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OUR REF S3106.1-02/KXH
YOUR REF
19 May 2006

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

Dear Mr Cruickshank

Consultation Exercise – Proposals for a new approach to delivering public transport infrastructure developments

Please find enclosed a hard copy of our submission to the above consultation paper, which was sent to you electronically this afternoon.

We enclose also the Respondent Information Form.

Yours sincerely

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Submission to the Scottish Executive

Proposals for a New Approach to Delivering Public Transport Infrastructure Developments

Submissions have been requested in relation to a Consultation Paper issued by the Scottish Executive (the "Executive") in respect of proposals to implement a new legislative framework for the process by which major public transport infrastructure projects are sanctioned. We welcome the opportunity to contribute to the development of this important piece of legislation.

The Consultation Paper sets out a series of different questions, and we have structured our submission to respond to each of these. Our response is set out below, and we hope that it is constructive.

1. Question 1 – Scope of the proposed legislation

1.1 The Consultation Paper sets out the Executive's proposal that the new procedure extend only to railway, tram, guided busway and inland waterway (canal) developments. This proposal mirrors, to an extent, the scope of the Transport and Works Act 1992 (the "TWA") in England and Wales.

1.2 We have noted, in particular, paragraphs 4.8 and 4.9 of the Consultation Paper that set out the Executive's reasoning in respect of their decision not to extend the new procedure to the construction of motorways, major trunk road schemes and significant harbour developments.

1.3 Whilst we appreciate that this project has been subject to significant time constraints, which has reduced the time available to the Executive to scope this legislation, we consider that this legislation should extend to all major transport infrastructure developments. We consider that such an approach would be preferable to the current proposal that would result in a fragmented system whereby certain developments proceed under one process, and others proceed under a variety of alternative, though similar, approaches. We consider that the proposed approach will lead to a lack of overall transparency of the development of such projects. In particular, by proposing to maintain the current piecemeal approach to such projects, the Executive will be missing a key opportunity to provide for greater access to the

process for the general public. In particular, we consider that there would be merit in incorporating the various Special Parliamentary Procedures referred to in the recent separate consultation by the Executive within the proposed Bill.

1.4 However, should the Executive continue to develop the proposal within the scope proposed in the Consultation Paper, we would be interested to see the intended definition to be given to "inland waterway developments". The Consultation Paper appears to suggest that these will be limited the development of canal systems. This does not equate with the usage of the TWA process in respect of such developments in England and Wales. A review of the orders made under that legislation indicates that a number of these orders relate to the development of bridges and other structures over rivers (also "inland waterways" as defined by the TWA). It is far from clear from the proposals set out in the Consultation Paper that such developments would fall within the scheme proposed by the Executive.

2. Question 2 - 6 month minimum pre application notification

2.1 We note the comments in paragraph 4.14 of the consultation paper that the Executive is keen to ensure pre-application consultations are taken in line with proposals set out in the Planning White Paper. We would observe that the Planning etc (Scotland) Bill in Section 35B requires a prospective applicant to give at least 12 weeks notice to the Planning Authority that an application for planning permission is to be submitted. Given the Executive's intention to make pre-application consultation mandatory we believe that the 12-week period set out in the Planning Bill is an appropriate time period to apply in relation to major transport projects as well. There seems to us to be no particular reason to draw a timing distinction between what might potentially be a relatively small transport project promoted under the regime set out in the Consultation Paper on the one hand and a very significant land use development proposed under the planning regime.

2.2 We do not believe that there is any case for lengthening the statutory pre-application period. In many cases, discussions will have been taking place on an informal basis with all parties likely to be affected by the proposals for some significant period of time prior to any application being submitted. We note the comments in relation to consultation with the various statutory agencies. We believe that in practice substantial dialogue will have taken place with these agencies in any event during the scoping process for the environmental statement which will accompany almost all projects which come forward under this procedure. In those circumstances comments received from the consultation bodies will be taken in to account as part of the ongoing process of preparation of the environmental statement and we do not believe that a mandatory pre-application consultation period of longer than 3 months is necessary to ensure that the proposals are subjected to effective scrutiny by those consultation bodies.

2.3 So far as initial pre-application consultation with community groups and other affected parties is concerned, we are fully supportive of the Executive's proposals to ensure that Promoters consult with affected parties. We wonder, however, whether a period of longer than 3 months would produce any clear benefit to the communities potentially affected. In some instances it may simply result in a greater blighting effect on properties which might potentially be affected by the proposals.

3. Question 3 – Promoter's rights to enter onto land

3.1 The Consultation Paper recommends that potential Promoters, who do not have existing statutory rights of access to land, are permitted to apply to either the Scottish Ministers or the local planning authority to be authorised to gain access. The Consultation Paper poses a specific question regarding what this process should be.

3.2 Given that such an authorisation would grant a Promoter a right to intrude on an individual's private property, it is imperative that the provisions of the Bill authorising this set clear and unambiguous criteria that must be met before such an authorisation could be granted. In particular, such criteria should be placed on the face of the Bill itself to enable them to be easily accessed and fully debated in the Scottish Parliament.

3.3 In addition, should authorisation be granted under these provisions, clear protections need to be put in place in relation to its operation. In particular, where a Promoter seeks to use this power to enter onto land without the consent of the owner or occupier, we consider that such a power should not able to be undertaken without the presence of an officer of the local planning authority or the Police in order that there is some independent oversight of those entering onto land. We consider that this course of action would offer appropriate protection to both the land owner and the Promoter.

3.4 Finally, the use of this power should be governed by provisions similar to those set out in relation to the entry powers of planning authorities in the Town and Country Planning (Scotland) Act 1997.

4 Question 4 - Documentation to be submitted in support of the Application

4.1 We believe that the list set out in paragraph 4.22 of the consultation paper provides a reasonable list of the information that should be provided. One query that we do wish to raise relates to the penultimate bullet point. This requires a Promoter's application to contain "details of any consents that are required to implement the proposal". We wonder whether this requirement is not already covered off in that, as with the existing Private Bills process, the draft Order itself would set this out in order to seek consent under the relevant statutory regimes (that is, to be granted deemed planning permission). Given that this information

would need to be set out in the draft Order, it is likely that it would also be set out in both the Explanatory Statement or Promoter's Memorandum

5 Question 5 - Implications of reducing the time period for objections

5.1 We do not believe that there are any significant implications of reducing the time periods in question and believe there is merit in having consistency in the way that different proposals under different regimes are treated. We would, however, recommend that a Promoter is required, prior to submission of an order, to set up a website containing links to all of the matters referred to in paragraph 4.22 to ensure that affected parties are given access at the outset of the objection process to the relevant information which they require in order to determine whether an objection is necessary.

6 Question 6 – Two-stage consideration by the Scottish Parliament

6.1 We agree with the comments made in the Consultation Paper that the proposal of the Procedures Committee of the Scottish Parliament that proposals be subject to a formal Parliamentary motion prior to proceeding to detailed consideration is likely to create unnecessary delays and duplication. We also have some concerns in relation to the public perception of the Parliament's decision to allow a project to move forward in principle without any detailed evidence taking or objectors being given a right to be heard at this stage. There is a danger that, by giving an "in principle decision" on projects at this stage, aggrieved parties seek recourse through the Courts with cost and timing implications for major projects.

7 Question 7 – Parliamentary consideration of non-NPF proposals

7.1 We do not agree that Parliamentary consideration of proposals under the new process should be limited to projects recognised within the National Planning Framework. Instead, we consider that Parliamentary consideration of proposals should be delineated based on the size and likely impact of the proposal.

7.2 Whilst projects within the National Planning Framework will always be of significant impact and should therefore always be subject to Parliamentary consideration, it is imperative that projects that have not been recognised in this framework, but which are likely to be of appreciable size or significant impact (including where the impact will be on a smaller geographical region but will be significant in that region) are also subject to Parliamentary scrutiny. We consider that the criteria for Parliamentary consideration should be clear and unambiguous and be reflected on the face of this legislation. Submission to Parliament should not be governed by Scottish Ministers' consideration of whether to designate a particular, non-National Planning Framework proposal, as one meriting such consideration.

In our view such a proposal lacks clarity and certainty for both Promoters and objectors and is inappropriate.

7.3 However, we do agree that in relation to smaller projects with limited impact some form of non-Parliamentary procedure would be appropriate. Again, there should be clear and unambiguous criteria so as to ensure that Promoters and objectors to proposals are clear which procedure would apply in any particular case.

Shepherd+ Wedderburn

May 2006