

DIALOGUE 4

Reporter's question 4 to Council (11 April 2022)

The Reporter considers the following two matters fundamental in relation to the current processing of this Order.

The first point concerns Article 4 and Schedule 1 of the Order. Notwithstanding the exceptions in Article 5, these provisions appear to the Reporter to be of the kind referred to in the Road Traffic Regulation Act 1984, Schedule 9, paragraph 13(1), ie provisions "so prohibiting or restricting the use of a road as to prevent, for more than 8 hours in any period of 24 hours, access for vehicles of any class to any premises situated on or adjacent to that road or any other premises accessible for vehicles of that class from, and only from, that road". There is an objection (objection no 68 from Rowena Ferguson) to these provisions. Bearing in mind the existence of the objection, and reading Schedule 9 paragraphs 13(1) and 13(2) of the 1984 Act together, it appears to the Reporter that the Order is one that requires the consent of Scottish Ministers before it is made. The present arrangements, including the Council referring the Order direct to DPEA without reference to Transport Scotland, and the Reporter having been appointed by the Council to report to the Council, do not reflect the relevant legislative provisions. The Reporter would therefore be glad to have the Council's comments on his view that the Order requires the consent of Scottish Ministers before it is made and, if the Reporter's view is accepted, an indication of how the Council intends to proceed with regard to the existing draft Order and the present arrangements.

If the Council agrees with the Reporter's view that the Order does require the consent of Scottish Ministers, one course of action would be for it to refer the existing draft Order, as it stands, to Transport Scotland. However, the Reporter points out a further problematical element of the existing draft Order in those circumstances. That arises from sections 3(1) and 3(2) of the 1984 Act. Section 3(1) of the 1984 Act says "a traffic regulation order shall not be made with respect to any road which would have the effect ... (b) of preventing for more than 8 hours in any period of 24 hours access for vehicles of any class, to any premises situated on or adjacent to the road, or to any other premises accessible for pedestrians, or (as the case may be) for vehicles of that class, from, and only from, the road". The existing draft Order appears to the Reporter to make such provision and so is contrary to section 3(1). The council could have taken advantage of section 3(2) which disapplies section 3(1) if the authority is satisfied, and it is stated in the order that it is satisfied, that section 3(1) should not apply, for one or more of five specified reasons. But the Council has not done that. If the Order were one which does not require the consent of Ministers and could continue to be processed under the present arrangements, the Reporter would be willing to consider a modification to bring the order into line with section 3, but that could be an option which Transport Scotland and Ministers might not be prepared to take.

The Reporter proposes to cease work on this case until he hears from the Council on the above matters.

Council answer to question 4 (28 April 2022)

On the first point, the Council agrees with what you say regarding the relevant provisions of Schedule 9, paragraph 13 of the 1984 Act. In addition, the Council would flag regulation 11 of the Local Authorities' Traffic Orders (Procedure) (Scotland) Regulations 1999 ("the Regulations") which provide that where the order is one which requires the consent of Scottish Ministers the Council's application will be accompanied by copies of such documents as are specified in schedule 4 of the Regulations.

The specified documents include the draft TRO, the relevant map, a statement of the Council's reasons for proposing to make the order, the issues of each local newspaper containing the proposal, the objections, copies of the reply sent to each objection, a list of those people or organisations consulted and a statement of their views, and in a case where a hearing has been held, a copy of the report and recommendations made by the reporter.

Given that the Council has decided to hold a discretionary hearing, we considered that it made most sense for the hearing to be held before the draft TRO is submitted to Scottish Ministers. In our view this approach most properly complies with the Regulations notwithstanding that the hearing is discretionary.

The Council did seek clarification on this point from Transport Scotland ("TS") and instructed Brodies LLP to make contact with TS (which it did on 7 October 2021) to inform it that the Council had decided to hold a discretionary hearing into the draft TRO. The Council explained to TS that it was aware of Scottish Ministers' discretion to require the Council to hold a hearing before it gives consent (in accordance with regulation 8(1)(c) of the Regulations) and asked whether in TS's view the Council's decision to hold a discretionary hearing would be likely to satisfy Scottish Ministers' in respect of the Regulations and avoid the potential requirement for the Council to hold a further hearing into the same TRO.

TS sought advice and responded on 29 October 2021 that: "As you are aware, Scottish Ministers have a discretion to require the holding of a hearing before giving consent however unfortunately we cannot provide our thoughts or make a decision as to whether to exercise that discretion until the Order is submitted for approval. Sorry I cannot be of more help."

In those circumstances and given the decision made by the Area Committee at their meeting on 16 September 2021 to hold a discretionary hearing, the Council considered that it should proceed with the discretionary hearing and subsequently submit all of the specified documents to Scottish Ministers in accordance with the Regulations referred to above.

With regard to the second point, the Council agrees that there should be reference to section 3 of the 1984 Act in the draft Order. We would therefore request that the Reporter modifies the Order accordingly, acknowledging of course that there is a risk that Scottish Ministers may not agree with that approach.

The Council hopes the foregoing comments are helpful.

Reporter's response to Council's answer (4 May 2022)

The Reporter has noted the Council's response to the points he raised in relation to the need for Scottish Ministers' consent to the order. On the basis of that response he has resumed work on the case.

On the first point, he accepts the council's position that the order can proceed to a hearing in line with current legislation.

On the second point, the Reporter notes that the Council wishes him to modify the Order to make reference to section 3 of the Road Traffic Regulation Act 1984. The most the Reporter could do in this respect is to recommend an appropriate modification, and he is prepared to give consideration to doing so. He cannot undertake to do so at this stage, particularly as the relevant provisions of the Order are subject to objection. In order to progress this matter, he suggests that the Council takes early steps to provide the Reporter with

(a) suggested wording of an appropriate modification which makes clear which of the five purposes in section 3(2) of the 1984 Act is invoked, and

(b) a statement of reasoned justification for the modification.