BIGGART BAILLIE
SOLICITORS

Tony Cruickshank
Transport & Works Consultation
Transport Strategy & Legislation Division
2D – Dockside
Scottish Executive
Victoria Quay
Leith
EH6 6QQ

Dalmore House
310 St. Vincent Street
Glasgow G2 5QR
Tel: +44 (0)141 228 8000
Fax: +44 (0)141 228 8310
DX GW9
LP – 1 Glasgow 12

E-mail:
info@biggartbaillie.co.uk

Website:
www.biggartbaillie.co.uk

7 Castle Street
Edinburgh EH2 3AP
Tel: +44 (0)131 226 5541
Fax: +44 (0)131 226 2278
DX ED15
LP – 2 Edinburgh 2

Our Ref: NMA/98.255

16 May 2006

Dear Mr Cruickshank,

I am pleased to provide you with my response to the Scottish Executive Consultation Document entitled "***Proposals for a New Approach to Delivering Public Transport Infrastructure Developments***" issued in February 2006.

As a Partner within the Infrastructure, Environment and Transport Department of Biggart Baillie, one of Scotland's leading commercial law practices, my colleagues and I are used to dealing with the challenging issues surrounding public transport developments in the UK.

The Biggart Baillie team has acted for a number of clients in respect of objections to Private Bills that have been promoted before The Scottish Parliament. Separately, we have acted for the promoters of a range of other forms of infrastructure projects, including roads, harbours, pipelines and electricity schemes. We also have a strong track record in relation to public inquiry and judicial review matters in a planning context.

However, the views expressed within this response are my own personal views, informed by experience, and not necessarily those of Biggart Baillie or any of our past or current clients.

In structuring my response to you, I have used the paragraph and question numbering of your original consultation document: -

- **Foreword** – I support the Minister's stated aims for the transport system as set out in the first paragraph and for the new process as set out in the fourth paragraph.

- **4.5** – as referred to below, promoters should be encouraged to actively engage with prospective objectors in advance of applying to the Minister for an Order and again in advance of initial parliamentary consideration. Equally, in relation to the third bullet point of paragraph 4.5, a ministerial decision should take account of both the terms of objections and the promoter's response to them.

- **Q1** – a phased approach would appear to be sensible. There may be consistency arguments for all transport projects being covered by the same procedures. Nonetheless there appears to be no compelling reason for changing the procedures in relation to either road or harbour developments at the moment. If the new procedures envisaged by this consultation are found to be effective once introduced and experience of them has been gained, there may be reason to conduct a wider consultation exercise with a view to adopting a common procedure for all forms of major infrastructure development (i.e. encompassing not only roads and harbour schemes but, for example, also pipeline and electricity related developments).

  In the meantime, it would be worth clarifying that the current proposals will apply not only to rail, tram, guided bus ways and inland waterway developments but also people movers, monorails and maglev developments and additionally (lest it fall between two sets of stools) public transport interchange developments.

- **4.13** – it should be made clear that directly affected parties will include wider groupings than those whose land or buildings may be subject to compulsory purchase or noise / visual intrusion. Relevant parties will include the owners and operators of existing infrastructure (including utilities) and service providers. Examples of the latter, as seen from Private Bills to date, include the Post Office, Network Rail and train operating companies and (in the case of GARL) air traffic control.

- **4.14** – the emergency services (including British Transport Police) and industry, economic and safety regulators (specifically the Office of Rail Regulation) should be included in the list of compulsory pre-application consultees.

- **Q2** – the question raises the issue of what the purpose of the pre-application period should be. The Private Bill process could be said to have failed to place suitable emphasis on efforts to accommodate and resolve concerns of stakeholders in advance of introduction of a bill, rather than merely informing them of outline proposals.

  A six month period linked to a requirement upon the promoter to demonstrate reasonable efforts have been made to accommodate concerns or otherwise pre-empt objections could add a pro-active approach to the new regime. If sufficient time is given for such pro-active steps to be effective, the new procedure could prove itself to be more efficient not only in terms of time and cost but also in terms of quality of output. Whilst it may not be possible for all issues to be resolved, a period of six months would allow reasonable time for effective engagement.

  If a promoter can demonstrate engagement with all prima facie affected parties and statutory consultees such that all of those third parties' positions are known and initial engagement can be shown either to have delivered a resolution or a final impasse, then there would appear to be no purpose to be served by delaying

matters until the expiry of a fixed pre-application period. Equally, if a short extension of the pre-application period would appear to offer a good chance of a potential objector's concerns to be resolved, then an ability for the Minister to take a pragmatic approach on the duration of the pre-application period could be beneficial to all parties. The onus, however, should be upon the promoter to establish a justification for any such variation in the timetable.

- **4.17** – the emphasis must be upon seeking resolution of issues. The consultation document is disappointingly silent on the standard by which a promoter's efforts will be judged and the consequences of any failure to meet that standard.

- **4.18** – whilst a financial capability or financial standing test is appropriate to prevent spurious requests for Orders, the consultation document is correct in acknowledging that promoters will not necessarily have secured funds in advance of an Order being sought or even made. The test of reasonable prospect of obtaining funds should be set up on a basis equivalent to that in procurement and tendering processes – namely, that the assessment should have regard to the identity and covenant of the promoter and the parties who are willing to confirm their intention or interest in funding the project.

- **Q3** – grant of power of entry in the absence of existing statutory right or agreement with the landowner/occupier could be seen as being a draconian measure. Such rights could be open to abuse, as alluded to in paragraph 4.20. Even with provision for compensation for damage and disturbance, the grant of such powers for prospective schemes could be thought to be excessive and raise human rights issues.

  In light of the range of information which can be obtained either by desktop studies analysing database and historic record information or remote sensing and non-intrusive investigation techniques, one has to question whether there are circumstances in which the grant of such powers can be properly justified in the absence of the subject scheme having been authorised by an Order being passed.

  Clearly stated and measurable criteria for the grant of such rights would need to be established.

  I would suggest that if such powers are to be available, they should only be capable of being granted upon a certificate from the Minister being confirmed by a summary application to a Sheriff, to whom the affected owner / occupier should be entitled to make representations. A balance of convenience test subject to a presumption against the grant of entry would appear appropriate.

- **Q4** – to create the necessary step change in the existing Private Bills process, potentially affected parties (i.e. potential objectors) need to be able to better understand the likely impact of the proposed scheme upon their interests. Experience from some Private Bills to date indicates that if the Bill as lodged before the Scottish Parliament and its accompanying papers had contained further detail a number of objections could have been pre-empted. This links back to the pre-application engagement and pre-emption period – if scheme designs including intended mitigation measures are included, the net result would be a more proactive and effective solution for all concerned.

In addition to the items listed in paragraph 4.22, I would suggest that provisional scheme designs be included.

To allow the Minister to assess the effort in and effectiveness of the promoter's consultation and resolution efforts, a statement of the level and nature of consultation undertaken and a statement of the alternative or substitute features that have been adopted during the pre-submission period to address concerns with or mitigate possible adverse effects of the proposal should be provided by the promoter.

The extent to which the promoter has made commitments to third parties in relation to any aspect of the proposed scheme or its consequences should also be clearly stated.

The promoter should separately be required to demonstrate the relevance of the proposed scheme to the Scottish Executive, National Transport Agency, Regional Transport Partnership and local authority policies.

The application papers must be a public document - to enable consultees to comment in the event that they feel the promoter has materially misrepresented any matter. Alternatively, such misrepresentation should form a ground for objection.

- **Q5** – a balance needs to be struck in relation to the period for objections – between unduly extending the Order process and allowing potentially affected parties an appropriate opportunity to consider their position, seek to engage with the promoter, take such professional advice and consult with their own stakeholders as necessary and, should they wish, to prepare and lodge an objection.

  Given that the Private Bills procedure has a 60 day objection period and it is not intended to realign all other aspects of the Orders procedure with the procedure for roads developments, the question really ought to be if there a justification for reducing from 60 to 42 days.

  The experiences of a range of objectors to Private Bills and their advisors indicate that to allow either for considered, measured and detailed objections which include indications of the manner in which the objection can be resolved or for agreement to be reached upon terms that resolve the prospective objector's concerns without an objection actually being lodged, the 60 day period should be retained.

  There is a possible counter argument that if pre-application obligations upon the promoter to effectively consult and engage with potential objectors are put in place, then there would be no net detrimental effect on potentially affected parties by shortening the objection period.

  Whilst accepting that there is a logic to that analysis, my earlier comments in relation to the time necessary to properly prepare and submit objections still apply. For objectors, as opposed to promoters, the project and its impacts will not be the focus of the normal working day of the people concerned. Therefore, there is very often an issue of finding time to consider the proposals (which the promoter will have had an extensive period to prepare), to form a view and to act upon it. If the material which will form the Promoter's application is to be substantially greater in terms of constituent elements, detail and thus volume, affected parties will need to

devote more time to considering materials in order to establish how their interests may be affected and thus whether or not they wish to object to the proposed scheme. In passing I would record that in that context, seeking external professional support should be seen not as some form of extravagance but as a perfectly reasonable and appropriate step for a potentially affected party to take.

On balance, I feel that the 60 day period should be retained.

In any event, whatever the actual number of days concerned, the objection period must comprise meaningful days – the Minister must have discretion to require an extension not only for bank holidays but for seasonal holidays. The objection period for the Edinburgh Airport Rail Link Bill included three bank holidays and just as importantly the schools' Easter holiday period, during which key staff in many organisations were on holiday for a week in addition to several long weekends. This significantly reduced the effective length of the objection period.

- **4.26** – I support this approach.

- **4.29** – add "wholly within the powers of the Scottish Parliament to grant".

- **4.32** – my comments at 4.18 above apply.

- **4.33** – there is a danger that a public interest test could have (or be perceived to have) the effect of rail roading (no pun intended) the proposal through to approval and in turn raise issues for judicial review or claims of breach of human rights. Whilst accepting that an assessment of whether or not any particular infrastructure project is in the public interest and thus worthy of being taken forward may be appropriate, I would suggest that the emphasis at the stage of an initial ministerial review should be on screening out schemes which have failed to establish a *prima facie* case of public interest. The difference in emphasis between this and the phrasing of the consultation document may be small, however, I would suggest it is significant.

- **4.27- 4.36** – subject to my specific comments above, I agree the terms of the consultation document.

- **Q6** – Step 4 raises constitutional issues of the balance of responsibilities and powers between the Scottish Executive and the Scottish Parliament. These are essentially political issues and which it is not appropriate for me to comment upon.

  That said, I acknowledge that given the significance (not least in terms of cost) of many of the types of schemes which will be covered by the procedure, it could be said to be appropriate that the Scottish Parliament should have an opportunity to debate whether, as a matter of principle, it is prepared to entertain the proposal.

  A contrary argument runs in parallel to the concern expressed above in relation to paragraph 4.33, namely that the Scottish Parliament approval in principle could result (or at least be perceived to be likely to result) in the approval of the Order at the end of the process being a 'fait accompli'. If such initial approval is made in the absence of objectors to the principle of the proposal being heard, issues of natural justice will arise. Allowing those objectors to be heard at the initial parliamentary stage is unlikely to improve the effectiveness or efficiency of the process beyond the current position under the Private Bills procedure.

- **4.41 – 4.43** – I agree with the rationale and proposals set out in the consultation document. Reporters in a planning context have a flexible yet professional and engaged approach.

  In my view the first sentence of paragraph 4.43 would have been better placed at paragraph 4.22. The final version of the new procedure should make it clear that the promoter must ensure its proposals are fully detailed and feasible at the point of submission. This will increase certainty about what is being proposed and reduce the difficulties faced by objectors when schemes are materially altered late in the day.

  Objectors in the Private Bills process have in some cases been (or at least felt) hindered by a lack of suitable detail in the Bill as introduced and the accompanying papers and as well as lack of engagement by some promoters. Those experiences have been compounded by Bill Committees and Clerks taking a strict view on the admissibility of material for evidence, of such being limited to matters expressly covered in original objections and not allowing admissibility questions to be debated. This has led to some objectors being frustrated that they have been unable to substantiate their position when it has become necessary to lead evidence, particularly when a lack of prior engagement by the promoter rather than any fundamental difficulty in agreeing a means of resolving the objection has resulted in objections having to be sustained during the parliamentary process.

  The new process should allow the reporters to exercise discretion in the management of the inquiry process, so as to not only allow but encourage resolution of objections and the introduction of relevant material to substantiate positions if a negotiated compromise cannot be found.

- **4.44** – whilst accepting that the Scottish Ministers may have particular matters upon which they wish to be informed for the purposes of their decision, the primary and overarching role in relation to detailed consideration should rest with the reporter.

  An ability for Scottish Ministers to direct the examination could be said to conflict with both the independence of the reporter envisaged by paragraph 4.41 and the constitutional position of the Scottish Parliament in relation to the sanctioning of powers to be sought under Orders procedures.

  For the Scottish Ministers to have a controlling hand in the public examination of the issues would also run contrary to the approach and core principles referred to in the fourth paragraph of the Minister's foreword to the consultation document.

- **4.45 – 4.47** – in relation to costs, if as part of the preliminary consideration of an application, a public interest test of whatever nature is passed, then that should be accepted by the Scottish Executive as an acceptance that it should bear the cost of mounting the examination, including production of transcripts and any further dissemination of proceedings (such as making materials available on the Internet as with the Private Bills procedure).

  Such an approach would be consistent with statements elsewhere in the consultation document (for example paragraph 4.39, which states "the most important and complex schemes will generally have been considered in the context of the National Planning Framework"). It will also place schemes being promoted by the private sector on an even footing with those being promoted by the public

sector. It should be noted that the rail and tram scheme Private Bills thus far promoted in the Scottish Parliament have had a very substantial financial support from the Scottish Executive.

In passing, I would observe that the consultation does not seek to address the issue of objector's expenses. The Private Bill procedure is clear that the Scottish Parliament is not in a position to award expenses against the promoter and that, save insofar as forming a legitimate head of claim for compulsory purchase compensation purposes, the promoter will not be liable for objector's expenses unless the promoter agrees to the contrary as part of a compromise agreement.

Please refer to my comments at Q5 above in relation to affected parties seeking professional support. In addition to those considerations and to the equality of arms arguments which have been put in the context of review of the Private Bills procedure, I would suggest that consideration is given to either the Reporter or the Minister being empowered to require the promoter to reimburse or contribute towards an objector's expenses in the event that an objection is held to be substantiated or that a promoter has failed to adequately engage with the Objector to seek to resolve the objection with amendment to the scheme (whether by adjustment to the drafting of the Order or the introduction of reasonable and practicable mitigation measures).

- **4.48 – 4.52** – I agree with the consultation document's proposals.

- **4.53** – I agree with the amendment to Step 3 as proposed. The question of whether affirmative order process is sufficient or whether a super-affirmative process is required is again a constitutional and political issue concerning the balance of the roles of the Scottish Ministers and the Scottish Parliament and something upon which I do not feel comfortable commenting. I would observe, however, that in light of the terms of paragraph 4.35, a super-affirmative order process may result in less delay than re-presentation following rejection of an affirmative order.

- **Q7** – there may be occasions where transport related projects although not designated "national developments" in the National Planning Framework may nonetheless be of such a cost or otherwise of sufficient regional or strategic importance in terms of the issues raised, the wider implications or precedent which may be set as to render parliamentary scrutiny appropriate.

  On the question of who decides whether parliamentary scrutiny is appropriate, I would suggest that whilst the Scottish Ministers should be given the ability to refer matters to the Scottish Parliament, the Scottish Parliament should be entitled to require scrutiny of a proposed scheme, the potential impacts and the terms of the Order seeking to empower it prior to the Order being passed.

As a general observation I note that the distinction between the Procedures Committee's suggestions and the proposals now being consulted upon is not as immediately clear as it perhaps could have been. Additionally, the terms "the Minister", "the Scottish Ministers" and "the Scottish Executive" are used in the document in a manner that does not aid comprehension of what is being proposed. I would have thought that the use of term "the Minister" throughout would have been both sufficient and clearer. Finally, we would suggest that there should be greater clarity as to the distinction in purpose and relationship between Pre-Application consultation and the

Objection Period. A clear statement of what is expected of both a promoter and of consultees at the Pre-Application stage is, I would suggest, necessary. Equally, the consequences of failure to meet those expectations should be spelt out.

In the case of a promoter, that might be rejection or delay of the application, or liability for expenses if the consultee subsequently objects and is held to be justified in doing so. In the case of a consultee, the consequences may be loss of the right to object.

I return the Respondent Information Form relating to the consultation paper and this response, duly completed.

Yours sincerely

Neil Amner
Partner
Infrastructure, Environment and Transport Department
Biggart Baillie, Solicitors.

namner@biggartbaillie.co.uk

Annex G - RESPONDENT INFORMATION FORM: Scottish Transport - Review of special parliamentary procedure provisions

Please complete the details below and return it with your response. This will help ensure we handle your response appropriately. Thank you for your help.

Name: Neil Amner

Postal Address: Biggart Baillie, Dalmore House, 310 St Vincent Street, Glasgow, G2 5QR

1. Are you responding: (please tick one box)

(a) as an individual ~~Y/N~~ go to Q2a/b and then Q4

(b) **on behalf of** a group/organisation ~~Y/N go to Q3 and then Q4~~

INDIVIDUALS

2a. Do you agree to your response being made available to the public (in Scottish Executive library and/or on the Scottish Executive website)?

Yes (go to 2b below) ~~Y/N~~

~~No, not at all Y/N We will treat your response as confidential~~

2b. Where confidentiality is not requested, we will make your response available to the public on the following basis (**please tick one** of the following boxes)

Yes, make my response, name and address all available ~~Y/N~~

~~Yes, make my response available, but not my name or address Y/N~~

~~Yes, make my response and name available, but not my address Y/N~~

ON BEHALF OF GROUPS OR ORGANISATIONS:

3 The name and address of your organisation **will be** made available to the public (in the Scottish Executive library and/or on the Scottish Executive website). Are you also content for your **response** to be made available?

Yes ~~Y/N~~

~~No Y/N We will treat your response as confidential~~

SHARING RESPONSES/FUTURE ENGAGEMENT

4 We will share your response internally with other Scottish Executive policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Executive to contact you again in the future in relation to this consultation response?

Yes ~~Y/N~~

~~No Y/N~~