

**CIRCULAR 7/2009
SCHEMES OF DELEGATION AND LOCAL REVIEWS**

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INTRODUCTION

1. Part 3 of the Planning etc. (Scotland) Act 2006 (the 2006 Act) introduced a number of important changes to the planning appeal system in Scotland. At the centre of these are the provisions covering new schemes of delegation for local developments and the opportunity for the applicant to seek a review of a decision by the planning authority in certain circumstances where an appeal to Scottish Ministers will no longer be available.

2. This circular accompanies the **Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2008¹**.

3. Planning authorities currently ensure that certain decisions can be taken by officials under powers delegated to them instead of being considered by elected members of the authority at committee. Provisions for authorities to do this are currently available under the Local Government (Scotland) Act 1973. Delegation to officials is an important means of adding efficiency to administrative processes and the Government wants to encourage an appropriate level of delegation to officials to support modernising of the planning system. Where a decision is taken by an officer under powers delegated to him, the decision is taken as being a decision by the planning authority. The officer is simply acting in the role of a person appointed by the planning authority to issue a decision or to act in some other way on its behalf. Under the new system section 43A(1) of the Act notes that applications determined under the scheme are determined by the appointed person rather than the planning authority. This allows the applicant to request a review of the appointed person's decision, by the planning authority and provides a degree of separation. Mostly however, other than for section 43A (8) to (16) or section 47 the determination of an appointed person is to be treated as that of the authority.

4. At present, an applicant may appeal to the Scottish Ministers should they be aggrieved at a decision taken by the planning authority in respect of any application for planning permission. In future, where a decision on an application for planning permission for a local development² (as defined in the Hierarchy of Development) is taken, or could be taken³, by an appointed person the applicant will no longer be entitled to appeal to Scottish Ministers. Instead, they may require the planning authority to review the decision. The new requirements apply in instances where the application for planning permission has been refused, granted subject to conditions, or where the application has not been determined within the period prescribed in regulations. The 2006 Act inserts these new provisions into section 43A and 43B of the Town and Country Planning (Scotland) Act 1997.

¹ SSI 2008 No 433 - The Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2008
http://www.oqps.gov.uk/legislation/ssi/ssi2008/ssi_20080433_en_1

² The Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009
http://www.oqps.gov.uk/legislation/ssi/ssi2009/draft/sdsi_9780111001714_en_1

³ Where no decision has been taken within the prescribed period allowed for determination of the application (2 months after the validation date)

5. The new provisions described in this circular relate only to the applications for planning permission described in paragraph 4 above. 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, hazardous substances consent, conservation area consent or consent to display advertisements. These other forms of permission will retain their existing rights of appeal to Scottish Ministers.

6. The 2006 Act contains a number of provisions on procedures to be followed in preparing the new schemes of delegation and for requiring reviews of decisions taken under these. The regulations set out detailed requirements within the framework provided in the primary legislation: they do not restate the provisions in the primary legislation. This circular explains how the two sets of requirements fit together and is intended to provide an overview of the new regulatory requirements.

7. The new provisions are intended to improve efficiency in the decision making process whilst retaining a high quality of determination. The Government's intention is that planning authorities should make the most effective use of powers to delegate decisions on straightforward planning applications to officials, allowing elected members to focus attention on more complex or controversial applications. The approach taken in regulations is to provide planning authorities with significant scope to develop schemes of delegation that are appropriate to local circumstances and to provide a clear framework for conducting reviews of decisions locally.

SCHEMES OF DELEGATION

Content

8. Planning authorities currently operate schemes of delegation under provisions in the Local Government (Scotland) Act 1973. These powers enable local authorities to delegate a wide range of decisions to officers and are unchanged by the terms of the 2006 Act. The 2006 Act introduced a new, additional, scheme of delegation which is intended to support an efficient planning process for applications for planning permission within the category of “local developments”. The new section 43A schemes of delegation apply to applications for planning permission, or any application for consent, agreement or approval required by condition imposed on a grant of consent for a “local development”. The section 43A scheme of delegation is intended to be the sole means of delegating applications for local developments. Only delegated decisions from the category of local developments will attract the new review procedures.

9. Section 43A(1) requires the planning authority to prepare a scheme of delegation as soon as practicable by which any planning applications for local developments can be determined by a person appointed by the authority instead of by the authority. The scheme’s main role is to set out the classes of “local developments” which rather than having to be determined by elected members would be suitable for delegation to an appointed person - the scheme itself does not have to appoint persons to determine applications but is to set the framework by which applications are determined by appointed persons.

10. Section 43A(4) provides that regulations may set out the form, content and procedures for preparing and adopting a scheme of delegation. These details are set out in the accompanying regulations, the Town and Country Planning (Schemes of Delegation and Local Review Procedure)(Scotland) Regulations 2008.

11. Regulation 3 provides details of the content of the new schemes of delegation. It will largely be for planning authorities to determine the circumstances in which the determination of an application is to be delegated to an appointed person; the regulations provide extensive scope for them to do so. Regulation 3(1) requires the scheme to describe the classes of development to which the scheme will apply and to explain with respect to every class which applications may be determined by an appointed officer. These are classes within the category of local development which authorities can develop to tailor the scheme to their own circumstances.

12. Where an application may only be determined by an appointed officer in particular circumstances the scheme should set these out. Local authorities can tailor their scheme of delegation to suit their local circumstances and administrative procedures. This could include specifying in the scheme where delegation is restricted because of levels of public representation, objections from statutory consultees, where elected member(s) advise a particular application should be dealt with at committee rather than by the appointed officer, or any other circumstances the authority wish to prescribe.

13. Regulation 3(4) requires that a scheme of delegation should include provision preventing an appointed officer from determining an application for planning permission where the application is made by the planning authority or a member of the planning authority or where the planning authority have an ownership or financial interest in the land.

14. Apart from the circumstances set out in regulation 3(4) it will be for planning authorities to decide what other, if any, restrictions to apply to the scheme of delegation. This is consistent with the Government's view that there should be flexibility to enable planning authorities to develop clear schemes of delegation appropriate to local circumstances.

15. Notwithstanding the terms of the scheme of delegation and any restrictions it places on delegation section 43A(6) states that the planning authority may if they think fit, decide themselves to determine an applications which would otherwise fall to be determined by an appointed person. Any such decision must include a statement of the reasons for which it has been taken, and a copy of the decision is to be served on the applicant.

Delegation under powers from the Local Government (Scotland) Act 1973

16. Section 43A only applies to delegation of the determination of applications relating to local developments. As set out above at paragraph 8, local authorities' powers to delegate under the Local Government (Scotland) Act 1973 are in relation to other applications unchanged by the terms of the 2006 Act. Planning authorities can use these wider powers to delegate applications which are not eligible for inclusion in the section 43A scheme of delegation such as other types of applications eg for listed building consent, conservation area consent, consent to display adverts. other applications for consent, including those for listed building consent or hazardous substances consent retain the existing right of appeal to Scottish Ministers, regardless of whether they have been determined by officers under delegated powers or by members of the planning authority. Local authorities could also delegate decisions on major developments which are not significantly contrary to the development plan using the scheme of delegation under their Local Government (Scotland) Act powers, although the general expectation would be that elected members may have an interest in determining major developments. This scheme could also be used to set out any other planning functions the authority may wish to delegate eg enforcement duties. Schemes of delegation under Local Government (Scotland) Act powers do not require ministerial approval.

Procedures for adoption of the scheme

17. Regulation 4 provides that where the planning authority proposes to adopt a scheme of delegation under powers from the Planning Act they should send a copy of the scheme to the Scottish Ministers. The planning authority is not to adopt the scheme until such time as it has been approved by the Scottish Ministers. Schemes can not be approved subject to modifications, where changes are to be made the planning authority must send a revised copy of the scheme they propose to adopt to Scottish Ministers for approval.

Publication of the scheme

18. Once the scheme has been approved by Ministers and adopted by the planning authority, regulation 5 requires that the planning authority make a copy of the scheme available for inspection at an office of the planning authority and in every public library in the authority's area. The scheme must also be published on the internet. The provisions for adoption and publication contained within the regulations are intended to offer a straightforward process for putting the new schemes of delegation in place. Planning authorities remain free to take additional steps to publicise the schemes should they consider that to be appropriate.

Use of the section 43A scheme of delegation

19. Decisions made by an appointed person under the new scheme of delegation have the same status as other decisions taken by the planning authority other than the arrangements for reviewing the decision. Sections 43A(8) to (16) give an applicant a right to require the planning authority reviewing these decisions instead of a right of appeal to Scottish Ministers.

20. In cases where the planning authority receives an application for planning permission for a local development and the proposal would also require another type of consent e.g. listed building consent, there is the potential for there to be two separate routes for challenging the respective decisions, one on appeal the other to review. However, it will remain for the planning authority to consider which is the most effective route to determine related applications.

21. Section 43A(6) enables a planning authority to determine themselves an application which would otherwise fall to be determined under delegated powers. Where it is decided that members of the authority would take a decision on the planning application, section 43A(7) requires the authority to provide the applicant with a statement giving their reasons for deciding to determine the planning application themselves.

Subsequent schemes of delegation

22. Regulation 6 requires that the planning authority should prepare a scheme of delegation at intervals of no greater than every five years. Section 43A(1)(a)(ii) also prescribes that planning authorities must prepare a scheme of delegation whenever required by the Scottish Ministers. The procedure for doing so will mirror that of preparing the original scheme.

LOCAL REVIEWS

23. As set out in section 43A(8) where an application for planning permission, or for consent, agreement or approval of a proposal in the category of local developments falling within the scheme of delegation has been

- refused by an appointed officer;
- granted subject to conditions*; or
- has not been determined within the prescribed period (two months) but is of a class of application that falls within the scope of the scheme of delegation

the applicant may require the planning authority to review the case.

* Section 58(1) of the Act specifies that planning permission will expire after 3 years from the date on which it is granted unless the development to which it relates has been started. The Act also allows at section 58(2) that the planning authority may direct that a longer or shorter period than 3 years may apply. Although these time periods are not a condition to the planning permission, it is open to the applicant to seek a review against the 3 year time period, or any different period directed, as if it were a condition⁴.

The regulations set out the procedures for requiring a review and the process that should then be followed.

Notice of Review

24. Regulation 9 provides for the applicant to require a review in writing to the planning authority (the local review body). The request to review is referred to in Regulation 9 as the “notice of review”.

25. This notice must be served on the planning authority within three months of the date of the decision notice or from the date of expiry of the period allowed for determining the application (this period is set in the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 at regulation 27 as two months following the validation date).

26. The notice of review must be made on a form available from the planning authority and needs to include sufficient information to allow the planning authority to review the case. Accordingly regulation 9 sets out that the information to be provided by the applicant is:-

- The name and address of the applicant,
- The date and reference number of the application subject of the review,
- The name and address of the representative of the applicant (if any) and whether any notice or correspondence required in connection with the review should be sent to the representative rather than the applicant,
- A statement setting out the applicant’s reasons for requiring the review and by what procedure (or combination of procedures) the applicant wishes the review to be conducted. In this regard the procedures that may be used are

⁴ The Planning etc. (Scotland) Act 2006 (Consequential Amendments) Order 2009

set out in Regulation 12 and include written submissions, the holding of one or more hearing sessions and a site inspection.

27. All matters that the applicant intends to raise in the review should be set out in or accompany the notice of review as should all documents, material and evidence that the applicant intends to rely on. Regulation 9(5) makes it clear that apart from this information the applicant will only be able to raise matters or submit further documents in accordance to the extent permitted by the regulations. That is, either where the review body request further written evidence or where requested as part of a hearing session - reinforcing section 43B of the Act. These requirements are intended to ensure that the key items of information are provided efficiently at the start of the review process rather than at varying points throughout the process.

The Local Review Body

28. Regulation 7 requires that a review case is to be conducted by a committee of the planning authority comprising at least three members of the authority. The regulations do not define an upper limit on the number of members that should comprise the review body: the size will be for the planning authority to determine. In cases where the local review body comprises a small number of elected members, the authority should ideally ensure a larger pool of elected members is available to provide cover where appropriate. Regulation 7 requires that any meeting of the local review body considering how the review, or stages of it, should be conducted as well as the review itself should be in public. Consistent with the approach on appeals made to Scottish Ministers, the decision on the procedure of how a case should be reviewed will be for the local review body. While meetings are to be held in public, neither the primary legislation nor the regulations convey an automatic right for the applicant or others to make oral representation.

29. Membership of the local review body and administrative arrangements for supporting the review process will be for the planning authority to decide and so are not set out in the regulations. The Scottish Ministers expect that arrangements put in place by planning authorities to review decisions will follow a process that is demonstrably fair and transparent. Members participating in review cases should receive appropriate training in planning issues and in holding hearing sessions. In most instances it is likely that one local review body per planning authority will carry out the review function effectively. However, some authorities may consider that more than one review body would provide an appropriate service, perhaps given the size of the geographic area required to be covered.

30. Planning authorities will want to ensure that the local review body is supported by appropriate administrative and legal advice to ensure that members are guided on the review process. Section 43B restricts the ability of parties to introduce new material at the review stage while preserving the requirement to take into account and the entitlement to raise considerations which are material to the determination of the case. Where the local review body considers it necessary to take further advice before reaching a decision on the review it will be for the planning authority to arrange that. Scottish Ministers expect that all administrative arrangements required to support the review process locally should respect the principles of fairness and transparency that must underpin operation of the new system.

Notification to interested parties and publication

31. Once a notice of review has been submitted by an applicant Regulation 10 requires the review body to make interested parties aware of the review request within 14 days of the notification. Interested parties are defined in the regulations and include any statutory consultees or other parties who have made, and have not withdrawn, representations in connection with the application. The regulation requires statutory consultees to be notified by post of the review and for other persons either by post or by local newspaper advertisement. The regulations allow that wherever there are notification requirements these can include arrangements for electronic notification (see para 48 below)

32. The notice to interested parties should contain the following information required by the regulation:-

- The name of the applicant and the address of the site to which the review relates.
- A description of the application.
- An explanation that copies of any representations previously made regarding the application, other than those to be treated in confidence, will be sent to the applicant and will be considered by the review body when determining the review.
- An indication that further representations may be made to the local review body and explain how representations may be made and by what date. 14 days is to be provided for interested parties to make further representation.
- Details of where a copy of a notice of review and other related documents can be inspected.

33. The local review body must ensure that a copy of the notice of review, and any related documents or representations are available for inspection at an office of the planning authority. The planning authority are to give any person who requests the opportunity to inspect and where practicable take copies of any review documents until such time as the review is determined. Any interested party can make further representation on the review case within 14 days from the date on which notification has been given by the local review body.

Review Procedure

34. In cases where the local review body consider that there is sufficient information from the material before it, including the notice of review, the decision notice, and report of handling, and any further representations from interested parties it may under regulation 12 proceed to determine the review. It is expected that the majority of cases coming before the local review body will be accompanied by sufficient information in order for the review to be determined quickly.

35. However, in some cases, including those involving non-determination of the planning application, it will be necessary for the local review body to obtain additional information. Part 4 and Schedule 1 of the regulations set out the procedures for doing so. Regulation 13 confirms that the local review body may determine at any stage of the review process that further information or representations should be

made to enable them to determine the review. Further information may be required by one or a combination of procedure, such as:-

- Written submissions;
- The holding of one or more hearing sessions;
- Inspecting the land which is the subject of the review case.

36. Under Regulation 14 the local review body can hold a pre-examination meeting to consider the manner in which the review or any part of the review is to be handled. This will not be appropriate in every case. However, where there is a range of issues to be examined or more than one method likely to be used to support the review process, such a meeting can provide the applicant and interested parties clarity as to the procedures and their respective roles and help ensure the review is conducted efficiently and expeditiously. The pre-examination meeting could take place when the local review body meet to consider whether it has sufficient information to enable it to determine the review. It is stressed that a pre-examination meeting will not be necessary in all but the more complex cases, perhaps where there are a range of interested parties or where there are planning issues that require to be explored by further examination or oral evidence.

Compliance with development management procedures

37. Regulation 19 sets out that where procedures set out in the Development Management Procedure Regulations⁵ in regulations 18-20 and 25 in terms of notification, publication and consultation requirements by the planning authority have not already been complied with the local review body must ensure that these are carried out before determining the review. This is most likely to arise in instances where the review arises under section 43(8)(c) because the period allowed for determining the application expired.

Matters which may be raised in a review

38. Section 43B of the Act restricts the introduction of material in the review proceedings which was not before the appointed person at the time the determination reviewed was made. New material will only be permitted where the party can demonstrate that it could not have been introduced earlier in the process, or that it arises as a consequence of exceptional circumstances. This does not affect requirement or entitlement to have regard to the provisions of the development plan or any other material considerations.

Written submissions

39. Regulation 15 sets out a straightforward procedure for requiring additional information from parties in writing. Where the local review body requires further information to allow them to determine the review they may request information from the applicant or any other body or person they wish to receive information from by sending a written notice. The written notice should set out the matters on which further information is required, specify the date when it is required by and explain

⁵ Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 http://www.oqps.gov.uk/legislation/ssi/ssi2008/ssi_20080432_en_1

who else has been asked to provide additional information. Where the local review body issues a notice requesting further information from a body or person other than the applicant, it must send a copy of that notice to the applicant. When responding to the local review body with any further information copies should also be sent to the applicant and to such other bodies or persons as the local review body specified in the notice. It is for the local review body to set out in the notice all the addresses to which such copies of the further information should be sent. The applicant and any other parties have a period of 14 days in which to give comment on the additional material to the local review body, again providing copies to the applicant and other bodies or persons specified in the procedure notice.

Site Inspections

40. Regulation 16 sets out the procedures for site inspections. At any point in the review process the local review body may inspect the land subject of the review. They may do this either unaccompanied or accompanied by the applicant and any other party the local review body considers should attend. Where the inspection is to be accompanied the local review body is required to give reasonable notice to parties - the applicant and any interested party. However the local review body is not required to defer an inspection if any person to whom notice was given is not present at the appointed time.

Hearings

41. Whenever the local review body proposes to hear oral evidence the hearings procedures apply. Schedule 1 to the Regulations contains rules for holding hearing sessions. These are intended to provide a framework within which a local review body can hear evidence from the applicant or from interested parties on specific matters only. Hearing sessions are not intended to be adversarial: the hearing should take the form of a discussion led by the local review body. Only exceptionally is it envisaged that cross-examination would be required in order to provide a thorough examination of a particular issue. The schedule provides a framework for advising the principal parties of the hearing and for them to set out in advance their respective positions clearly.

42. Where a local review body decide that a hearing session should be held it is to write to the parties who have an interest in the issues to be discussed at the hearing. These include:

- the applicant;
- any interested party who made representations in relation to specified matters; and
- any other body or person from whom the local review body wishes to receive further representations or to provide information on specified matters.

43. The local review body should set out in writing to the above parties the matters that are intended to be considered at the hearing session – only those matters should be considered at the hearing session. The parties then have 14 days in which to confirm their appearance at the hearing session. This written confirmation means that the persons are entitled to appear at a hearing session.

The local review body will determine the arrangements for the hearing session and can vary the arrangements where it appears reasonable in the circumstances.

44. Before a hearing session is held those entitled to appear are expected to provide in advance an outline of the case they intend to put forward. This is referred to in the regulations as a hearing statement. Those entitled to appear are also required to provide copies or extracts of any supporting documents they intend to rely on in presenting their case. It is for the local review body to set out the timescale for submitting this information or for requesting further information from the parties following submission of their hearing statements.

45. The procedure to be followed at the hearing session is for the local review body to determine. The regulations do require that before the hearing takes place or at the outset the local review body explains the procedure it intends to adopt including the order in which the specified matters are to be considered and in which parties are to be heard.

46. The regulations enable those entitled to appear at the hearing to do that on their own behalf or to be represented by another person. Where two or more persons have a similar interest in the issues being considered one or more persons may appear on behalf of some or all of the parties where the local review body allows. It is not intended that the review process should be adversarial or that it must involve legal representation. The intention is that the planning authority put in place a fair and transparent process than enables them to reach a decision on determining the review.

47. Parties entitled to appear at the hearing will be entitled to bring forward evidence from another party in support of their case. The regulations are clear that the hearing process should take the form of a discussion led by the local review body and that cross-examination should not be permitted unless the local review body consider it necessary to ensure a thorough examination of the issues. The local review body is entitled to refuse to allow evidence to be given, cross examination or presentation of other issues which it considers to be irrelevant or repetitious. The local review body may from time to time adjourn the hearing session, giving such notice of the adjourned hearing session to the parties entitled to appear at the hearing session as may appear to the local review body to be reasonable in the circumstances.

Appointment of an assessor

48. Regulation 20 permits the local review body to appoint an assessor who can advise it on specified matters. Assessors are used infrequently in the current appeal system to advise on specialist or technical matters that are at issue. It will be for the local review body to consider to what extent there is a role for a specialist assessor to sit with it at a particular hearing session. It will also be for the local review body to decide where the assessor comes from, be it a private expert consultant, a specialist from a neighbouring authority or an expert from within the Council who has not had a previous involvement in the application. Where an assessor is appointed those entitled to appear at the hearing session must be advised of the name of the assessor and the matters on which they are appointed to advise on. The assessor

may make a written report to the local review body after the close of the hearing session.

New evidence

49. If, having carried out the additional procedure set out above, the local review body proposes to take into account any new evidence which is material to the review, regulation 17 requires that it must first allow the applicant and any other relevant party an opportunity to make representations on that evidence.

Decision notice

50. The local review body must give a decision notice to the applicant. It is important that the terms of the decision of the local review body are clear. Under section 43A(15) the local review body has the full powers to uphold, reverse or vary a determination and section 43A(12)(a) requires that the decision notice includes a statement of the terms in which the planning authority have decided the case reviewed. The decision notice must also include a statement of the reasons on which the authority based that decision. Regulation 21 sets out a number of requirements to ensure that there is consistency in the quality of decisions from local review bodies. The local review body must also notify every person who made (and has not subsequently withdrawn) representations in respect of the review to inform them that a decision on the review has been made, and where a copy of the decision notice is available for inspection.

51. In cases of reviews which are refused planning permission or granted subject to conditions, the decision notice must be accompanied by a notification. Schedule 2 to the Regulations provides the template for notification which is to be sent to the applicant.

Review on failure to determine the application

52. As set out above at paragraph 22, in cases where the appointed person has not determined the application within the period prescribed in regulations ie it has not been determined within the two month set out in the development management procedure regulations, the applicant may require the planning authority to review the case. Section 43A(17) provides that, if following the applicant submitting for a review on such grounds, the local review body has not conducted the review within two months, as set out in regulation 8(2), the authority shall have deemed to refuse the application, and the applicant will have the right to appeal to Scottish Ministers under section 47(1).

Electronic Communication

53. Regulation 22 sets out that any document required or authorised to be sent under the regulations may be sent by electronic communications, and the requirements in the regulations that any document is to be in writing will be fulfilled, subject to certain criteria being met. These criteria relate to where the recipient consents, or is deemed to have agreed to receive it electronically (ie if they have already used electronic communication to send a document). The document sent by

means of electronic communication must be capable of being accessed by the recipient, legible in all material respects ie all the information must be available to the recipient to no lesser extent than it would if sent by hard copy, and must be sufficiently permanent to be used for subsequent reference.