

Client Contact: Gerry Mahon
Brodies Contact: Jackie McGuire
Subject: Community Council Schemes
Date: 26 February 2014

You have requested advice in relation to Community Council Schemes and, more particularly in relation to the scope for community councils within the East Renfrewshire Council (ERC) area to amend their constitutions. You have also asked whether it is reasonable for a local authority to amend a community council scheme within a relatively short period of time after a community council election.

1 Community Councils and Community Council Schemes: The Legislative Framework

- 1.1 Community Councils, although unincorporated organisations, are creatures of statute. Section 51 of the Local Government (Scotland) Act 1973 (the 1973 Act) required every Scottish local authority to submit to the (then) Secretary of State before 16th May 1976, or such later date as may be agreed by the Secretary of State, a scheme for the establishment of community councils in their area (community council scheme). Section 51 of the 1973 Act is still in force (albeit amended), although its continuing relevance is not altogether clear.
- 1.2 Section 52 of the 1973 Act sets out the statutory procedures to be adopted where a new community council scheme is proposed, including provision for public consultation, the right of members of the public to make representations as regards a proposed scheme, the duty of the local authority to take account of representations, and for the approval of the scheme with or without modifications by the Secretary of State.
- 1.3 Section 53 of the 1973 Act contains provisions with regard to the amendment of community council schemes. Sections 52 and 53 of the 1973 Act also remain in force, although Section 53 has been amended so that amendments to community council schemes no longer require the approval of the Scottish Ministers (as successors to the Secretary of State) but may now be approved by the local authority.
- 1.4 Section 22 of the Local Government etc. (Scotland) Act, 1994 made provision for the continuation of community council schemes after local government re-organisation.
- 1.5 Section 52(c) of the 1973 Act provides that a draft scheme (i.e. one that is to be the subject of consultation) *shall* contain "provisions relating to the qualifications of electors, elections or other voting arrangements, composition, meetings, financing and accounts of community councils". Whilst the

provisions of draft schemes will be subject to consultation and may be modified through the statutory processes that are provided for in the 1973 Act, it is clear that a community council scheme must contain provisions as required by section 52(c) of the 1973 Act. These are mandatory requirements.

- 1.6 Section 53 of the 1973 Act contains provisions whereby a community council scheme may be amended. It also places a duty on local authorities, having regard to changing circumstances and to any representations made to them to review from time to time community council schemes. Where they consider that a community council scheme should be amended they must have regard to the statutory procedures contained within that Section of the 1973 Act. There is no less formal or less taxing mechanism by which a community council scheme may be amended, and the prescribed statutory process may be instigated only by the local authority.
- 1.7 It is our view that where a community council scheme has been made (or amended) under the provisions of the 1973 Act then the community council scheme must be adhered to by the community councils to which it is applicable. It is possible that, after it has been approved, a community council scheme might be challenged as being in some respects unreasonable or that, at some later date, a local authority may be challenged as being unreasonable if it did not respond to suggestions that a community council scheme ought to be amended. As far as we are aware, however, ERC's current community council scheme (the ERC Community Council Scheme) has not been the subject of challenge.
- 1.8 Members of community councils are elected by members of the community to which the community council scheme relates. Community council schemes make provision for the election of community council members.
- 1.9 The general purpose of community councils is defined in Section 51 of the 1973 Act as being to "ascertain, co-ordinate and express to the local authorities for its area, and to public authorities, the views of the community which it represents, in relation to matters for which those authorities are responsible and to take action in the interests of that community as appears to it to be expedient". In effect community councils have statutory mandate to give voice to the views of the communities they represent. Subject to certain pre-conditions, community councils are also statutory consultees in relation to planning applications where the proposed development is likely to affect the amenity of the community council's area.
- 1.10 Community councillors are therefore elected into office to give effect to the general purpose of community councils. It is important therefore that they act within the limitations and requirements of statutory community council schemes.
- 1.11 Section 55 of the 1973 Act provides that local authorities may make such contributions as they think fit towards the expenses of community councils within their areas, may make loans to those councils and may, at the request of such community councils, provide them with staff, services, accommodation, furniture, vehicles and equipment, on such terms as to payment or otherwise as may be agreed. This is a discretionary power, not a statutory duty

2 The East Renfrewshire Council Community Council Schemes

- 2.1 In 2009, the Scottish Government issued national guidance in relation to community councils (Good Practice Guidance for Local Authorities and Community Councils). We are advised that subsequent to the publication of this guidance ERC reviewed its community council scheme and, having followed the procedure set out Section 53 of the 1973 Act, made an amended scheme, the ERC Community Council Scheme. The ERC Community Council Scheme is available on the ERC website.
- 2.2 Paragraph 12 of the ERC Community Council Scheme provides that “Community councils have a duty to ensure that they are properly representative of the communities that they serve and that the views expressed by them fairly reflect the interests of all sections of their communities. In order to fulfil this duty each community council shall be required to adopt the model constitution in part two of this scheme which details the procedures to be followed.” It is very clear that local community councils are required to adopt the model constitution that is in part two of the ERC Community Council Scheme (the ERC model constitution). It is also, in our view, quite clear that local community councils may not, of their own volition, amend their constitution so that it is different from the ERC model constitution.
- 2.3 We note that the ERC Community Council Scheme does not reserve any authority to ERC to amend the ERC model constitution or to approve constitutions that are broadly in line with the ERC model constitution. This strongly suggests that ERC cannot make amendments to the ERC model constitution, as regards all or any of its local communities, without the necessity of fulfilling the requirements of Section 53 of the 1973 Act.
- 2.4 The ERC model constitution contains provisions as regards the membership, office bearers, meetings, committees, voting, and office bearers of local community councils. It also contains provisions regarding public participation in community council business including that “all meetings of the community council shall be open to members of the public”. We are of the view that these provisions are within the parameters of Section 52(c) of the 1973 Act. In any event they are included in the ERC Community Council Scheme and regard must be had to them by the local community councils to which the ERC Community Council Scheme is applicable by operation of statute (namely the relevant provisions of 1973 Act).
- 2.5 We would emphasise that the relationship between ERC and local community councils is not contractual. Local community councils must by operation of statute have regard to the ERC Community Council Scheme regardless of whether they have signed on the dotted line. They are also obliged to comply with the requirements of any (properly made) amendments to the ERC Community Council Scheme. This, of course means that, at present all community councils in the ERC area are obliged to adopt the ERC model constitution. They must of course, also comply with the requirements of the ERC Community Council Scheme as lawfully amended.

3 Non Compliance

- 3.1 We are given to understand that a number of local community councils have purported to introduce changes to the ERC model constitution. They cannot do so unilaterally regardless of whether the

purported changes have been approved by a majority, or indeed all members of the relevant community council. Changes that have been introduced in this way are invalid. This may have arisen in consequence of local community councils having formed the view that, as unincorporated bodies, they may amend their constitution provided the amendments are approved by all members of the community council. However, this degree of autonomy is not available to community councils who exist only because of, and who are limited in what they can do by the provisions of their community council scheme.

- 3.2 Where an ERC community council is operating outwith the requirements of the ERC model constitution it runs a number of risks. Depending on the nature of the departure from the ERC model constitution that a community has introduced, the community council may run the risk that its office bearers have not been properly appointed (this may lead to additional personal exposure for the office bearers in question but we have not explored this possibility in any detail). Changes to the voting provisions that are contained in the ERC model constitution may also give rise to invalid decisions, as might the exclusion of the public from meetings of a community council.
- 3.3 Where there is a question as to the validity of an ERC community council decision, ERC may find itself in some difficulty. How, for example, does it treat an objection to a planning application that has been submitted by a community council, if it cannot be certain that the decision to submit the objection is valid?
- 3.4 Other potential problems might include the validity of cheques and other documents that require to be signed by office bearers.

4 Resolving difficulties

- 4.1 Local authorities have a statutory overview of their local community councils. Therefore, whilst community councils operate independently of local authorities, in our view, a local authority may have reasonable cause for concern where it is apparent that a local community council is not operating within the requirements of its community council scheme. In exceptional circumstances a local authority may reasonably from the view that intervention is required. So, for example, where a local authority is concerned about the financial governance arrangements within a community council, it may wish to consider whether it is necessary to withhold or reduce the annual administrative grant that it pays to the community council.
- 4.2 Local authorities are not obliged to provide financial assistance to community councils. However, Scottish Government guidance recommends that community councils are paid annual administrative grants (no level of grant is suggested). Some local authorities may have included an obligation to make such grant within their community council schemes although (as is the case with ERC) it is likely that conditions will apply. Whether the non- adherence by a community council to the requirements of a community council scheme would justify the withholding of grant funding will depend on the circumstances, and of what is reasonable, on a case by case basis. However, it may be considered unreasonable to withdraw funding without first have attempted to resolve matters with the community council, particularly if to do so would place the community council in financial difficulty. What is

reasonable will also depend on the terms of the community council scheme. So, for example, where a community council scheme makes it explicit that grant funding is made available subject to compliance with the requirements of the scheme, a local authority may be on firmer ground as regards withholding funding as a means of responding to non-compliance.

- 4.3 There would appear to be no statutory mechanism by which a local authority may dissolve a community council other than by revoking or amending a community council scheme.

5 Amending Community Council Schemes

- 5.1 As mentioned in paragraph 1.6 above, the 1973 Act provides that community council schemes may be amended. A local authority may amend a community council scheme having regard to changing circumstances and having regard to any representations made to them. There is no restriction in the 1973 Act as to when a local authority might decide to amend a community council scheme (subject of course to compliance with the requirements of Section 53 of the 1973 Act). However, whether a decision to make amendments is reasonable will depend upon prevailing facts and circumstances and upon the objective justification for the amendments.

- 5.2 The current ERC Community Council Scheme has been in place since 2009. Passage of time alone may suggest that ERC may wish to consider whether it is appropriate to amend the ERC Community Council Scheme (for example to take account of the changing footprints of local communities as a consequence of new housing developments).

- 5.3 Although the most recent community council elections were held in September 2013 there is nothing inherently unreasonable in the Council deciding to review the ERC Community Council Scheme at this point in time. The test is one of reasonableness, and the nature of any proposed changes and ERC's reasons for seeking to introduce them may be more relevant to that test than the question of timing, particularly as the CEC Community Council Scheme has not been reviewed for some time.

BrodiesLLP

February 2014