

CORRESPONDENCE ON AWARDS OF HEARING EXPENSES TO SUCCESSFUL OBJECTORS

NB all correspondence is via the Programme Officer

Reporter to Council, 7 August 2024

The Reporter is minded to use the Code of Practice for flood protection scheme hearings as a procedural basis for his continuing work. This Code is part of the Scottish Government's publication "Flood Risk Management (Scotland) Act 2009: local authority functions under part 4 guidance." A copy can be found [here](#).

Council to Reporter, 19 August 2024

Expenses - can the Reporter please confirm the Council's interpretation of this section, namely that while in normal court actions expenses follow success this is not the general case in a hearing and Circular 6/1990 will be applied?

Reporter to Council, 20 August 2024

On expenses, the Reporter would expect [Planning Circular 6/1990: awards and expenses](#) to be followed. From that, his view is that, unless there were exceptional reasons for not doing so, the Council would award expenses to an objector to the flood protection scheme if the objector has an interest which is adversely affected by the scheme as now proposed and whose objection is effectively upheld by the Council's final decision (post-hearing) on the scheme.

Council to Reporter, 26 August 2024

With respect to expenses, the Council respectfully suggests that [Planning Circular 6/1990: awards and expenses - gov.scot \(www.gov.scot\)](#) is not appropriate to be used at this hearing. The circular is regarding the Secretary of States powers to award expenses in Inquiries. This is not analogous to a Hearing which will lead to a report which will enable the Council to make a decision on the Scheme. In the circular it is the Secretary of State who is the ultimate decision maker whereas in this hearing it is the Council. The circular does not cover a situation where the decision maker would be expected to grant expenses against itself, which is what the Reporter is suggesting.

Reporter to Council, 10 September 2024

The Reporter has now considered the Council's contrary comment on his view expressed earlier about expecting [Planning Circular 6/1990: awards and expenses - gov.scot \(www.gov.scot\)](#) to be followed in connection with awards of expenses to successful objectors.

The Reporter notes the Council's reliance on the references in Planning Circular 6/1990 to awards of expenses being made to successful objectors in cases which have been subject to an inquiry and where the Secretary of State is the ultimate decision maker. The Reporter accepts that that reliance is a fair reflection of paragraph 16 of the Circular in isolation. Clearly, also, the Newton Stewart Flood Protection Scheme involves a hearing (rather than an inquiry) and the Council will be the ultimate decision maker (rather than the Secretary of State).

However, the Scottish Government's guidance provided in Appendix G (Code of practice **for hearings** – Reporter's emphasis) of [Flood Risk Management \(Scotland\) Act 2009: local authority functions under part 4 guidance - gov.scot \(www.gov.scot\)](#) says "Whilst the 2009 Act is not specifically provided for under Circular 6/1990 ..., it would not be unreasonable to adopt the provisions of the Circular for the purposes of this guidance." In the Reporter's view that means that (cf paragraph 16 of the Circular) where an objector to a flood protection scheme successfully defends his rights or interests which are adversely affected by that scheme, an award of expenses will be made in his favour unless there are exceptional reasons for not doing so. The guidance in Appendix G explicitly refers to hearings rather than inquiries. In addition, the guidance was written in the knowledge that Schedule 2 of the 2009 Act provides for hearings (paragraph 8) and that, after a hearing, the final decision on a scheme is made by the local authority. In other words, the guidance in Appendix G about adopting the provisions of the Circular for a scheme like this was written in the full knowledge that it would apply to a Council-decided scheme following a hearing.

The Reporter therefore maintains his view that, unless there were exceptional reasons for not doing so, the Council would award expenses to an objector to the Newton Stewart Flood Protection Scheme if the objector has an interest which is adversely affected by the scheme as now proposed and whose objection is effectively upheld by the Council's final decision (post-hearing) on the scheme.

Having taken that view, however, the Reporter is not minded to seek or deal with any application for an award of expenses by an objector. This is because a decision on such an application would be dependent on the Council's final decision on the scheme itself. For that reason, the matter will rest in the Council's hands at that stage.