

Legal advice & drafting of Revised Scheme for Stage 2

PLEASE NOTE

The correspondence below includes discussion about elements of the revised scheme that were dropped prior to the publication of the Stage 2 consultation draft. This was due to complexity or practicality.

From: Charles Livingstone (Brodies Solicitors)
Sent: 05 July 2014 12:53
To: 'Reid, Jamie'
Subject: RE: Community council scheme [BRO-D.FID2686345]

Jamie

With apologies for being slightly later than trailed, I attach the revised Scheme etc with changes shown tracked. I have included a few comments where items remain to be confirmed, so please just let me know if you would like to discuss any of those.

Kind Regards

Charles

From: Charles Livingstone (Brodies Solicitors) [mailto:charles.livingstone@brodies.com]
Sent: 04 June 2014 23:01
To: Reid, Jamie
Subject: RE: Community council amendments [BRO-D.FID2686345]

Jamie

I attach the revised scheme. I have added the model constitution and standing orders as appendices but have not yet made any changes to those. I will do that tomorrow and update you as soon as possible. However, I think the bulk of the changes you were looking for are relevant to the scheme so you needn't wait to review that.

Kind Regards

Charles Livingstone
Associate
On behalf of Brodies LLP
Edinburgh, UK
mailto: charles.livingstone@brodies.com
<http://www.brodies.com>

Telephone: ++44 (0) 131 228 3777

From: Reid, Jamie [mailto:jamie.reid@eastrenfrewshire.gov.uk]
Sent: 04 June 2014 13:50
To: Charles Livingstone (Brodies Solicitors)
Subject: RE: Community council amendments [BRO-D.FID2686345]

Charles

Further answers below. Could you give me a call, discussed this with Jim and we are thinking that it may be best to drop the mid-terms but limit co-optees to serving in upto one full term without having to be elected?

Jamie Reid
Community Resources Manager
Corporate & Community Services

Phone: 0141 577 8557

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From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]

Sent: 03 June 2014 21:57

To: Reid, Jamie

Cc: Sneddon, Jim

Subject: RE: Community council amendments [BRO-D.FID2686345]

Jamie

Thank you for these responses. I have noted a number of follow-up queries against some of the questions below (differently indented, and highlighted), and should be grateful for your further comments on those.

Kind Regards

Charles

From: Reid, Jamie [<mailto:jamie.reid@eastrenfrewshire.gov.uk>]

Sent: 03 June 2014 11:54

To: Charles Livingstone (Brodies Solicitors)

Cc: Sneddon, Jim

Subject: RE: Community council amendments [BRO-D.FID2686345]

Charles

I've tried to answer as much as possible below.

Regards

Jamie Reid
Community Resources Manager
Corporate & Community Services
Phone: 0141 577 8557

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From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]
Sent: 02 June 2014 19:47
To: Reid, Jamie
Cc: Sneddon, Jim
Subject: Community council amendments [BRO-D.FID2686345]

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Jamie

My review of the model and ERC schemes, plus your proposal, has prompted a number of questions that I should be grateful if you would clarify. I have not yet completed my review but given the tight timescale I thought it would be best to get some questions to you sooner rather than later. Apologies if any of the answers are in parts of the papers I have not yet reached.

1. Please can you send me a Word version of the existing scheme, which I can then revise? **We only have a pdf however it is best to base it off the national model scheme (the link I sent should open a word version of that) as our current scheme does not follow the structure of the model scheme and that is one of the criticisms/causes of confusion.**

Do you have a Word version of the election nomination form (which is not based on a model document)? **Yes – the one we used in 2013 is attached**

Is your constitution also to be replaced with the Scottish Government's model constitution? **Yes**

Should the terms of the model(s) take priority over the existing terms of your scheme (and constitution), if they differ? Obviously the terms you want to add will take precedence over both. **Yes**

2. You want CCs to provide approved minutes within 14 days of approval. The constitution suggests minutes are not currently approved until the subsequent meeting, so do you want there to be a more proactive obligation on CCs to approve their minutes sooner than that? **No – they should send in the minute one it is approved at the next meeting. We do need you to make sure that constitutions are amended to reflect any relevant elements set out in the scheme.**
3. Section 52(2)(a) of the 1973 Act requires that CC schemes should contain maps showing the boundaries of the various CC areas. I see the website has a 'mapping solution' on which the areas can be overlaid, but that is not referred to in the scheme. I would suggest that the maps be appended to the scheme itself. That will in any event be necessary for those areas the boundaries of which you are proposing to change (your slides mention Giffnock / Thornliebank and Nielston / Uplawmoor), as the Council will need maps showing the changes to approve and then make available as part of the consultation process. Maps may also be required for any sub-division of the larger wards and/or managing any re-districting of areas that go above the 20,000 population limit you want to impose. **Yes – we're on that.**
4. On the latter point, how are population numbers measured? Is it by reference to the number of people on the Electoral Register for each area? **Basis for CC population estimates are small area population estimates (SAPE) from National Records of Scotland. To improve accuracy a pro-rata formula is applied to resolve data zone overlaps between community council areas, this splits a datazone where a boundary overlap occurs based on the proportionate share of households on either side of the community council boundary. E.g. if one side of the datazone split has 30% of households this will receive 30% of the population of the split data zone. This is the most accurate estimate that can be supplied on available data.**

So could I simply refer to "the population of the area as estimated using the National Records of Scotland's small area population estimates"? A longer definition may become quite hard to follow. **Yes – that's fine.**

What process do you have in mind for when an area goes above 20k? Because community boundaries are an integral part of the scheme I am not sure they could be changed without going through the full amendment process under section 53 of the 1973 Act. We could perhaps include a limited power to redraw the boundary only to the extent necessary to bring the population of an area back below 20k. **That's exactly what we had in mind. If a pop goes over 20k That CC should be subject to a limited review to determine a split in order to bring the pops below 20k and this should be subject to a 12 week consultation not require a full scheme review. It would also be helpful, if possible, to provide ERC with the limited power to make one single**

boundary adjustment between two adjacent CCs (subject to a 12 week consultation) within a financial year without requiring the scheme to be opened.

I don't think a consultation under section 53 of the 1973 Act necessarily entails a scheme being fully opened up for review or consultation. The authority only has to give public notice of what it proposes to do (in this case a single boundary change), and invite and consider representations on those proposals alone. It seems to me that the only advantages in departing from the section 53 procedure would be (a) avoiding the consultation requirements and (b) obtaining two-thirds approval to propose the change and then again to make it. **OK – but to be clear, in the example, does that mean a single public notice with a 12 week consultation would be sufficient? I assume it would require 2 Special Council Meetings with a 2/3 majority to initiate the consultation and subsequently approve it? If so, can we make it clear in the scheme that's what would be required to update individual elements – not a full scheme review?**

Boundaries are one of the issues section 52(2) requires schemes to determine, so a good argument could be made that changing those without following the section 53 procedure would be ultra vires. If you would be having a 12 week consultation anyway then (a) above is not an issue, so unless the obligation to get members' approval is likely to be an onerous one I would not recommend going outside section 53 in relation to a boundary change. **As above we're not trying to step outside section 53 or act ultra vires I am trying to avoid a situation where sensible, uncontroversial or minor updates to keep the scheme fit for purpose cannot be made without a 3 stage review, requiring 4 or more Special Meetings of the Council and at least 28 weeks of consultation – which is likely to lead to a 10 month plus end to end process.**

5. Do you have particular sub-divisions in mind for the larger (>10k) areas? I think we should specify the relevant divisions in the amendment proposals. **No - That has still to be determined but I hope to resolve ASAP.**
6. Are 'co-opted' members still to have the same voting rights as other members, per the constitution? The proposal for making one-third of the seats available for co-option on certain grounds suggests a greater equivalence with the appointed representatives mentioned at paragraph 12 of your constitution, who do not have voting rights, than the current co-opted members who are brought in to fill vacancies. **Yes co-opted members have the same residence criteria and the same status as elected CC members with the exception of term duration and limits. Appointed reps can be from out with the CC area and don't have voting rights.**

Is it still to be possible to co-opt a member to fill a vacancy caused by, for example, a member moving away? **Yes** Are the same specific grounds for co-option (diversity etc.) to apply in those circumstances, or should the CC maintain its existing discretion there? **The co-option should be used to promote diversity**

7. If one-third of members are to be co-opted, does that mean the existing maximum number of seats should be maintained and the number available for elected members reduced by one-third, or that the maximum should be increased by 50% in order to add seats for co-opted members? **The overall number of seats should be maintained and the number available for election reduced.**
8. Your slides refer to co-opted members having 2 year terms. Can they be co-opted again for a further 2-year term? **Yes**

The slides refer to "2-term limits on unelected", but I wasn't sure if that was for uncontested elections, co-opted members or both – please can you confirm? **Both**

I see from clause 21 of your scheme that a community council will be returned uncontested as long as there are no more nominations than there are seats. Presumably that means that members will be returned uncontested through no fault of their own, and so should not be term-limited? I am not sure if uncontested may still equate to "elected", but I take from some other parts of the slides that you have used elected to mean those returned following a ballot. **Uncontested are those nominated but did not require a ballot. They should be term limited. The issue isn't about fault or intentionality - we're trying to drive up the numbers of CC members elected to their CC.**

If a person is twice returned uncontested, are they no longer eligible to be nominated for election at all, or are they allowed to be nominated but only able to be returned if there is a ballot? In either case, is there any concern about creating an unintended consequence of no longer having enough willing and eligible candidates to actually form a council? **They can be nominated but can't be returned a third time uncontested.**

In the latter scenario in particular, people would not know whether they were eligible for election until nominations had closed and they knew whether a ballot was to be held. If there were insufficient

nominations to prompt a ballot, but nominally enough to return a council uncontested, the numbers might fall below half the maximum after those who were term-limited were discounted. In such an event no council would be established, per bullet 3 at clause 21 of your scheme. **Happy with your suggested solution below.**

If you want to avoid that I could make an exception to allow term-limited individuals to be returned if necessary to form a council. If there were more term-limited candidates than were required to meet the minimum they could perhaps draw lots. **OK**

9. Presumably that 'uncontested' process also means that the reduced term limit of 2 years for an uncontested member essentially means repeating the full process for the whole community council 2 years later rather than 4 years later? **Not quite – we will “only” run mid-term elections on the vacant and uncontested seats. But yes in theory if no one is elected we would need to run the full thing every two years.**

I am not sure this is possible given the way the elections work, as members are not elected to specific seats in the way that MPs are. Either there are more nominations than there are seats, in which case a ballot is held, or there are fewer nominations than there are seats, in which case all members are returned uncontested. So if uncontested members have a reduced term limit of 2 years, that means running a full election process 2 years later (subject to what I add at question 12 below). **I think this may be best dealt with by phone – aren't we doing a similar thing by reducing the number of seats for election and keeping an element for co-option?**

10. I am not clear on the last sentence in slide 1 – “Current co-optees must stand if they wish to be eligible for co-option should they be unsuccessful”. Please can you explain what is intended there? **I think on reflection we will leave that idea for now as it adds too much complexity especially if we introduce neighbourhood subdivisions. (For clarity only, an example of how that might work was: There are 15 seats on a CC. 10 for election, 5 for co-option. 5 are elected, 5 uncontested and 5 subsequently co-opted on within the first 2 years. The midterms come up. 5 seats are up for election. All 10 CC members who were either uncontested or co-opted must run for the 5 seats if they wish to stay eligible for co-option even if they later lose the election.)**

As noted above, it does not seem to me to be possible to have some elected seats and some uncontested seats. However, please let me know if I am missing something.

11. The model scheme refers to MPs, MSPs and councillors being ex officio members, but your constitution only refers to councillors. Should the others be included? **Yes**
12. Clause 17 of your scheme provides that the regular election cycle is shifted if there is a clash with local government elections. Should that also apply to an uncontested community council (i.e. to extend the term from 2 years to 3 years?) **Yes**

This could have the following consequence: All community councils are established in year 1. The elected ones would not have another election until year 4. The uncontested ones would have a fresh election in year 2, but local government elections prevent that and so it is year 3 instead. Would you want those councils to be elected again in year 4, so as to avoid some areas getting out of sync with others? **Yes – we want to keep them in sync, so elections don't clash.**

Separately, the model scheme also mentions Scottish Parliament elections so should a clash also be avoided with those? **Yes**

Noted. The result of that could be to delay community council elections by 2 years, given that Parliament elections and local government elections are also scheduled so as to avoid each other. The next elections to those are in 2016 and 2017 respectively, so the consequence could be that if there were community council elections in 2014 ('year 1'), uncontested councils could not in any event have a fresh election until year 4. Are you happy for that to be the outcome, if that is how the years work out? **Yes**

13. Clauses 18 and 21 (second bullet) refer to candidates and voters being over 16 and on the electoral register. However, 16 and 17 year olds will not usually appear on the register. Is there some special provision made for community council elections to which we could refer in the scheme? **No this only applies if they are listed on the register. Individuals can apply to be on the register once they are 16.**
14. Clause 20 refers to “the election timetable” for nominations, but that is not defined. I appreciate this is from the model scheme, but should we specify what the deadline for nominations is? **Only specify that there should be a 6 week nomination period.**

We can say that nominations will be open for 6 weeks, but can we say when the opening or closing date will be (either a set date, or fixed by reference to the date of the actual election – i.e. closing 3 weeks beforehand)? Otherwise, we could just say that the period will begin on a date to be appointed by the local authority, with the exact timing at the local authority's discretion as long as the period closes in September.

Ok – specify it as 4 weeks prior to the elections

The scheme refers to elections taking place in September, but if no ballot is held are the appointments still made in September (**No this would not be the case as a candidate only become a member of the CC once they have completed the training and the CC has met for the first time – that could be into October**) or could it be earlier than that? If so, do the ballots also take place in September? (**Not necessarily – better to keep this as open as possible to allow for the logistics of holding elections and getting the new CCs set up**) It would be helpful to know how the timings work in practice.

15. Clause 21, second bullet, also refers to the greatest number of votes. Do voters only get to cast one vote? **Yes**

The model allows as many votes as there are seats available on the council. If voters only get one vote, do you get situations where a few candidates get most of the votes and others can't be separated because they only get a few? **If candidates within a CC or subdivision have same number of votes draw lots to decide the winner.**

16. If an insufficient number of nominations are received (clause 21, third bullet), does nothing further happen until the next set of elections, or can some interim arrangement be made to re-open nominations? **The model scheme “does not preclude the local authority from issuing a second call for nominations for a community council area failing to meet the minimum membership requirement within 6 months of the closing date for the registration of the first call for nominations.” I think we would want to leave it at that as there is also the potential again 2 years later.**

17. Clause 22 refers to the first post-election meeting covering various things, including “adoption of the constitution”. Is the view that a new community council is an entirely new association, and so the constitution has to be adopted as of new each time? **Yes, this should also happen following midterm elections.**

18. Slide 2 refers to mandatory training and induction. Can we define what that is? Also, is there a timescale for members to complete that? **The scheme should require ERC to run induction training post elections but prior to first meetings of CCs. It should induct CC members on the role of the CCs, requirements of the Scheme & Code of Conduct and give a basic coverage to the roles of office bearers and the basic skills required for these roles.**

The slide suggests that an elected or uncontested person would only be a councillor after they have completed the training, rather than that they would cease to be so if they didn't complete it within a certain time (as with the 6 months allowed for co-opted members). I am conscious that framing the requirement that way may be opposed unless the training could be provided and completed fairly quickly after the election, as it would prevent councillors taking their seats. The drafting would also be more complicated for an obligation to do the training in advance, rather than within a certain time of being elected, but I can frame it however you prefer. **The issue is that co-optees may come on board at any time so the timescale for them needs to be different as we can't run training for individuals. Every six months allows us to bundle it up. The principle is everyone immediately after elections then every six months for any new members thereafter.**

19. However the obligation is framed, I would suggest including an agreement in the nomination form to undertake the training if successful. **Agreed.**

20. Slide 2 also refers to the public election statement. We could include a template with the nomination form, so do you have a particular format in mind? **Only that it should list the candidate's name, CC and any subdivision (if appropriate). It should be no more than 250 words, set out why they are running and hope to achieve and must not reference anyone else. It must be submitted with the nomination. Corrections only permitted for typographically or factual errors.**

21. The agreement to be bound by the scheme and code of conduct could also be included in the nomination form. The slide say “the signed code” must be witnessed and notarised by a Council officer, but if we included that agreement in the nomination form could the form be notarised

instead? Presumably the logistics are basically the same whether it is the form or a signed copy of the code that is to be notarised. **Yes – so long as the scheme is unequivocally enforceable.**

Kind Regards

Charles Livingstone
Associate
On behalf of Brodies LLP
Edinburgh, UK
mailto: charles.livingstone@brodies.com
<http://www.brodies.com>

Telephone: ++44 (0) 131 228 3777



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T 0131 228 3777, F 0131 228 3878, DX Ed10 Edinburgh-1

Also at: 2 Blythswood Square, Glasgow G2 4AD, Scotland UK T 0141 248 4672, F 0141 221 9270, DX GW11 Glasgow-1; And: 23 Carden Place, Aberdeen AB10 1UQ, Scotland UK T 01224 392 242, F 01224 392 244, DX AB10 Aberdeen; And: 8th Floor, 41 Avenue des Arts, 1040 Brussels, Belgium T +322 808 7990, F +322 588 1776

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