cases
Option 3(1) – remove PAC for Section 42 Applications	• Would avoid costs in Option 1 in relation to changes to conditions, which are unlikely to benefit from PAC • Simple/ Clear cut – no confusion or complex judgements about the need for PAC	• There may be cases in which PAC on a change of conditions is appropriate and the benefits in option 1 would be lost. • However, these are likely to be few in number and there remains the Section 42 Application itself, to which objections can be made
Option 3(2(a)) – reduce 12 week period for all PAC	• See Benefits of Option 1 • Reduced costs of delay due to PAC (see Costs Option 1)	• Costs in running PAC re Option 1 • Public Disillusion where PAC only is about conditions not the whole development • Public disillusion where they feel PAC being rushed in some cases relating to the whole development
Option 3(2(b)) – reduce 12 week period for PAC in relation to Section 42 Applications	• See benefits Option 1 • Reduce costs of delay (see Costs Option 1)	• Unnecessary PAC still being required in some cases • Costs in running PAC in Option 1 • Public Disillusion as

		PAC is only about conditions not the whole development • Possible confusion re which minimum period applies
Option 3(3) – power to regulate for which types of applications or applications in particular circumstances where PAC not required	• The benefits in Option 1 could be targeted to appropriate applications. • Costs in Option 1 of holding PAC could be avoided in appropriate cases. • Costs of Delay in Option 1 could be avoided in appropriate cases. • Benefits may be largely theoretical giving drafting problems (see Costs)	• Near impossible to define in legislation the necessary criteria • Any such criteria unlikely to be clear creating confusion and dispute and delay over whether PAC is required or not. • Costs in Option 1 for running PAC and the delay would still be incurred in some cases.

Amendments regarding applications subject to right of local review

Option	**Benefits**	**Costs**
Option 1 – Do nothing	Nil	• Applications or permissions may be "stuck" where legislation makes no provision for them • Delay or increased risks due to legal uncertainty as to appropriate course as provisions not clear • Applicants may avoid appropriate planning mechanisms
Option 2 – Amend sections of the 1997 Cat to provide for cases subject to local review	• Avoids Costs in Option 1.	nil

Declaration and publication

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed: DEREK MACKAY

Date: 21 November 2012

Minister for Local Government and Planning

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EQUALITY IMPACT ASSESSMENT RECORD

Title of policy/ practice/ strategy/ legislation etc	**Miscellaneous Amendments to the Planning System 2012 – amendments to the Town and Country Planning (Scotland) Act 1997**	
Minister	**Minister for Local Government & Planning**	
Lead official	**Alan Cameron**	
Officials involved in the EQIA	**name**	**team**
	Alan Cameron **Graham Robinson**	**Planning and Architecture Division**
Directorate: Division: team	**Planning and Architecture Division**	
Is this new or revision to an existing policy?	**Amendments to existing legislation**	

1. The public sector equality duty requires the Scottish Government to pay "due regard" to the need to:

   - eliminate discrimination, victimisation, harassment or other unlawful conduct that is prohibited under the Equality Act 2010;

   - advance equality of opportunity between people who share a protected characteristic and those who do not; and

   - foster good relations between people who share a relevant protected characteristic.

2. These three requirements apply across the "protected characteristics" of age; disability; gender reassignment; pregnancy and maternity; race; religion and belief; sex and sexual orientation.

3. Equality considerations are therefore integrated into all the functions and policies of Scottish Government Directorates and Agencies.

4. Equalities Impact Assessment (EQIA) enables us to consider how our policies may impact, either positively or negatively, on different sectors of the population in different ways.

What is the purpose of the proposed policy (or changes to be made to the policy)?

5. The objective is to ensure that statutory planning procedures are proportionate, efficient and effective. In particular those that relate to the development management procedures and planning appeals introduced in August 2009.

6. This EqIA relates to a number of refinements and amendments to the Town and Country Planning (Scotland) Act 1997 regarding procedures on:

Development Management

- Remove requirements for pre-application consultation on planning applications to amend conditions

Local Review Procedures

- allow applicants and planning authorities to agree an extension to the period after which the applicant can seek local review on the grounds of non-determination (as is the case with planning appeals)

- technical legal amendments to ensure the provisions of the 1997 Act are appropriately applied to applications to which new rights to local review apply.

Who is affected by the policy or who is intended to benefit from the proposed policy and how?

6. These changes are primarily about streamlining the planning process and ensuring requirements are clear, proportionate and effective. The main change to applications with a right to local reviews is the ability to agree extensions, thus allowing the applicant to allow more time for the planning authority to issue a decision while preserving his or her right to challenge their failure to issue a decision after the extended period. The technical amendments in relation to such applications are to ensure the mechanisms of the planning system are applied or clarify their application in such cases. With regard to the changes in development management, there will be a more proportionate requirement to consult with communities.

How have you or will you put the policy into practice, and who is or will be delivering it?

7. The initial consideration of these procedural requirements rests with Scotland's planning authorities, though applicants will face some reduced requirements, namely reductions in pre-application consultation in certain cases. There will be amendments as appropriate to the guidance introduced in 2009 in relation to Development Management and Appeals.

How does the policy fit into our wider or related policy initiatives?

8. These changes will help improve clarity of the existing provisions and contribute to achieving a planning system which is efficient and *fit for purpose*.

What we already know about the diverse needs and/or experiences of your target audience

9. Equality Impact Assessments were prepared for the planning legislation these proposals seek to amend. Building on those assessments, we are not aware of any evidence that any of the equality strands will be affected by the proposals. The proposals will affect all business or individuals seeking approval of a relevant planning application proportionately.

Do we need more information to help us understand the diverse needs and/or experience of our target audience?

10. We recognised that there was scope to increase our knowledge as to whether and if so how the proposals in relation to the removal of pre-application consultation requirements and the ability to agree extensions in local review cases may affect particular sections of society. To assist in this, we included a specific question in the consultation paper "Miscellaneous Amendments to the Planning System 2012" seeking views on whether there are particular impacts on societal groups that we should be aware of.

11. Most respondents either did not respond at all (36 respondents) or indicated that they had no comments to make (37 respondents). The other comments largely fell into two, essentially inter-related, categories:

- Nine respondents said that it was unlikely that the proposals would impact on equalities groups
- Eleven respondents said that the partial EQIA was comprehensive - which might suggest, although it is not stated in these responses, that the respondents agree with the conclusions reached in the EQIA.

Describing how Equality Impact analysis has shaped the policy making process

12. These changes are largely technical, fine tuning measures with regard to the existing planning procedures. However, the need for this equality impact analysis has ensured we are not complacent in considering the impact of the measures involved. We did not believe there were likely to be any such impacts and nothing has emerged to contradict that view.

Monitoring and Review

13. These amendments arise from a review of the modernisation of the planning system and are designed, in part, to address some concerns around the changes. We are in regular, ongoing contact with planning system

stakeholders or their representative bodies, and will take the opportunity to take views on these amendments.

Authorisation

14. These changes are largely technical refinements and fine tunings of the existing procedural requirements.

- This Equality Impact Assessment has informed the development of this policy:

  Yes ☒ **No** ☐

- Opportunities to promote equality in respect of age, disability, gender, gender identity/transgender, sexual orientation, race and religion and belief have been considered, i.e.:
  - Eliminating unlawful discrimination, harassment, victimisation;
  - Removing or minimising any barriers and/or disadvantages;
  - Taking steps which assist with promoting equality and meeting people's different needs;
  - Encouraging participation (e.g. in public life)
  - Fostering good relations, tackling prejudice and promoting understanding.

  Yes ☒ **No** ☐

Declaration

I am satisfied with the equality impact assessment that has been undertaken for Miscellaneous Amendments to the Planning System 2012 – amendments to the Town and Country Planning (Scotland) Act 1997 and give my authorisation for the results of this assessment to be published on the Scottish Government's website.

Name: John McNairney
Position: Chief Planner
Authorisation date: 22 November 2012