



Law Society  
of Scotland

# Stage 1 Briefing

## Planning (Scotland) Bill

May 2018



## Introduction

---

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society previously responded<sup>1</sup> to the Local Government and Communities Committee's (the Committee) call for evidence on the Planning (Scotland) Bill (the Bill) and has the following comments to put forward for consideration at Stage 1.

If you would like to discuss this paper, or if you would like more information on the points that we have raised, please do not hesitate to contact us. Contact details can be found at the end of the paper.

## General comments

---

As with the Planning etc. (Scotland) Act 2006, the current Bill takes the form of amending existing legislation. Throughout the Bill, there are multiple amendments to the same sections. As a result, the Bill is difficult to follow and we consider this to be contrary to the intention to involve the public in both the consultation and planning process.

It must be noted that the Bill deals with planning at a very high level. The Bill is of a skeletal nature with detail to be set out in regulations. This makes it difficult to understand the full impacts of what is proposed by the Bill. The impact upon the planning system of the proposed changes will be largely driven by both the content of regulations and by the decisions and actions of those involved in delivering the provisions. This lack of clarity may be a disincentive to investors and developers.

We consider that transitional provisions in the Bill will require careful consideration. Clear transitional provisions and guidance are required to ensure that there is no policy hiatus.

<sup>1</sup> <https://www.lawscot.org.uk/media/359608/planning-s-bill-call-for-evidence-final.pdf>

## Summary of comments

---

By way of summary, we note our position on the key parts of the Bill as follows:

- We would welcome additional scrutiny of the National Planning Framework (NPF).<sup>2</sup>
- The proposed establishment of regional partnerships is unlikely to be sufficiently robust to replace Strategic Development Plans.<sup>3</sup>
- It is not clear how the removal of statutory supplementary guidance will be dealt with.<sup>4</sup>
- In respect of Local Development Plans (LDPs), the practicalities of the evidence report stage are not yet clear. There is the potential for a loss of opportunity for community engagement by removal of the main issues report unless robust consultation is included in the evidence report stage.<sup>5</sup>
- We consider that contrary to the Committee's view, planning authorities will require to take account of any Local Place Plan (LPP) it receives, although having given consideration to it, may choose not to include it in the development plan. It is questionable as to whether there will be sufficient resources for LPPs to be meaningfully prepared by communities.<sup>6</sup>
- We note that the Bill does not provide for a third party right of appeal. We support such exclusion for the reasons given in the policy memorandum, in particular, the likely delay, resource level and economic implications involved.<sup>7</sup>
- We are concerned about the front loading required to prepare Simplified Development Zones (SDZs). If an SDZ is to be included in the NPF or the LDP, this is likely to lack flexibility which is contrary to the intention that SDZs can be prepared to drive forward development.<sup>8</sup>
- We consider that there may be practical difficulties in relation to proposed amendments to the period for plans to be implemented from the date of Planning Permission in Principle (PPP).
- We note that the Committee suggest further restrictions be made on repeat applications. There is currently provision for planning authorities to prevent repeat applications.<sup>9</sup> It is not clear whether there is a need for greater restrictions.<sup>10</sup>
- The Bill contains enabling powers in respect of fees and therefore limited comment can be made. We consider that there should be flexibility for planning authorities in fee charging.<sup>11</sup>
- The enforcement provisions have the potential to be a deterrent mechanism for the most serious breaches of planning control, although we note that often breaches are inadvertent.<sup>12</sup>
- We are supportive of the requirement for compulsory training for local government councillors.<sup>13</sup>

<sup>2</sup> See Local Government and Communities Committee, Stage 1 Report on the Planning (Scotland) Bill, paragraphs 66 and 67.

<sup>3</sup> *Ibid.* Paragraphs 92-96.

<sup>4</sup> *Ibid.* Paragraphs 112 and 134-135.

<sup>5</sup> *Ibid.* Paragraphs 136-139.

<sup>6</sup> *Ibid.* Paragraphs 185-190.

<sup>7</sup> *Ibid.* Paragraphs 221-225.

<sup>8</sup> *Ibid.* Paragraphs 277-281.

<sup>9</sup> Town and Country Planning (Scotland) Act 1997, Section 39 (as amended).

<sup>10</sup> See Local Government and Communities Committee, Stage 1 Report on the Planning (Scotland) Bill, paragraphs 308-309.

<sup>11</sup> *Ibid.* Paragraphs 326-330.

<sup>12</sup> *Ibid.* Paragraphs 363-364.

- We consider there would be benefit in planning authorities reporting on performance. This should promote public confidence in the system.<sup>14</sup>
- We note limited comment can be made in relation to the proposed infrastructure levy due to the limited detail in the Bill.<sup>15</sup> Any proposal for land value capture will require careful consideration given it is a very complex and niche matter. It is not clear that there is an evidence base for such a proposal.<sup>16</sup>

## The Bill

---

### Part 1 – Development Planning

#### Section 1 – National Planning Framework

The Bill proposes a move to a longer planning cycle of 10 years at national level. The effect of the proposed changes to Section 3A of the Town and Country Planning (Scotland) Act 1997 ('1997 Act') is that once the National Planning Framework (NPF) has been published, Ministers must consider whether to revise it within five years. However, it appears that if the NPF is not revised at that point, the next revision might not take place for a further 10 years. That means that in practice, an NPF might remain in force for 15 years without revision. We question whether this was truly Scottish Government's intention.

The NPF will form part of the local development plan (LDP) and so will have an enhanced role. The Bill does not provide for any public examination process and we question whether 90 days of Parliamentary scrutiny is an effective substitute in the circumstances. We suggest that some degree of independent assessment, such as with orders made under the Transport and Works Act 1992, may be appropriate to ensure public confidence in the transparency of robust community engagement in the process.

#### Section 2 – Strategic Development Plans

Strategic planning is an essential element of the planning system currently fulfilled in the four city regions by Strategic Development Plans (SDPs). The Bill removes the requirement for preparation of SDPs.

The ending of SDPs will potentially result in a vacuum which may not be sufficiently filled by the proposed establishment of regional partnerships. Regional partnerships will operate on an informal basis. In the absence of clear-cut statutory duties and functions, we have concerns that such partnerships will not be effective. There is no mechanism for deciding disputes when the partners may be unable to agree.

---

<sup>13</sup> See Local Government and Communities Committee, Stage 1 Report on the Planning (Scotland) Bill, paragraphs 373-375.

<sup>14</sup> *Ibid.* Paragraphs 352-356.

<sup>15</sup> *Ibid.* Paragraphs 405-409.

<sup>16</sup> *Ibid.* Paragraphs 414-415.

One of the recommendations of the *Independent Review of Planning*<sup>17</sup> which has not been taken up in the Bill was the establishment of a national infrastructure agency. Such an agency may be able to assist partnerships in the identification of strategic infrastructure needed to support new development.

We consider that there is a strong need for clear transitional provisions and guidance to ensure that there is no hiatus in development planning following the ending of SDPs.

### **Section 3 – Local Development Plans**

Under the Bill, planning authorities will be required to produce, as the first stage in preparing a LDP, an 'evidence report' which encompasses certain prescribed matters. This will be submitted to the Scottish Ministers. The process has been referred to informally as a 'gatecheck'. All evidence reports will be the subject of an assessment by a person appointed by the Scottish Ministers, most probably one of the Scottish Government reporters, to assess whether the report contains "sufficient information to enable the planning authority to prepare a local development plan".<sup>18</sup> It is not clear what constitutes "sufficient information" as the Bill gives no broad parameters in this respect.

While up front examination of key issues by the gatecheck process is welcome, we consider that the Bill has a number of issues in respect of these provisions:

- The procedure is unclear. The status of and planning authority process for preparation of the evidence report is not clear; for instance, is it envisaged that the evidence report would require planning committee approval before submission or is it capable of being prepared and submitted by delegation to officers?
- If the examiner carrying out the gatecheck is not satisfied with the evidence report, the planning authority then has to prepare a revised report to be subject to further assessment. The Bill does not provide for the examiner to make binding recommendations, as is currently the case with LDPs.
- At this stage, the nature of the relationship between the gatecheck process and LDP examination are uncertain.
- The role of third parties in the gatecheck process is unclear, other than confirmation in the evidence report that the planning authorities have had regard to Local Place Plans and Local Outcomes Improvement Plans. If the gatecheck is to effectively determine key issues, such as the housing land requirement, then it is essential that third parties have an opportunity to participate in that process in an effective manner.
- The provisions about the gatecheck process appear to lack robustness. In the Bill, there is a lack of firm tests for the examiner to consider.
- The status of the gatecheck findings is unclear. Section 3(6) of the Bill only requires the planning authority to "have regard" to the evidence report when preparing the proposed LDP.

<sup>17</sup> <http://www.gov.scot/Resource/0050/00500946.pdf>

<sup>18</sup> Planning (Scotland) Bill, Section 3(4).

- The Bill does not contain provisions as to the procedure for the addition of land sites post-gatecheck stage, particularly in respect of housing land. Given the change to a 10 year plan, there is likely to be an increase in cases in which such issues arise at post-gatecheck stage.

The detail of regulations will require to be carefully considered to ensure sufficient flexibility is afforded where required, but to ensure that the gatecheck process meets the intended aim of simplifying the procedure. For the gatecheck to be of any purposeful value, the later examination and approval of LDPs requires to remain sufficiently robust but not be overly onerous given the nature and extent of the later examination process.

#### **Section 4 – Statutory Guidance**

The Bill abolishes statutory supplementary guidance. It is not clear from the Bill itself if it is intended that all the material currently contained in statutory guidance will move to be contained within the NPF or the LDP. It would seem to be at odds with the aim of simplifying plans to put such detail into the LDP.

We do note that some planning authorities currently have substantial volumes of statutory guidance which results in considerable complexity. There will however remain a need for detailed information on a variety of matters, for example local design guidance and guidance on affordable housing. The financial memorandum accompanying the Bill predicts savings from the abolition of statutory guidance. This fails to acknowledge the potential use of non-statutory supplementary guidance.

#### **Section 7 – Amendment of NPF and LDPs**

Section 7(3) of the Bill seeks to introduce provisions about the amendment of LDPs. The use of the terms “take into account” and “have regard to” are particularly vague. It is not clear whether one requirement is of greater significance than the other. We anticipate that any potential significant conflict between the NPF and LDP would be picked up during the gatecheck process however this is not clear from the terms of the Bill.

There is a need for flexibility in approach to the NPF and LDP given the move to a 10 year cycle for LDPs. Consideration requires to be given as to whether flexibility is found within primary legislation itself, which may give rise to uncertainty, or whether the flexibility should fall within the NPF itself.

#### **Section 8 – Development Plan**

The Bill provides that the NPF will form part of the development plan. This is to be welcomed due to the potential streamlining effect of incorporation of the Ministers’ policies in the NPF rather than having them embedded and often repeated in the LDP.

The Bill is not sufficiently clear as to how situations of incompatibility between the NPF and LDP will be dealt with, and at what point, given that the gatecheck pre-dates the preparation of the LDP. The Bill does not set out any parameters within which an LDP must operate and appears to envisage situations where an LDP would be “incompatible” with the NPF. In that scenario, the LDP would prevail since it had been

prepared later. This is a radical departure from the current provisions where an LDP which falls within an area covered by a higher level plan must be “consistent” with that plan.

### **Section 9 – Local Place Plans**

We consider that these provisions, if used appropriately, could well be used to enable communities to influence and promote development. The provisions of section 9 are short, with the detail to be set out in regulations. While we appreciate that it is not the intention to heavily regulate this area, it is not clear what constraints, if any, there will be in the preparation of Local Place Plans (LPPs), including requirements for publicity, consultation and objection.

The status of LPPs is unclear. In the preparation of Local Development Plans, planning authorities are to “have regard to” LPPs. This contrasts with the planning authority having to “take into account” the provisions of the National Planning Framework. As referred to above, this distinction is not clear. If an LPP is not accepted by a planning authority, the plan will not be incorporated into the Local Development Plan and so will simply fall. It is also noted that LPPs within a local authority area may be conflicting, for example, if prepared by different interest groups. It is not clear if or how these will be reconciled.

It will be crucial that community bodies who wish to prepare LPPs have access to suitable advice as necessary from a range of professionals. We anticipate that the preparation of LPPs will be driven to a large extent by community groups’ motivation and ability to access advice and assistance as required to support them in the preparation of a plan. We consider that there are delivery models set out in the Community Empowerment (Scotland) Act 2015 which could be replicated here.

We question whether the process of inclusion of LPPs in Local Development Plans will be truly cost neutral for planning authorities as set out in the financial memorandum to the Bill. We note that there is a possibility of LPPs emerging during the 10 year lifespan of the Local Development Plan and it is unclear as to whether the planning authority will need to decide what position to take on such LPPs as they emerge.

### **Part 2 – Simplified Development Zones**

The Bill contains provisions to provide for areas where planning permission is automatically deemed to have been granted. The provisions extend the types of permission currently deemed to have been granted in a Simplified Planning Zone. We note the potential benefits to place making of Simplified Development Zones.

It is questionable whether local authorities have both the personnel and the financial resources to carry out the necessary preparation work required for a Simplified Development Zone (SDZ). The Bill is unclear on whether planning authorities will seek to recover the costs of SDZs from developers.

The Bill does not provide for an independent check on the SDZ provisions, although consultation is required. The scheme is to be decided upon by a hearing of the relevant Council. We consider that it would

be appropriate to have an independent reporter to examine the provisions, for example a Planning and Environmental Appeals Division (DPEA) reporter could carry out this role.

## Part 3 – Development Management

### Section 17 – Duration of Planning Permission

Section 17 amends the period for plans to be implemented from the date at which Planning Permission in Principle (PPP) is granted. Currently, from the date of PPP being granted, developers have a three year period in which to submit applications for approval of matters specified in conditions (AMCs) and two years from the date of approval of AMCs is allowed for implementation. The Bill's provisions mean that there will simply be a period of five years from PPP being granted to implement plans. This may not always be feasible due to the time taken to discharge AMCs and it is not clear if AMCs be sought after the five year period.

There are issues as to what is to be considered as an AMC. It does not appear that these changes will fix the fundamental problems with AMCs. We note the rationale behind the change may be to push development forward however we consider greater balance is required.

We note the removal of 'directions' and move back to 'conditions' in relation to time limits on Planning Permissions and welcome this. Where a Planning Permission is issued without a condition setting a time limit, the Bill states that it is "deemed" to be granted subject to such a condition. Section 17(5) of the Bill allows for appeals to be lodged against such deemed conditions. We consider that Section 42 of the 1997 Act should also be referred to in this section to make it clear that applications to the planning authority can be made in relation to "deemed" as well as "actual" conditions.

### Sections 19 and 20 – Planning Obligations

The Bill contains provisions which would allow departure from the clear link between payment being made in terms of a section 75 agreement and the development of infrastructure. Section 19(2) seeks to introduce a new section 75(1A) into the 1997 Act. This appears to follow on the back of the decision in *Elsick Development Co Ltd v Aberdeen City and Shire Strategic Development Planning Authority*.<sup>19</sup> This case presents a difficulty for planning authorities if they seek to collect contributions retrospectively from phases of completed development, as opposed to collecting the contributions in advance of any particular phase being completed.

The provisions of the Bill, however, appear to have the result of decoupling financial payments from particular infrastructure developments. This may be seen as a backward step in what has been reasonable

<sup>19</sup> [2016] CSIH 28.

successfully provision of section 75 agreements. We suggest that the wording of this section is reconsidered to maintain the requirement for a link to the planning purpose but allow flexibility in the timing of collection of the contribution.

## **Part 4 – Other Matters**

### **Section 21 – Fees**

The Bill contains enabling powers in respect of fees and therefore limited comment can be made at this stage. We consider that there should be flexibility in fee charging to reflect local circumstances and local economic trends. It is important that a balance be struck to ensure that discretionary charges are reasonable and proportionate and neither places an undue burden on developers nor on tax payers.

### **Sections 22 and 23 – Enforcement**

The provisions in the Bill have the potential to be a deterrent mechanism. However, many breaches of planning control are likely to be inadvertent or come about by a genuine disagreement on the legal position. Increased penal measures will not assist in resolving these issues and may go as far as discouraging engagement with planning control.

We acknowledge that currently many local authorities are reluctant or do not have sufficient resources to undertake direct action. This may be due to difficulties faced in recovering the costs of taking action. The ability to make charging orders and to tie the expenses of direct action to the land owners may ensure that the some of the most serious breaches of planning control can be remedied.

### **Sections 24 and 25 – Training**

We are supportive of the requirement for compulsory training for local government councillors in planning matters. Planning is a legislative process and it is important that local policy decision-makers understand fully the foundations of their decision making.

### **Section 26 – Performance**

The Bill contains provisions to require planning authorities to report on the performance of their functions. We consider that national recognition of improved performance should assist planning authorities to continue to improve and should promote public confidence in the system. The concepts of performance management, best value, benchmarking and shared best practice all form part of the modern public sector working environment. We do note however that the Planning (Scotland) Act 2006 contains provisions on performance management yet these were not taken forward. Planning authorities currently report voluntarily on their performance. We therefore question why this matter is being considered again at this stage.

## Part 5 – Infrastructure Levy

The Bill includes wide-ranging powers to introduce an infrastructure levy but contains little details as to how the levy will operate. This will likely be a significant concern for developers and may be a disincentive for investors who want certainty as to how such a system will operate.

The levy appears to be similar in concept to the previously proposed planning gain supplement and development land tax regime which were unsuccessful. There is a question as whether the infrastructure levy is truly an infrastructure tax or rather a land value tax.

The provisions of Schedule 1, Part 5 of the Bill suggest that the levy may be nationally set. This may reduce some of the difficulties faced in England and Wales with the Community Infrastructure Levy, where the levy was set locally and this resulted in high set-up costs and little return. The provisions allowing planning authorities to waive or revoke the levy may be seen as future proofing and would allow authorities in less affluent areas to waive the levy in order to encourage investment.

The provisions of Schedule 1, Part 14 of the Bill are of particular note. They appear to provide for levies to be collected at a local level then remitted to Scottish Government, and thereafter the Government may seek to redistribute funds to local authorities. This may result in levies collected in economically rich local authority areas being redistributed to fund local authorities that are not so affluent.

The practicality of the levy is not set out and we would encourage Scottish Government to consult on and give consideration to this in further detail. Even if provisions are invoked for the setting and implementation of an infrastructure levy, it will be necessary to test the viability of the levy. Considerations will need to be given as to whether the levy will be collected upfront or retrospectively. It is not clear how the levy will be utilised for infrastructure projects not being undertaken by local authorities but by other organisations such as Transport for Scotland or Scottish Water.

We are concerned about the extent to which the levy will relate to funding of local and regional infrastructure, particularly when provisions remain for section 75 agreements. Section 75 agreements currently operate within a controlled framework where there requires to be a relationship between the payment being made and the development of infrastructure. The provisions for the infrastructure levy do not appear to suggest such a clear link or indeed any link.

Finally, there is a clear potential for double charging where section 75 agreements are in place. It is not yet clear how this will be avoided.

## Part 6 – Final Provisions

We have no comment to make on this Part.



**For further information, please contact:**

Alison McNab

Policy Team

Law Society of Scotland

DD: 0131 476 8109

[AlisonMcNab@lawscot.org.uk](mailto:AlisonMcNab@lawscot.org.uk)