ANNEX C CONSULTATION QUESTIONNAIRE

1. Do you agree that the rules should not define 'prohibitively expensive'?

We do not agree. We consider that the concept of 'prohibitively expensive' requires some degree of certainty. The term, even post-Edwards, is one which has caused a significant divergence of opinion both within the Outer and Inner Houses (compare the RSPB decision with the Outer House decisions in John Muir Trust and Gibson and the conflicting Inner House decisions in relation to the latter cases- all of which tried to apply Edwards). In an area where certainty is desired, the uncertainty surrounding the test is not acceptable and, of itself, leads to significant expense in dealing with PEO motions.

However, there does need to be a degree of balance. We do not consider than an overly prescriptive definition of the term would be helpful as this may not allow the concept to remain flexible enough to adapt moving forward. Nevertheless, there is far too much uncertainty (and attenuated costs) attached to the term remaining too loosely defined.

2. Do you agree that the rules should not distinguish the question of prospects of success from the question of whether or not the proceedings are prohibitively expensive?

The question of prospects of success is an important one and, insofar as it may be lost in any question of "prohibitively expensive" (howsoever that concept evolves- be it by statutory definition or judicial interpretation) should be kept as a distinct question/ a distinct aspect of the "prohibitively expensive" test.

Whilst challenges with merit should be encouraged, challenges with little or no merit ought not to be; although this problem is, to some extent addressed by the permission stage.

3. Do you have any comments on draft rule 58A.6 for the determination of an application?

We consider that an accelerated procedure would be of great benefit to parties involved in a judicial review.

However, we should note that it is not the hearing itself which can be long, drawn out and expensive - but written submissions and exchanging and responding to the same which increase time and cost. We consider that the procedures for the written application need to be more carefully considered with prescribed information provided to the court. This should limit the time and expense of this element of the procedure. Further, the length of any hearings on a PEO application should be limited by a more focused/prescribed written stage.

In general, the new rules should set out the process for bringing the application, the information which should be produced, and any pre-action protocols that may be required.

Separately, we disagree with the Inner House's comments (in Gibson) as regards the analysis of what the applicant produces - whilst we do not consider that forensic analysis is required, some querying and testing of the applicant's accounts etc. is justified - particularly where there are anomalies or information is clearly lacking. Both this exercise, and the legal arguments and analysis, require opportunity for response - which discussion is expedited rather than hampered by a hearing. However, many of these issues would be resolved by provisions setting out the information, and the amount of information, which must be provided with the application.

Furthermore, the greatest delay to PEOs and the underlying judicial review, is the time taken for a reclaiming motion (in relation to the motion granting/ refusing the PEO) being heard; by virtue of the procedure involved, the availability of a division to hear the reclaiming motion and the fact that procedure in the Outer House ceases altogether (compounded by the fact that the clerks will not fix hearing dates for the judicial review in the Outer House until Inner House procedure is complete, or very almost complete resulting in hearing dates not even being fixed until the Inner House is *functus,* notwithstanding that such dates are typically months after they are fixed) can result in delays (and of course uncertainty) for the developer-which delays could, of themselves, be fatal to the project underlying the consent complained of.

The foregoing delays completely undermine the speedy determination of the application in terms of Rule 58; as such, whilst we welcome measures to expedite PEO motions in the Outer House we do not consider that consideration without appearance of counsel will achieve that aim; and consider that similar measures must be taken in the Inner House (or, at least, hearing dates marked or fixed in the Outer House whilst a reclaiming motion is dealt with).

4. Do you have any comments on draft rule 58A.9 for the expenses of the application?

It would be beneficial to add to “except on special cause shown” wording to the effect of “or where the PEO application enjoyed little or no prospects of success”- again, to prevent abuse of process.

We also consider that there may be some merit in requiring parties to seek agreement on the issue of expenses before the application is made.

5. Do you have any comments on draft rule 58A.8 for expenses protection in reclaiming motions?

We agree that it is appropriate that the petitioner’s expenses remain capped if they are the respondent in an appeal/ a fresh PEO is required if the petitioner is the appellant.

6. Do you have any comments on the draft amendment to rule 38.16?

As above.

7. Do you have any other comments on the proposals contained in this paper?

As above.