

FALKIRK COUNCIL

**Subject: IMPLEMENTATION OF THE PLANNING ETC (SCOTLAND) ACT 2006 –
PRE-DETERMINATION HEARINGS**
Meeting: FALKIRK COUNCIL
Date: 14 September 2009
Author: DIRECTOR OF DEVELOPMENT SERVICES

1. INTRODUCTION

1.1 The purpose of this report is to:

- a) Inform members of the provisions contained in the Planning (etc) Scotland Act 2006 (“The 2006 Act”) and associated legislation and advice regarding pre-determination hearings.
- b) Seek approval of procedures for the delivery of the requirements of the Act in this regard.
- c) Seek approval for consequent amendments to the Council’s Standing Orders.

2. BACKGROUND

2.1 An integral part of the Scottish Government’s modernising planning agenda is to increase the level of community engagement and involvement in the planning process. Pre-determination hearings are aimed at making the planning system more inclusive, allowing the views of applicants and those who have made representations in respect of certain types of applications to be heard before a planning decision is taken. Pre-determination hearings are mandatory for applications within the following categories:-

- National developments
- Major developments that are significantly contrary to the development plan.

2.2 Under Section 56 (6A) of the Local Government (Scotland) Act 1973, inserted by the 2006 Act, applications that require a mandatory pre-determination hearing are to be determined by the Council after a hearing and cannot be delegated to the Council’s Planning Committee nor to officers.

2.3 Section 38A of the Town and Country Planning (Scotland) Act 1997, inserted by the 2006 Act, and Regulation 27 of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 provide for applicants and persons who have submitted representations to the planning authority to have the opportunity of appearing at and being heard at a pre-determination hearing before a “committee of the authority” (as opposed to the Council itself) before the Council determines the application.

3. RELEVANT COMMITTEE

- 3.1 It is for the Council to decide the relevant committee to hold pre-determination hearings. Research undertaken highlights differences in existing planning committee structures in other Councils. In some authorities the Council is also the planning committee. In others there are area planning committees, an overall strategic planning committee and a full Council all comprising different groups of elected members. Of course, in Falkirk there is a Planning Committee and, as of 3 August 2009, the Council.
- 3.2 The diversity is reflected in the varying ways in which other local authorities intend to deal with pre-determination hearings although it appears that not all have yet decided how they will deal with them. Several local authorities intend their planning committees in their existing form to hold the pre-determination hearings with a detailed minute and report of the proceedings being laid before the Council prior to its making a determination. At least one other local authority intends to expand its planning committee to include all elected members for the purpose of holding pre-determination hearings while another option is to constitute the Council itself as a new committee for the sole purpose of holding pre-determination hearings.
- 3.3 Each option has its advantages and disadvantages. If the Committee holding pre-determination hearings (whether as an extended Planning Committee or as a new Committee) comprised all members, all elected members involved in determining the planning application would have an opportunity to visit the site, hear evidence and ask questions of the applicant and/or agent, objectors, supporters etc before determining the application. This would not be the case if the pre-determination hearing were held by the Planning Committee in its existing form. This could lead some members to feel that they require further information before reaching a decision and requesting that consideration of an application be deferred resulting in a delay in determination.
- 3.4 However, demands on elected members' time are already heavy and convening a Committee comprising all members at short notice could be problematic particularly should it become a frequent occurrence.
- 3.5 Members of the Planning Committee already have experience of dealing with planning matters and would require little in the way of further training before holding pre-determination hearings. Training will be offered shortly, particularly for the benefit of members who have not had previous training/experience in planning matters.
- 3.6 The number of planning applications that would require a pre-determination hearing has been considered. Applying the new legislative requirements to applications received in the period 2007 to 2009, there would have been up to 6 pre-determination hearings in that two year period. However, there are 4 current applications that will probably require pre-determination hearings and determination by the Council.
- 3.7 Unless meetings of the Committee responsible for holding pre-determination hearings can be arranged at reasonably short notice the determination of national planning applications and major planning applications that are significant departures from the Development Plan will be delayed. However, there will normally be sufficient notice that such a hearing will be required, to allow proper scheduling.

Discussion

- 3.8 It is important to note that pre-determination hearings have been introduced by Scottish Government to make the planning system more inclusive, enabling the views of applicants and those who have made representations to be heard at Committee before a planning decision is taken. The circumstances in which a pre-determination hearing is mandatory are limited, applying only to proposals that are of recognised national importance or proposals that are significantly contrary to the Development Plan. Such proposals by their nature may either be controversial or of significant public interest and therefore warrant greater scrutiny by the planning authority.
- 3.9 Given the role of the Council in determining these planning applications and their importance, and the need for greater scrutiny when such cases do occur it is considered that it would be appropriate to expand the Planning Committee to include all members of the Council for the purpose of holding pre-determination hearings. It is proposed that the existing Convener and Depute Convener of the Planning Committee would retain such roles at pre-determination hearings. Adopting this proposal would require altering the Councils Standing Orders as set out and highlighted in Appendix 1.
- 3.10 Notwithstanding the administrative challenges this might bring, it is considered that, in the interests of transparency of process, all members who are likely to be determining any such application should also have the opportunity to be involved in the hearing process.

4. PRE-DETERMINATION HEARINGS PROCEDURE

- 4.1 Section 38A of the Town and Country Planning (Scotland) Act 1997, as inserted by the 2006 Act, advises that the precise procedures for arranging and conducting pre-determination hearings is a matter for the planning authority to decide. Guidance on matters to be considered in the procedures is set out in annex F of circular 4/2009, 'Development Management Procedures'. These include:
- The order of proceedings.
 - The maximum number of individuals to speak to either side.
 - The maximum time available for applicants. Rules governing witnesses and those who made representations to present their cases and respond to each others statement.
 - The opportunity for Committee members to ask questions of applicants, consultees, objectors and supporters.
 - The opportunity for Committee members to ask for additional advice and information from planning officers.

- 4.2 Research has been undertaken in the form of informal consultation with other planning authorities through the Heads of Planning Society and other contacts and a review of literature. The majority of Councils do not have procedures currently in place in respect of pre-determination hearings as required by the new legislation. A set of procedures is proposed for Falkirk Council which it is considered reflects the best elements found and also takes into account procedures already followed by Falkirk Council at planning site visits. These proposed procedures are set out in Appendix 2.

5. FINANCIAL IMPLICATIONS

- 5.1 Pre-determination hearings will have implications in respect of Councillor and staff time and the costs associated with preparing for and attending pre-determination hearings and the associated travel costs and the costs of premises. Pre-determination hearings could delay the determination of planning applications and therefore may potentially increase costs for applicants, as well as affecting performance indicators.

6. LEGAL IMPLICATIONS

- 6.1 Pre-determination hearings in the circumstances described are a requirement of the new legislation. There should be no legal or risk implications associated with the proposals.

7. CONCLUSIONS

- 7.1 Falkirk Council, as planning authority, requires to decide which Committee of Council will hold pre-determination hearings and to set out procedures for arranging and conducting them. It is important that these procedures are clear and consistent, efficient and effective for the participants and assist the Council in its statutory duty in the determination of planning applications.

8. RECOMMENDATION

8.1 It is recommended that Council:

- (1) Agree to delegate to the Planning Committee the holding of pre-determination hearings with the Committee being expanded to include all members of the Council for such purposes.**
- (2) Agree to amend the Council's Standing Orders as set out in Appendix 1 of this report.**

- (3) Agree the pre-determination hearing procedures as set out in Appendix 2 of this report.

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Director of Development Services

Date: 8 September 2009

LIST OF BACKGROUND PAPERS

1. The Town and country Planning (Scotland) Act 1997
2. The Planning etc (Scotland) Act 2006
3. The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008
4. The Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009
5. Circular 4/2009, 'Development Management Procedures'
6. Falkirk Council Scheme of Delegation – approved 3 July 2009

Any person wishing to inspect the background papers listed above should telephone Falkirk 01324 504875 and ask for Bernard Whittle (Planning Co-ordinator).

Appendix 1

PROPOSED AMENDMENTS TO STANDING ORDERS (underlined)

PLANNING COMMITTEE

For the avoidance of doubt, under S 56 (6A) of the 1973 Act, there is reserved to full Council, the determination of all applications which fall within S 38A (1) of the Town and Country Planning (Scotland) Act 1997. These are applications which require a mandatory pre-determination hearing prior to determination and include “national developments” as set out in a National Planning Framework and major developments which are significantly contrary to the development plan.

Terms of Reference

1. To discharge the Council’s regulatory and enforcement functions, in accordance with Council policy and so far as not reserved to Council or delegated to the Planning Review Committee or any other Committee or Officer, which relate (but not exclusively) to:-
 - (i) Town and Country Planning;
 - (ii) Roads and Transportation;
 - (iii) Building Control;
 - (iv) Other matters of a regulatory or enforcement nature.

Powers

- 2 (a) In relation to development control matters, to determine applications for:-
 - (i) listed building and conservation area consent
 - (ii) discharge, amendment or deletion of conditions
 - (iii) certificates of lawfulness of existing or proposed development
 - (iv) advertisement consent
 - (v) hazardous substances consent
 - (vi) decisions on permitted development, and
 - (vii) planning permission in relation to major and local developments in terms of s26A(1) subsections (b) and (c) respectively of the Town and Country Planning (Scotland) Act 1997, other than those which require to be determined by the Council in terms of the provisions of s56(6A) of the 1973 Act, in circumstances where:-
 - (i) the application has been made by the Council,

- (ii) the application has been made by a member of the Council or by an officer involved in the statutory planning process
- (iii) the application relates to land in the ownership of the Council or to land in which the Council has a financial interest,
- (iv) determining the application (whether by grant or refusal) would result in a contravention of the development plan or a contravention of the Council's policies, whether or not objections have been made
- (v) it is proposed to approve the application and there is a formal objection from a statutory consultee which would trigger referral of the application to Scottish Ministers,
- (vi) there has been a request from an elected member to refer any matter to committee within 7 days of the periodical recommendations list being issued, in which case reasons must be stated or
- (vii) for any other reason, the Director of Development Services considers it inappropriate to consider the application under delegated powers

2 (b) To conduct pre-determination hearings required by s 38A of the Town and Country Planning (Scotland) Act 1997

3. To hear and determine unresolved objections to any order proposed for the regulation of traffic and the implementation of traffic management schemes under the Road Traffic Regulation Act 1984, the Roads (Scotland) Act 1984 and the Local Roads Authorities' Traffic Orders (Procedure) (Scotland) Regulations 1987, and to conduct any hearings required under those acts and Regulations.
4. To consider and determine any of the regulatory and enforcement matters relating to the Council's functions as Roads Authority, in terms of the Roads (Scotland) Act 1984, the Road Traffic Regulation Act 1984, the Town and Country Planning (Scotland) Act 1997 or any other relevant Acts or Regulations, where the nature of the matter has been deemed controversial by the Director of Development Services.
5. To conduct hearings under the Building (Scotland) Acts 1959-70 and to make appropriate determinations.
6. To agree the procedures relating to conduct of any review carried out by the Planning Review Committee, other than those already set out in regulations or a development order.
7. In carrying out any of their powers hereunder, the Committee may:-
 - (i) conduct hearings in such manner as they consider appropriate, having regard to the subject matter under consideration and the requirements of law;
 - (ii) visit any site connected with a matter under consideration if it would assist the Committee in the discharge of their functions;

(iii) authorise the institution, entering appearance in or defending of any proceedings before any Court, Tribunal or Inquiry (where not authorised elsewhere in these Schemes of Delegation) where Council involvement is necessary to protect or uphold the interests of the Council and its community in respect of any matter within the remit of the Committee, provided that it will remain open to any Chief Officer to provide the foregoing authority where time limits or an emergency situation requires immediate action to ensure the Council's participation in the proceedings.

8. Any regulatory or enforcement powers or duties conferred or imposed on the Council in terms of law, apart from those detailed herein as being within the remit of the Council, the Planning Committee or the Planning Review Committee will be executed by the Chief Officer for the relevant Service and, in the event of there being any conflict as to which is the relevant Service, the Chief Executive will be entitled to decide. Without prejudice to the generality of the foregoing, it is specifically acknowledged that the Director of Development Services will have power to:-

- (i) vary or otherwise any planning permission where the variation sought is not material, under section 64 of the Town and Country Planning (Scotland) Act 1997
- (ii) advertise applications for planning permission when considered necessary or desirable
- (iii) decide whether the topping, lopping or felling of trees subject to Tree Preservation Orders is necessary in terms of section 160 of the Town and Country Planning (Scotland) Act 1997 and the authorisation of such activities
- (iv) make emergency Tree Preservation Orders
- (v) issue stop notices and instruct action for interim interdicts
- (v) issue breach of condition and planning contravention notices
- (vi) pursue enforcement action
- (vii) issue statutory notices in terms of the Building (Scotland) Act 2003 and any Regulations made there under or any amendment thereof

STANDING ORDERS RELATING TO MEETINGS

SECTION 4

CONSTITUTION, MEETINGS AND PROCEEDINGS OF COMMITTEES AND SUB-COMMITTEES

34. COMMITTEES

34.1 At its Statutory Meeting, the Council will appoint:-

- (i) Standing Committees, together with any other bodies required for statutory purposes. The powers of the Committees will be set out in their terms of reference,
- (ii) A Convener, Depute Convener and Members for each.

34.2 The number of Members on each Committee and the quorum for each will be as set out below:-

STANDING COMMITTEES

<u>Committee</u>	<u>Membership</u>	<u>Quorum</u>
Policy and Resources Committee	8	3
Education Committee	12 plus 3 representatives of denominational bodies as required by Section 124 of the 1994 Act; 2 parental, non- voting representatives and 2 non-voting young people to be nominated by the Falkirk Schools' Council	4 elected Members
Environment and Community Safety Committee	12	4
Economic Strategy and Development Committee	12	4
Leisure, Tourism and Community Committee	12	4
Housing and Social Care Committee	12	4

Planning Committee	<u>12</u> except when <u>conducting a pre-</u> <u>determination</u> <u>hearing required by</u> <u>s 38A of the Town</u> <u>and Country</u> <u>Planning (Scotland)</u> <u>Act 1997 when the</u> <u>membership will</u> <u>comprise all</u> <u>elected members of</u> <u>Council</u>	<u>4</u> except when <u>conducting a pre-</u> <u>determination hearing</u> <u>required by s 38A of</u> <u>the Town and Country</u> <u>Planning (Scotland) Act</u> <u>1997 when the quorum</u> <u>will be a quarter of the</u> <u>membership</u>
Planning Review Committee	5 The Convener and Depute Convener of the Planning Committee, ex officio, with 3 others drawn from the remaining members of the Planning Committee on a rota basis	3
Civic Licensing Committee	10	4
Audit Committee	6	4
Appeals Committee	8	3
Investment Committee	6	3
Appointments Committee	6 Plus the Convener of the relevant Scrutiny Committee on an ad hoc basis where he/she is not already a Member of the Committee; where there is more than one Scrutiny Committee to which the appointee would principally report,	3

	the Conveners should agree amongst themselves which Member will attend.	
Consultative Committee	6	3
Emergency Committee	The Members of the Policy and Resources Committee	3
Bo'ness Common Good Fund Committee	The Provost, Depute Provost and Members of the former Burghal area	3
Denny and Dunipace Common Good Fund Committee	The Provost, Depute Provost and Members of the former Burghal area	3

Falkirk Common Good Fund Committee	The Provost, Depute Provost and Members of the former Burghal area	3
Grangemouth Common Good Fund Committee	The Provost, Depute Provost and Members of the former Burghal area	3

34.3 The Education Committee, the Environment and Community Safety Committee, the Economic Strategy and Development Committee, the Leisure, Tourism and Community Committee and the Housing and Social Care Committee are collectively referred to as the Council's 'Scrutiny Committees'.

34.4 (i)The Convener of the Policy and Resources Committee will be the Convener of the Emergency Committee.
(ii)The Convener and Depute Convener of the Planning Committee will be the Convener and Depute Convener of the Planning Review Committee

34.5 The Council may appoint special Committees for such purposes as it may from time to time consider expedient.

- 34.6 The Policy and Resources Committee may at any time appoint Sub-Committees or panels and may authorise the appointment of such Sub-Committees and panels by any of the Scrutiny Committees. Such bodies' terms of reference and the delegation of any powers to them must be explicit and within the appointing Committee's terms of reference.
- 34.7 A Member of a Sub-Committee or panel must be a Member of the Committee appointing it.
- 34.8 With the exception of the Common Good Fund Committees and from time to time the Planning Review Committee, Membership of all Committees and Sub-Committees will reflect the political balance of the Council. Seats allocated to Political Groups will be as resolved by the Council at the Statutory Meeting or at any other meeting of the Council as required to comply with the provisions of the 1989 Act or any Regulations made thereunder.
- 34.9 The Director of Law and Administration is authorised to appoint, nominate and convene Committees, boards and panels for specific statutory purposes. These include:-
- (i) Council Tax and Housing Benefit Review Boards;
 - (ii) Access to Personal Files Review Boards (Education, Housing and Social Work);
 - (iii) Complaints Review Committee (Social Work);
 - (iv) Education Appeals Committee;
 - (v) Appointments Committee (Education);
 - (vi) Attendance Committee (Education).
- 34.10 The Council is the lead Council among Falkirk, Stirling and Clackmannanshire Councils in respect of the following statutory Committees:-
- (i) Joint Advisory Committee on the Inspection of Residential Care Establishments,
 - (ii) Joint Children's Panel Advisory Committee.

The Director of Law and Administration is authorised to appoint, nominate and convene these Committees or to liaise with the other two Councils in so doing.

- 34.11 The Director of Law and Administration will appoint, nominate and convene the bodies referred to in Standing Orders 34.9 and 34.10, and like bodies, in accordance with their statutory framework. These bodies will follow the procedure that is suitable to the subject matter being considered and will not otherwise be bound by the procedures for meetings set out in these Standing Orders. They will usually be required to observe the principles of natural justice and to follow a set procedure.
- 34.12 Meetings of the Appeals Committee and the Appointments Committee will follow procedures which are set out by the Director of Law and Administration and which will conform to the principles of good employment practice. Those Committees will not otherwise be bound by the procedures for meetings set out in these Standing Orders.
- 34.13 The Council and its Committees and Sub-Committees can establish other informal advisory or consultative bodies, which are not Council Committees or Sub-Committees. They may also establish working groups which may include both officer and Member representation.
- 34.14 With exception of the Planning Review Committee, the Members of each Committee referred to in Standing Order 34.2 and the Conveners and Depute Conveners thereof:-
- (i) will be appointed by the Council at the Statutory Meeting of the Council in terms of Standing Order 5, and
 - (ii) will hold office until the date of the next election of Councillors, unless:-
 - (a) otherwise decided by the Council by resolution following a Notice of Motion in terms of Standing Order 28, or
 - (b) an individual Councillor delivers to the Chief Executive a letter of resignation specifying the particular office from which (s)he is resigning and the date on which such resignation will take effect.

Appendix 2

PROPOSED PRE-DETERMINATION HEARING PROCEDURES

Where a Pre-determination hearing is to be held the following procedures would apply:-

1. The pre-determination hearing will only be held once the neighbour notification period has expired.
2. Parties invited to the pre-determination hearing will be the applicant/agent, any authority or person consulted by the planning authority in compliance with Section 43(1)(c) of the Town and Country Planning (Scotland) Act 1997, as amended by the Planning etc (Scotland) Act 2006 and from whom the Council received representations i.e. the statutory consultees and any other person from whom the Council received representations.
3. Once the date for the hearing has been confirmed, formal invitations will be issued, giving fair notice to the applicant/agent, the statutory consultees who have submitted representations, and any other person from whom the Council received representations, confirming arrangements for the hearing.
4. Parties wishing to be heard at the hearing should advise the Director of Law and Administration of their intention by 12 noon on the day before the proposed hearing (excluding Saturdays and Sundays). Parties must advise the name of the person(s) who will be speaking. All interested parties, even if they do not wish to be heard, retain the right to attend the hearing to listen to the proceedings.
5. The Director of Development Services will provide a written report for the hearing that describes the proposal and summarises the relevant Development Plan policies and material planning considerations. A copy of the report will be available three clear days prior to the hearing. This report will not normally make recommendation for approval or refusal of the planning application. A full report including such recommendation will be submitted to Council for consideration after the hearing has taken place.
6. If appropriate, on the day of the hearing or as close to this date as possible members of the Committee shall have an opportunity to visit the site. They may be accompanied by such officers as they deem appropriate. The purpose of a site visit will be to inspect the site and the surroundings, not to debate the application or to hear representations from any party. No other person may participate in a site visit or address the Committee during a site visit. No such site visit will be a formally constituted meeting of the Committee.
7. At the pre-determination hearing the order of business will be as follows:
 - (a) The Convener will explain the purpose of the hearing.
 - (b) The Convener will invite the relevant officer to present the report referred to in paragraph 5 above.

- (c) The following parties will then be given the opportunity of being heard by the Committee: the applicant and/or agent, relevant statutory consultees, and any other person from whom the Council received representations including objectors and supporters.
 - (d) The applicant and/or agent will have a right of reply to any points raised by any party heard by the Committee.
 - (e) Members of the Committee will be invited to question the applicant/agent or any party heard by the Committee or to seek guidance on factual or legal matters from Council officers after each presentation.
 - (f) Members of the Committee may identify any other planning issues that they wish to see addressed in the report to the meeting of Council that will consider the application.
 - (g) Convener closes the pre-determination hearing.
8. The agenda for the hearing will list the order in which categories of speakers should address the Committee.
 9. Unless with the consent of the Convener, the applicant and/or agent will normally be entitled to speak for up to 10 minutes in total. Any individual who has made representations regarding the planning application will normally be entitled to speak for up to 5 minutes. For parties other than the applicant, where there are two or more persons having a similar interest being discussed at the hearing a spokesperson should, where possible, make the submission on behalf of the group. This is to ensure that all relevant matters are given the time to be put forward and to avoid repetition by parties with similar issues. Unless with the consent of the Convener, a spokesperson for a group will normally be entitled to speak for up to 10 minutes. In the event that a large number of representations are received, mainly on the same aspect(s) of the application, the Convener may limit the number of speakers, having regard to paragraph 12 below.
 10. If anyone who has intimated their intention to be heard fails to appear at the hearing timeously, the Committee may proceed with the business without hearing that person.
 11. No cross-examination of any parties by other parties will be permitted.
 12. The Convener will be responsible for ensuring that the business of the Committee is carried out efficiently while having due regard to the principles of natural justice.
 13. For the avoidance of doubt, no decision on the application will be taken at the hearing.
 14. The application will be determined at the next appropriate meeting of Council after the pre-determination hearing.