

Transparency



bto News

Development Planning: 49 or 50 houses?

With the new planning regime, introduced by the Planning etc (Scotland) Act 2006 and affecting planning applications made since 3 August 2009, the scale of proposed development is a critical factor in taking forward planning for development work.

“49 or 50 houses?” may appear a facetious question, but it illustrates one of the points at which a development proposal moves from a Local application (less than 50 houses) to a Major application (50 or more houses) by virtue of the “Hierarchy of Developments” order. These two types of application are subject to different procedures and requirements.

bto anticipates that this question, along with others such as “Will our wind-farm’s capacity exceed 20 megawatts?” will become common place. Where the position is not clear, as well as making your own assessment, application can be made to the planning authority for a “screening opinion” on whether a proposal is Major or Local.

For some, such questions will only be asked or opinions sought in order to find out which procedure must be followed. For others, it will be worth considering which procedure might benefit the

applicant and whether or not to change proposals to access the preferred procedure.

The new regime also provides a third procedure – for National applications – relative to developments identified in the National Planning Framework. However, National applications are much less common and this article focuses on Major and Local procedures.

For Major proposals, another route to planning consent is to seek allocation within the Development Plan for the proposal. The table on the next page indicates key elements of Local and Major application procedures for individual planning applications.

For specific proposals, as well as the key points in the table, the whole procedures applied by the relevant planning authority should be considered. Site specific matters can arise (e.g. some applications affect listed buildings, or require an environmental or traffic impact assessment) which can also add to the procedure and progress of planning applications. When applicants are working their way through the complexities of development planning applications **bto’s** Planning team is here to help.

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When do development proposals change from being Local to Major applications?

Windfarm Project Finance - bto insights

Some tips regarding issues to be aware of when you are involved in windfarm projects.

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Guidance for construction companies dealing with debt during the economic downturn.

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Watch out for...

Development Planning: 49 or 50 houses?

Major applications: identified in “Hierarchy of Developments” order	Local applications: Any application that is neither National nor Major	
Decided by committee	Scheme of delegated authority: setting out which applications will be decided by:	
PAC (pre-application consultation): <input type="checkbox"/> Proposal of application lodged ≥12 weeks before submitting application <input type="checkbox"/> Planning authority notifies applicant of any additional consultation required Consult: with community council(s); by newspaper advert; by one public meeting; and any additional consultation required by notice	Officers with delegated authority	or committee
	No PAC	
PAC Report to accompany application	No PAC Report	
Design and access statement to accompany any application	Design statement to accompany some applications (e.g. within conservation area)	
Pre-determination hearing held if application is significantly contrary to the development plan or, otherwise, if planning authority so chooses.	No pre-determination hearing required - may occur if planning authority so chooses	
4 months later all documents lodged - deemed refusal if no decision issued	2 months after all documents lodged - deemed refusal if no decision issued.	
Major and Local: 3 months to appeal a refusal (or particular conditions on a consent)		
Appeal to Scottish Ministers /DPEA (Directorate for Planning and Environmental Appeals)	Appeal delegated decision to Local Review Body	Appeal committee decision to Scottish Ministers / DPEA

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Non-contentious: Marion Davis mda@bto.co.uk

Windfarm Project Finance - bto insights

The Hammars Hill wind project is one of a number of wind projects on Orkney in which bto's renewable energy team has been delighted to be a lead adviser in the past few years. Our renewables specialists combine banking and finance, construction, corporate, planning and real estate expertise, and have developed a strong track record in on-shore wind projects with a typical build cost of up to £10m. These are significant projects, the successful and timely delivery of which requires efficiency and strict adherence to timescales.

In all construction projects, delay is a key risk. In on-shore wind projects in the UK, this can be all the more so because securing turbine supply at all to some of the best sites, which are often remote and challenging, is difficult. Turbine suppliers will set a delivery date and stick to it. If the site is not ready on time, it could be months until the next delivery slot becomes available, as delivery dates are set by reference to schedules for delivery to other projects and with weather conditions in mind as regards both shipping and the erection work itself.

Significant wind projects such as these are usually

bank funded on a project finance basis. This means that the bank will carry out extensive diligence on the contracts that underpin the project and its construction. The bank will also require a number of direct agreements in its favour from balance of plant and other contractors and professionals. Contractors and professionals should ask their clients whether they have had a comprehensive checklist of the bank's requirements as regards timescales, the terms of the appointment, the scope of work, the amount of PI cover to be carried, the need for and terms of reliance letters and/or collateral warranties, the need for direct agreements and/or parent company guarantees and the parties to whom any reports must be addressed. It is only with a detailed understanding of these points that pricing and other key decisions can be made.

If you are involved in the early stages of a wind or other renewable energy project and would like to pick our brains, please call one of the solicitors in our team. In addition to wind, we have extensive experience in hydro, biomass, solar, CHP and anaerobic digestion schemes.

Ralph Riddiough rr@bto.co.uk

When the Foundations Start to Crumble: Insolvency in the Construction Industry

During the current economic crisis, instances of construction company insolvencies have been higher than in any other industry sector in the UK, a fate which has been experienced at all levels of the supply chain.

Although some increased activity has been experienced, the general outlook for the industry for the immediate future remains uncertain, the key driver for this, of course, being a lack of funding.

There is, however, a degree of optimism from some quarters that the new era of political governance represents an opportunity for renewed investment in and focus on the construction industry.

Whilst this may assist companies in avoiding insolvency in the future, this provides little respite for those companies which are faced with a statutory demand or abbreviated demand (commonly known as a 48 hour demand) from a creditor.

If a company is served with a statutory demand in terms of the Insolvency Act 1986 ("the Act") requiring it to pay a sum which is due, payment must be made within a period of 21 days of service. If not, the company will be deemed unable to pay its debts and the creditor may petition the court for its liquidation.

An abbreviated demand offers a creditor an alternative, quicker route to having a company wound up affording a minimum period of 48 hours for payment before a petition can be submitted to the court.

What should a company do if it receives either one of these demands?

If the debt is due then it should be paid or agreement reached with the creditor as to suitable instalment payments.

If either whole or part of the debt is genuinely disputed, this must be raised immediately with the creditor. If the company can establish a stateable ground for not

making payment, the creditor will not be in a position to proceed with a liquidation petition. Legal input at this stage can be critical to ensure that the dispute is clearly stated and there is no dubiety about the position going forward.

From a creditor's or pursuer's perspective, it is clear that these demands, particularly the 48 hour demand, provide a useful, although sometimes regarded as controversial, mechanism to creditors wishing to recover funds quickly, without the need to raise a potentially expensive and drawn out court action. We are often instructed to issue both statutory and abbreviated demands by a range of clients.

If the situation arises where a liquidation petition is presented to the court, a document called a caveat gives a company advanced notice of a creditor's attempt to wind up the company. We are regularly involved in lodging caveats with the court to afford clients this level of protection. Caveats last for a period of one year and operate as a highly useful advanced warning system.

Demands aside, construction companies should, nevertheless, be alert to the fact that a debt will not become indisputably due within the terms of the Act as a result of an adjudicator's decision. The rationale of the Housing Grants, Construction and Regeneration Act 1996 does not mean that, without further investigation, a company will be wound up where other disputes exist to extinguish the amount said to be owed. The debtor will, however, have to show that his dispute is genuine which will likely mean taking active steps, such as commencing a cross-adjudication or litigation, to enforce payment in these other disputes.

bto's Construction and Insolvency teams would be pleased to assist companies in these difficult times.

Construction: [Jilly Petrie jpe@bto.co.uk](mailto:jpe@bto.co.uk)
Insolvency: [Kirsteen Maclean kim@bto.co.uk](mailto:kim@bto.co.uk)



bto Update

New bto Partners



Ann O'Connell

Jane Steel

bto has gained two new partners in the last year. **Ann O'Connell**, a specialist in Construction Law accredited by the Law Society of Scotland, has vast experience in dealing with claims for engineers and building consultants and a comprehensive knowledge of construction industry contracts. Her expertise has been invaluable to **bto's** housebuilding/developer clients and her input enhances

the offering of **bto's** growing renewables team.

Ann sits on the drafting committee of the Scottish Building Contracts Committee (SBCC). She is also a member of the Society of Construction Law and lectures frequently to the Royal Institution of Chartered Surveyors.

Jane Steel has joined **bto** as a property partner. Jane works in the investment/development, retail and leisure/hospitality sectors. In particular, Jane works closely with James Dickson and Nicolas McBride in **bto's** Retail and Leisure, Hospitality and Licensing teams, both of which are ranked by The Legal 500.

Ann O'Connell aoc@bto.co.uk

Jane Steel js@bto.co.uk

New Frontiers in Business Development for Mackrell Member Firms



Bill Speirs, Partner, attended Mackrell International's AGM in Sydney, Australia, hosted by Australian member firm Lander & Rogers, in the Spring.

Mackrell International is a global network of 76 independent, full-service, medium-sized commercial law firms representing 142 offices in over 23 countries and comprising over 4000 lawyers worldwide.

Membership enables **bto** to remain close to our clients while at the same time offering them the expertise and knowledge obtained by professionals in other jurisdictions. Member firms refer business to one another according to client needs anywhere in the world.

If you have international operations, are looking to expand abroad or need help outside Scotland, the MI network can assist.

Benefits to you include include:

- a seamless service,
- a shared pragmatic, commercial attitude to business,
- access to quality legal representation around the world and
- strong, long-standing personal relationships among member firms result in **bto's** clients receiving prompt, reliable, senior-level representation from other member firms.

For further details, please speak to any member of the **bto** team or visit:

www.mackrell.net/

Watch out for...

Fringe Workshops

Paul Motion, head of **bto's** Technology & IP team, is providing workshops again at the Edinburgh Festival Fringe:

Stealing Ideas - Unravelling Copyright at 10:30 on 12 August.

Small Print - Big Problem, which examines contract issues at 14:00 on 26 August.

Both events are free and ticketed. Venue: **Fringe Central**, Appleton Tower, Crichton Street.

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<http://twitter.com/btosolicitors>

Directors' Duties - Three years on

Almost three years have elapsed since the Companies Act brought into force the new codified provisions on duties for Directors - Are you up to speed? For more information, visit www.bto.co.uk

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