



**REPORT TO: PLANNING AND REGULATORY SERVICES COMMITTEE ON
26 MARCH 2019**

**SUBJECT: HANDLING OF SECTION 36 CONSULTATIONS, ATTENDANCE
AT PUBLIC LOCAL INQUIRIES AND ASSOCIATED COSTS**

**BY: CORPORATE DIRECTOR (ECONOMIC DEVELOPMENT,
PLANNING & INFRASTRUCTURE)**

1. REASON FOR REPORT

- 1.1 To inform the Committee of the procedures in the dealing with Section 36 applications and the associated costs for Moray Council with handling these consultations as a Planning Authority.
- 1.2 This report is submitted to Committee in terms of Section III (E) (1) of the Council's Scheme of Administration relating to the functions of the Council as Planning Authority.

2. RECOMMENDATION

2.1 It is recommended that the Committee agree to:

- i) **note the contents of the report and procedures in handling Section 36 applications and their associated costs;**
- ii) **note the methods of responding to these applications and the staff resources being drawn from Legal Services, Development Management, Development Plans, Environmental Health, Transportation, Moray Council's Landscape Advisor and the requirement for input from Moray Council's legal advisors to carry out an advocacy role at a Public Local Inquiry (PLI); and**
- iii) **the Head of Development Services sending a request to the Scottish Government seeking a grant to assist with the handling of these consultations that have been submitted prior to the amendment of the Electricity (Applications for Consent) Regulations 1990 being implemented (anticipated to be May 2019) where such applications are to be determined after May 2019 to fill the gap between the existing and proposed fee structure.**

3. BACKGROUND

- 3.1 In Scotland any application to construct or operate an onshore power generating station with a capacity over 50 megawatts (MW) requires the consent of Scottish Ministers under Section 36 of the Electricity Act 1989. Such applications can either be refused or granted (with or without conditions). Where consent is granted, deemed planning permission may also be granted. Applications for the construction or operation of an onshore power generating station of 50mW or less are made to the relevant Planning Authority.
- 3.2 If a Planning Authority objects to a Section 36 application, and no proposed modifications or conditions cause it to withdraw that objection, or if Ministers decide at their discretion to refer the application to Public Local Inquiry (PLI), that application will be passed from Energy Consents & Deployment Unit (ECDU) to the Directorate for Planning and Environmental Appeals (DPEA), to be considered at a PLI. Once the papers are passed to the DPEA, Scottish Ministers cease to have a role in the application until the Reporter's report is received.
- 3.3 An independent Reporter will be appointed by Scottish Ministers to conduct the inquiry and compile a report considering all the evidence from the application process and from the various parties through inquiry, hearing and written submissions. The Reporter then submits an official report, making a recommendation in respect of the application, to the Scottish Ministers following the close of the inquiry. Scottish Ministers must take the report into account in reaching their final decision on the application. The inquiry report will be published at the same time as the Minister's decision on an application.
- 3.4 In February 2018 the Scottish Government produced a paper on Fees Charged for Applications under the Electricity Act 1989. As a Footnote to this consultation this paper stated "The proposed fee increases outlined in this paper reflect costs to Scottish Ministers and assume Planning Authorities will not receive any additional money following the implementation of the revised fees. Ministers intend to maintain the existing voluntary payments at current absolute values and they will cease to be the equivalent of two-thirds of the increased application fees Ministers plan to introduce". In effect this would mean that Planning Authorities would not receive additional fee payments.
- 3.5 In December 2018 the Scottish Government published their response to the consultation exercise on the Fees Charged for Applications under the Electricity Act 1989. In summary the fees are proposed to be increased and there will be greater remuneration to planning authorities in relation to onshore applications than previously proposed in the consultation document. A voluntary contribution shall continue to be made to Planning Authorities, now to be equivalent to one half of the fee received for onshore electricity generation development under Section 36 and 36C of the Act for which the revised fee is paid. Ministers aim to implement the revised fees from May 2019 but will be subject to a negative procedure in the Scottish Parliament.

This means that the regulations are signed by a Minister before they are laid before the Parliament, and they come into force generally 28 days after being laid.

4. RESOURCE IMPLICATIONS AS A CONSULTEE

- 4.1 Since the consultation paper on fee structure was issued this Council has been consulted on three Section 36 applications; two are pending consideration and one, to which the Council submitted an objection, pending determination at inquiry.
- 4.2 In summary, based on the current levels of fees charged we are in receipt of £52,000 to deal with all three consultations. Had the fee increase been implemented sooner we would have been in receipt of £197,500, a difference of £145,500. Prior to a consultation being received the LPA is involved in scoping exercises under the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 and pre-application meetings to identify supporting information requirements including viewpoints for landscape assessment and involves significant staff resources.
- 4.3 The next stage in terms of responding to these consultations we consult with our internal consultees including Development Plans, Transportation, Environmental Health (to address Noise, Private Water and Contaminated Land issues), Flood Risk Management, and we undertake consultation with our Landscape Adviser prior to presenting a report to this Committee. The recommendation to Members as to whether or not an objection should be raised to the consultation prior to being returned to the ECDU involves this Committee making a site visit and giving careful consideration to all material considerations raised in a detailed Committee Report.
- 4.3 Where an objection by a Local Planning Authority (LPA) is raised the application sits with the Directorate of Planning & Environmental Appeals (DPEA), before being allocated to a Reporter and is to be decided by way of an Inquiry. This will then involve Officers attending a pre-inquiry meeting, preparing inquiry statements and precognitions which will be the subject of an inquiry session. There can also be hearing sessions and written submissions for some topics and these also have to be prepared for. All of this involves a considerable amount of staff resources and costs. A decision is then required as to whether or not Counsel needs to be engaged to represent the LPA at the inquiry. The decision on this depends on the complexity of the issues involved. This resource in addition to the staff costs already incurred in reaching this stage can be a significant cost and can amount to over £50,000 depending on the length of the PLI. These costs have to be met up front and only if, at the conclusion of the process, the Reporter considers that another party has acted unreasonably, can some of the costs be recovered. The Council is always left "out of pocket" to some extent.
- 4.4 In deciding whether to engage Counsel, the complexities of the case and the significance of the issues to the Council as Planning Authority must be weighed against the resulting cost in preparing for and presenting the case to the PLI. In terms of the Council's Scheme of Delegation the Head of Legal

and Democratic Services can instruct Counsel, in consultation with the Council Leader and the relevant Committee Chair in this case the Chair of this Committee. In many cases the Council's case has been presented by in-house legal and planning staff and we have sought to restrict our involvement in the PLI process as much as possible. Officers have contacted the DPEA to express our concerns about the financial burden PLIs place on Councils in the current financial climate but they have confirmed that PLIs are part of the statutory planning process and Councils are expected to participate in the process.

- 4.5 The existing fee structure has already been deemed to be inadequate at covering the cost of handling these applications which are becoming increasingly complex. The most recent submissions require cumulative assessments to be made not just on landscape and visual grounds but also to assess cumulative noise impacts (which may require the Council to engage a specialist noise adviser). These specialists are also required to be available at inquiry and hearing sessions.
- 4.6 The timing of the three recent Section 36 applications is unfortunate in terms of being able to benefit from the proposed revised fee structure and Members are asked to note the resource implications that are being incurred. In terms of being able to fill the gap that currently exists between the existing and proposed fee structure (taking into account the current financial position of the Council) it is recommended that a grant be sought from the Scottish Government.

5. SUMMARY OF IMPLICATIONS

(a) Corporate Plan and 10 Year Plan (Local Outcomes Improvement Plan (LOIP))

The Corporate Plan priorities are to promote economic development and growth and maintain and promote Moray's landscape and biodiversity and work towards a financially stable council that provides valued services to our Communities.

(b) Policy and Legal

Electricity Act 1989, Energy Consents Good Practice Guidance (Scottish Government Energy Consents & Deployment Unit), The Electricity (Applications for Consents) Regulations 1990 and Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017. Fees Charged for Applications under the Electricity Act 1989.

(c) Financial implications

None from this report but financial implications will arise through the handling of individual consultations. If a PLI is triggered there is no specific budget to cover the costs of this. In the past these have been treated as a call on Council reserves but these have been depleted over the years so any PLI would result in a significant budget pressure.

(d) Risk Implications

The risk of not having a robust defence would impact on the integrity of the planning system.

(e) Staffing Implications

There are increasing staffing implications arising from the handling of these consultations as a result of the increasing complexity of the cumulative issues that are raised. . There are also significant impacts on staff who are involved in any PLI process

(f) Property

None.

(g) Equalities/Socio Economic Impact

None.

(h) Consultations

The Corporate Director (Economic Development Planning & Infrastructure), the Head of Development Services, the Legal Services Manager, Neal MacPherson (Principal Planning Officer, Development Management), Gary Templeton (Principal Planning Officer, Development Plans), the Transportation Manager, the Consultancy Manager, the Environmental Health Manager, the Equal Opportunities Officer, Paul Connor (Principal Accountant) and Lissa Rowan (Committee Services Officer) have been consulted and comments received have been incorporated into the report.

6. CONCLUSION

6.1 Note the Local Planning Authorities role in handling Section 36 Applications, the impact on staff resources and costs associated with dealing with these consultations. It is recommended that a grant be sought from the Scottish Government to assist with the handling of these consultations to fill the gap between the existing and proposed fee structure.

Author of Report: Beverly Smith, Development Management & Building Standards Manager

Background Papers:

Ref: