
**PETITION: PUBLIC REPRESENTATION ON "SECTION 36"
WIND ENERGY PROPOSALS**

Briefing Note

PETITIONS COMMITTEE

21 March 2024

1.0 BACKGROUND

- 1.1 This paper relates to the consideration and determination of proposals for large scale wind farm development, specifically those dealt with through what is generally known as the "Section 36" process. To understand this process, it is important to start with some legislative context.
- 1.2 In this case, "Section 36" means Section 36 of the Electricity Act 1989. In its opening paragraph, Section 36 states:
- "...a generating station shall not be constructed ... extended or operated except in accordance with a consent granted by the Secretary of State."*
- 1.3 That explicitly makes the Government the decision maker. This provision is qualified further into the Section by reference to the requirement that it is only proposals where the generating capacity exceeds 50MW.
- 1.4 This is important because, unlike other development proposals, the controlling legislation is not the Town and Country Planning (Scotland) Act 1997 and, crucially, it is the Scottish Government, and not the Council, that is the determining authority. It is not a planning application. That, in turn, is important because whereas planning legislation and regulations are very prescriptive about the need for the Council to undertake public consultation and the manner in which it should conduct that, the Electricity Act places no such responsibility on the Council.
- 1.5 Schedule 8 of the Act sets out the procedure for applications to be made and includes the provision for the "relevant" planning authority (i.e. the Council) to be notified when an application is made (to the Government). It goes on to say that, if the planning authority were to object and not withdraw that objection, a public inquiry would be triggered. The convention is that the planning authority would then be required to appear to present evidence to that inquiry.
- 1.6 In its definition of "relevant planning authority", the Act simply states that, in Scotland, that means a general planning authority or a district

planning authority. It makes no further statement as to how the planning authority should prescribe that duty internally, including on to whom that responsibility falls within the organisation. It is silent on all other aspects of the process and the expected role of the planning authority.

1.7 It does go on, in paragraph 3, make separate provision for “objections by other persons”.

1.8 It states that:

“Where in the case of an application for consent under section 36 or 37 of this Act—

(a) the Secretary of State is not required by virtue of paragraph 2(2) above to cause a public inquiry to be held; but

(b) objections or copies of objections (by third parties) have been sent to the Secretary of State in pursuance of regulations made under this paragraph,

the Secretary of State shall consider those objections, together with all other material considerations, with a view to determining whether a public inquiry should be held with respect to the application and, if he thinks it appropriate to do so, shall cause a public inquiry to be held, either in addition to or instead of any other hearing or opportunity of stating objections to the application.”

The legislation therefore squarely places the duty of considering third party representations upon the Government in its capacity as determining authority. Furthermore, regulations direct that those 3rd party representations are made directly to Government.

2.0 TERMS OF PETITION

2.1 The issue being raised in the Petition being raised before Members is focussed upon the petitioners’ argument that their view should be taken into consideration as part of the Council’s input in to the Government’s decision. In their view, that should allow for third party representations to be included within the officer’s report to the Planning and Building Standards Committee and, in turn to allow verbal representations to be made to support those written views.

3.0 CURRENT COUNCIL POSITION

3.1 As the legislation referred to above confirms, there *is* a mechanism for communities and individuals to make representations, both to the decision-maker and, at the pre-application stage, to the developer, but it is correct to say that it is not through this Council.

3.2 As already noted, the Council is not the decision-maker nor is this a “planning decision” in the sense that it is a planning application determined through that statutory process. Applications made under Section 36 of the Electricity Act, as any proposal with an electricity generating capacity of 50MW or more must, is made to the Scottish

Government's Energy Consents Unit (ECU), acting on behalf of the Scottish Government, for determination. As a result, and as part of that the application process, Scottish Borders Council is only "notified" of the proposal.

- 3.3 The ECU are the determining authority for Section 36 applications and it is their responsibility to ensure that the application is publicised and to consider third party representations.
- 3.4 When an application is submitted to the ECU, if a view is sought by them from this Council, it is in its capacity as planning authority. The view being sought is that of the Council, not of anyone communicating with the Council, who have their own direct line of communication and will have their comments taken into consideration upon determination, in exactly the same way as will this Council's.
- 3.5 All other third party representations must be made directly to the ECU for their consideration, because they are the determining authority. It is purposely not the responsibility of the Council to communicate the views of others as part of that process, precisely because the ECU will receive them directly and address them accordingly as decision-makers.
- 3.6 The Council's remit is therefore to assess the planning implications of the proposal; in other words, to assess the proposal against development plan policies and make any technical assessments that it has responsibility for, such as landscape and visual impacts, access, noise and the effect of these on residential amenity. Like Community Councils (and anyone else with an interest), the Council then also submits its view to the ECU. The Council's responsibility in these cases, as far as it is defined, is to offer its own view on the proposal; it is a commonly held misconception that it is "taking sides" in its assessment merely because it has formed a view in support or opposition. Its view must, as it should, be an independent one based upon the merits of the proposal.
- 3.7 The ECU publish all of the information associated with the application on their own website. In every sense, therefore, the information *is* freely available and is where the community's view is – and should be – heard. As the ECU is the determining authority, that is entirely the correct location. It is not for the Council to duplicate that effort or that responsibility.
- 3.8 All decisions on S36 notification responses are made the Planning & Building Standards Committee before they are issued on behalf of the Council. Although a recommendation is made to them in an accompanying report by officers, they are entitled to arrive at a different view. It is not therefore correct to say that it is solely a decision of officers.
- 3.9 In making their decision, should Councillors wish to view any community or individual comments about the application, they are able to do so by checking the ECU website, something they are actively encouraged to do within the report on the proposal that goes to the Planning & Building Standards Committee. A link to the representations is provided for

Members within the body of the report, giving them unrestricted access, not just to the representations but to all of the documentation being considered. They are thus able to gauge the level of opposition (or support) and the reasons for it. In the context of the limited statutory role of the Council, that is considered to be a reasonable and proportionate response.

- 3.10 The Public Speaking protocol at the Planning & Building Standards Committee was introduced, at the request of Members, to enable verbal representations to be made, specifically in relation to planning applications. It relates only to the determination of planning applications, because the Council is the body that makes the decision.
- 3.11 It is incorrect to suggest that Councillors have no influence over procedure. Any Councillor can raise the question over the need for change to process or, as happened in the case of public speaking, an entirely new process. Any decision is one that would be made by Members themselves.
- 3.12 The arrangements for S36 applications have existed for some years and no Member of the Committee has sought a change. Indeed, as the petitioner notes, a public question was recently raised on this very issue and, in his response to the question, the Chairman and Portfolio Holder made clear his justification for continuing with current practice. There was no alternative view proposed by any Member present, suggesting that Councillors are content with the current arrangements.

4.0 Risks and Implications

- 4.1 The Petitions Committee is being asked to "instruct" officers to include community representations in its reports to the Planning & Building Standards Committee. There is no statutory requirement for such an instruction. The justification appears to be based upon what the petitioners have described as "best practice", citing Highland Council as its only example.
- 4.2 The reality is that, nationwide, there are a range of differing practices and Highland has been highlighted because it has adopted an approach that the petitioners favour. It is neither right nor wrong, nor good or bad practice in the eyes of the law, because the law is silent on roles and procedure. Scottish Borders Council's approach is not wrong because it differs from the Highland approach. It is equally compliant. Read literally, the Electricity Act does not actually *require* the Council to respond or indeed take any action at all once it has been notified. It could decide not to offer a view at all and still be compliant with the law.
- 4.3 On the specific point of referencing objectors' views, there is a very specific risk: If the Council is to properly reflect the views of all those wishing to make views, it would need to undertake its own consultation to invite representations to be made directly to the Council. That is an unnecessary risk, given that it is not the Council's responsibility to either invite comment or, more importantly, to make the decision. There is no statutory basis for it to undertake any of those actions.

- 4.4 The primary rationale for the current practice is as set out in the preceding paragraphs but if the approach being advocated by the petitioner were to be accepted, there are some further implications to be considered: Firstly, the Council will need to dedicate additional resources to administer the process being suggested. There are additional costs in neighbour notifying residents and administering the process, which it has no statutory obligation to do. Additionally, if the Council does adopt these non statutory process, it then places itself at risk of legal challenge if it fails to follow those procedures, even though there is no legal requirement for them to be adopted. This would seem to be creating an unnecessary additional legal risk.
- 4.5 It is fully accepted that the determination of proposals under the terms of the Electricity Act is not without flaws and the respective roles of this Council and of the ECU are not helped by that. It is nevertheless the legislation that we must work with and it is officers' view – both from a planning and legal standpoint – that the current approach adopted by this Council is entirely proportionate and consistent with that legislation. If the legislation is found wanting – or needs to be clarified – then an approach to the Scottish Government to invite them to review *their* processes would seem the more appropriate course of action.

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Background Papers: Petitions Procedure

Previous Minute Reference: Item 11, Scottish Borders Council, 26 October 2023