



Law Society  
of Scotland

# Stage 3 Briefing

## Planning (Scotland) Bill

February 2019



## 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.

This briefing paper is intended to inform MSPs of our comments on the Planning (Scotland) Bill in advance of the Stage 3 Debate in the Scottish Parliament.

The Bill<sup>1</sup> was introduced into the Scottish Parliament by the Cabinet Secretary for Communities, Social Security and Equalities, Angela Constance MSP, on 4 December 2017.

The Bill was allocated to the Scottish Parliament's Local Government and Communities Committee. The Committee issued a call for written evidence and we provided a written submission to the Committee.<sup>2</sup> On 17 May 2018, the Committee produced a stage 1 Report.<sup>3</sup> The stage 1 Debate took place in the Scottish Parliament on 29 May 2018 and the Scottish Parliament agreed to the general principles of the Bill.

A number of amendments were made to the Bill at stage 2. The Bill completed stage 2 on 14 November 2018 and a Bill as amended has been published.<sup>4</sup>

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.

<sup>1</sup> As introduced, [http://www.parliament.scot/S5\\_Bills/Planning%20\(Scotland\)%20Bill/SPBill23S052017.pdf](http://www.parliament.scot/S5_Bills/Planning%20(Scotland)%20Bill/SPBill23S052017.pdf)

<sup>2</sup> <https://www.lawscot.org.uk/media/359608/planning-s-bill-call-for-evidence-final.pdf>

<sup>3</sup> [http://www.parliament.scot/S5\\_Local\\_Gov/Reports/Planning\\_Report.pdf](http://www.parliament.scot/S5_Local_Gov/Reports/Planning_Report.pdf)

<sup>4</sup> [http://www.parliament.scot/S5\\_Bills/Planning%20\(Scotland\)%20Bill/SPBill23AS052018.pdf](http://www.parliament.scot/S5_Bills/Planning%20(Scotland)%20Bill/SPBill23AS052018.pdf)

## Summary of comments

---

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

- The Bill was significantly amended at stage 2. As a result, the Bill is now difficult to follow with contradicting and complex provisions. The Bill requires to be given full consideration at Stage 3. If the Bill is enacted as amended, we have serious concerns that it would be unworkable and fail to meet its intended policy objectives. The Bill introduces a considerable number of new duties for planning authorities and Scottish Ministers. The resource, funding and efficiency implications of this will be significant.
- We oppose the introduction of a statutory purpose of planning which may lead to a burdensome decision making process and could give rise to the potential for legal challenge.
- We welcome additional scrutiny of the National Planning Framework (NPF) but note the 120-day period for consultation which will lengthen the period for an NPF being prepared.
- In the absence of a robust statutory alternative, we support the retention of Strategic Development Plans (SDPs). The introduction of an evidence report stage is to be welcomed but we consider it essential that the full examination of SDPs is retained.
- We offer qualified support for the removal of statutory supplementary guidance. We have concerns as to how important statements of policy which are currently part of the development plan will be formulated, consulted upon and adopted for decision-making purposes.
- We offer qualified support for the changes to Local Development Plans (LDPs). We have concerns that the practicalities of the evidence report stage are not yet clear. It is important that robust consultation is undertaken as the evidence report will have a critical role in setting the policy direction of LDPs.
- We support the introduction of Local Place Plans (LPPs) which have the potential to strengthen community planning. We are, however, surprised that an LPP should be afforded, at least at a technical level, the same status as the NPF which has been approved by Parliament. It will be crucial that community bodies who wish to prepare LPPs have access to suitable advice and would question whether the resource implications for planning authorities have been properly assessed.
- We have concerns as to what a Culturally Significant Zone (CSZ) will actually consist of and its scale and whether they require statutory (as opposed to the current) policy protection. Careful consideration as to the scope of a consultation zone (100m) is required and we have apprehensions that if applied inappropriately, these provisions could undermine important urban regeneration projects.
- While we support Master Plan Consent Areas (MCAs), we do not consider that these will result in a step change to consenting and are concerned about the resources required to prepare MCAs. The proposed introduction of land value capture may be contrary to Protocol 1, Article 1 of the European Convention of Human Rights. If this or a similar provision is to be introduced, we suggest that this

should be dealt with by way of a wider reform of the Compensation Code which has been examined by the Scottish Law Commission<sup>5</sup>.

- We do not support the amendments to remove planning performance requirements and training for council members. Accountability in terms of performance and quality of decision making are key principles that underpinned the Bill at introduction.
- We generally support introduction of an infrastructure levy but note limited comment can be made due to the scant detail in the Bill. We welcome the ‘sunset clause’ introduced at stage 2.
- We note that the Bill does not provide for a third party right of appeal. We would oppose an introduction of this at stage 3. This could lead to delays in decision making and would mean decisions being taken centrally rather than by local government. In order to avoid the adversarial implications, it would be far more desirable to improve community engagement and the availability of LPPs has the potential to reduce conflict with and engage communities.
- Many of the amendments to the Bill at stage 2 are focused at a level of detail that would not normally be included in primary legislation. Appreciating the laudable aims of many of these amendments, a large number of these matters could be dealt with in secondary legislation or planning policy and in respect of certain matters, are already covered under existing legislation.

## General comments

---

Planning is a matter which affects all communities and fundamental to the economy. It is therefore of great importance that the law in this field is clear and can be understood by Scottish Government officials, planning authorities, businesses and individuals. As with the Planning etc. (Scotland) Act 2006, the Bill takes the form of amending existing legislation and some may find it difficult to follow.

Throughout the Bill, there are instances of multiple amendments to the same sections. As a result, the Bill as amended is now difficult to follow with contradicting and complex provisions. It is crucial that sufficient Parliamentary time is allocated for the Bill to be given full consideration at Stage 3.

Many of these amendments if enacted would operate to undermine the general principles of the Bill which were to strengthen and simplify the system, and to ensure the planning system better serves Scotland’s communities and the economy. If the Bill is enacted as amended, we have serious concerns that it would be unworkable and fail to meet its intended policy objectives.

It must be noted that the Bill deals with planning at a high level. The Bill as introduced was of a skeletal nature with detail to be set out in subsequent regulations. This makes it difficult in respect of a number of matters to fully appreciate the impacts of what is proposed by the Bill. The detailed impact upon the planning system of the proposed changes will be largely driven by both the content of future regulations

<sup>5</sup> In their project on Compulsory Project - <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/compulsory-purchase/>

and by the decisions and actions of those involved in delivering the changes. Having said this, many of the amendments introduced at stage 2 are focused at a level of detail that would not normally be included in primary legislation. Some of these matters are already covered under existing legislation and we suggest that a number of other matters could be dealt with in secondary legislation or planning policy.

The Planning system was relatively recently amended comprehensively by the Planning etc (Scotland) Act 2006 with those reforms coming fully into force in 2009. The scale and content of the proposed amendments to the Bill (should they all be enacted) may negatively impact on the limited resources of planning authorities and will not result in a better planning system for all interested parties, applicants or communities.

These amendments approved at Stage 2 have included the incorporation of a number of new sections which deal with a variety of matters, including, the purpose of planning, open space and play strategies, culturally significant zones, short-term holiday lets, and others. These matters were not dealt with in the Bill when it was introduced and therefore did not form part of the debate in the Scottish Parliament at stage 1 and nor have they been consulted upon. Other matters which were dealt with in the Bill as introduced have faced significant amendment, including the National Planning Framework, local place plans and infrastructure levy provisions.

The inclusion of a significant number of amendments and the placement of around 60 additional duties on planning authorities and additional duties on Scottish Ministers, which will in turn impact on the speed of planning decisions, has compromised the coherence of the Bill. We do not consider the resource implications have been properly assessed. Given the extent of changes, a revised financial memorandum requires to be prepared in order to properly assess the financial and potential resource impact. We consider that a systematic overhaul of the amendments to the Bill is required at stage 3 to ensure that it both meets its policy objectives and ensure it is logical, consistent and meaningful. In this exercise, it is important to pay close regard to the Policy Memorandum that accompanied the Bill and to the proposals initially consulted on by Scottish Government in advance of the laying of the Bill.

Finally, we consider that transitional provisions in the Bill will require careful consideration. Clear transitional provisions and guidance are required to ensure that the provisions are enacted smoothly and effectively.

## The Bill

---

### Part A1 and Part 1 – Purpose of Planning and Development Planning

#### Sections A1 and A2 – Purpose of planning

It was originally envisaged that including a purpose of planning in the Bill was unnecessary as it would be difficult to define and if defined prescriptively, could result in uncertain outcomes with the potential for challenge. Two, different, purposes of planning were introduced to the Bill at stage 2. We note that neither of these purposes were subject to the Scottish Government's pre-Bill consultation<sup>6</sup>.

The first, dealt with in section A1, although wide in scope, requires planning decisions to be in the "best long term public interest" which imposes an unnecessarily high test for decisions. We consider that this opens up the potential for challenge of Scottish Ministers' and planning authorities' making decisions in planning matters.

The second, dealt with in section A2, also introduces a purpose of planning, referring to the "long term public interest" with reference to sustainability and national outcomes under the Community Empowerment Act 2015. This relates to the National Planning Framework and development planning only, not to development management. We note that this section also creates duties on Scottish Ministers and planning authorities to exercise their functions with the objective of implementing certain international obligations. We suggest that this reference to the objective of implementing international obligations is unnecessary and may lead to difficulties of interpretation as these duties (if they are relevant) will already apply.

We consider that any inclusion of a statutory purpose for planning is undesirable as planning decisions must already give a primacy to the development plan (which should be an expression of the long term public interest) and may lead to an unnecessary and burdensome decision making process. There may be unintended consequences of introducing a statutory purpose for planning resulting in delays in the delivery of development and potentially legal challenges on the basis that a decision does not comply with the defined planning purpose.

Further, this would appear to create tensions with the requirements of section 25 and 37(2) of the Town and Country Planning (Scotland) Act 1997. It is important to observe that a duty to further sustainable development is already contained within section 3E of the 1997 Act in relation to development plans and therefore the introduction of a further duty appears unnecessary.

In the event that a statutory purpose is to remain within the Bill, we suggest that this be limited to the terms of the proposed section 3ZA(3), i.e. referring to sustainable development and achievement of the national outcomes. If this were to be included, we suggest that there should be a provision defining sustainable

<sup>6</sup> Places, people and planning: A consultation on the future of the Scottish planning system, 2017.

development or empowering Scottish Ministers to issue clear guidance on its meaning as is currently expressed in Scottish Planning Policy 2014.

## **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 or beyond. That means that in practice, an NPF might remain in force for 15 years or more without revision. In a changing economy, it may better to ensure that there is more frequent revision of the NPF.

As amended, the Bill contains a requirement for the NPF to contain housing targets. We note that the inclusion of housing targets within the NPF has the potential to result in conflict between national and local planning authorities whereby targets are set at national level but there is insufficient land locally to meet the targets. It is important that such targets are not fixed in isolation. For example, it is necessary for infrastructure requirements to be fully considered when housing targets are fixed. There requires to be consideration as to how such targets will be set at national level. In addition, it will be necessary to ensure that there is an appropriate mechanism to review and annually update the targets set within the NPF, particularly given the potential duration of the plan which could now be 10 years or more.

The NPF will form part of the local development plan (LDP) and so will have an enhanced role and will incorporate national planning policies (which will form part of the development plan) which is to be welcomed. The Bill as amended provides for a consultation process on the proposed draft NPF. We welcome the requirement for public engagement in addition to the requirement for the Scottish Parliament to approve the framework. We note the requirement for the Scottish Ministers to "have regard to any representations about the proposed draft framework that are made to them within no more than 120 days of the date on which the copy of the proposed draft framework is laid before the Parliament"<sup>7</sup>. It is likely to take some time for the NPF to progress through Parliament and we have concerns regarding the time which will be taken for the NPF to be approved.

## **Section 1A – Open space strategy**

This section was introduced to the Bill at stage 2. We note that the protection of open space is adequately delivered through the local development plan and Scottish Planning Policy and therefore we question whether it is necessary for this to be dealt with in the Bill.

## **Section 2A – Strategic Development Plan**

Strategic planning is an essential element of the planning system currently fulfilled in the four city regions by Strategic Development Plans (SDPs). Section 2, which removed the requirement to prepare SDPs, was

<sup>7</sup> Planning (Scotland) Bill, Section 1(9).

deleted at stage 2. Therefore, the Bill as amended continues to support the provision of SDPs albeit with some changes to their examination and approval. In the absence of a robust statutory alternative, we support the retention of SDPs.

We previously noted that the ending of SDPs would potentially result in a vacuum which may not be sufficiently filled by the proposed establishment of informal regional partnerships. It remains our view that if SDPs are to be removed, there requires to be a robust statutory alternative put in place. While under the current SDP system there are inevitably tensions in different planning authorities, it seems unlikely that improvements in efficiency and the speed of good decision making will be achieved by removing their current statutory duties to work together and substituting this with informal regional partnerships. If SDPs are to be removed, there would also be a strong need for clear transitional provisions and guidance to ensure no hiatus in development planning following the ending of SDPs.

Section 2A concerns the preparation of an evidence report for an SDP. These provisions are similar to the evidence report process for LDPs. The evidence report 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 DPEA reporters, to assess whether the report contains "sufficient information to enable the strategic development planning authority to prepare a strategic development plan".<sup>8</sup> It is not clear what constitutes "sufficient information" as the Bill gives no broad parameters in this respect. In relation to SDPs, there does not appear to be a further examination stage once the SDP has been prepared. We consider that an independent assessment (examination) of the plan is essential. We address a number of further matters in our comments relating to LDPs below.

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

By way of amendment at stage 2, a requirement for LDPs to include targets for the provision of housing for older and disabled people has been introduced to the Bill. We note that these targets will need to be closely linked to the housing targets contained within the NPF. While this is a laudable objective, the provision of such housing is considered among a range of other legislation and policies.

Under the Bill, planning authorities will be required to produce, as the first stage in preparing an LDP, an 'evidence report' which encompasses certain prescribed matters. This is similar to the provisions of section 2A concerning an evidence report for SDPs. We welcome the introduction at stage 2 of a requirement to seek views, and have regard to any views expressed, from various stakeholders and the public at large, including from Gypsies and Travellers, and children and young people<sup>9</sup>.

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

<sup>8</sup> Planning (Scotland) Bill, Section 2A(4).

<sup>9</sup> Planning (Scotland) Bill, Section 3(4).

- Clear cut rights of consultation and participation by all stakeholders in the evidence report examination process is required;
- At this stage, the nature of the relationship between the evidence report process and LDP examination are uncertain;
- It would be helpful if the Bill more clearly expressed the scope of the evidence report examination process. There is uncertainty as to whether the evidence report and subsequent assessment by DPEA will focus on housing land supply which is, in the majority of cases, the key matter of controversy. Under the current arrangements, difficulties have been encountered during the plan examination stage where housing sites identified in the proposed plan need to be excluded and/or new sites to support the housing land supply targets must be sought. While the evidence report stage is likely to minimise this possibility, there needs to be a flexibility built into the system that enables a DPEA reporter to introduce additional sites where this is required, bearing in mind the lifespan of the LDP of up to 10 years;
- The evidence report and gatecheck procedure do not enable active participation by way of a hearing or inquiry involving those in the consultation exercise;
- The provisions about the evidence report examination process appear to lack robustness. In the Bill, there is a lack of firm tests for the examiner to consider. In England and Wales under the Planning and Compulsory Purchase Act 2004 the test is one of “soundness”;
- The status of the evidence report examination 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. It would be appropriate for the proposed LDP to be consistent with the evidence report;
- While we understand that the move to a 10-year plan cycle (currently five-year cycle) should reduce the burden on plan preparation, we have concerns that a 10-year old plan is likely to be significantly out of date, and not reflect the required land use development in a particular area. The requirements for a modification or new LDP within the 10 year cycle should not be discounted.

We also note that the evidence report is to set out how the authority have invited local communities to prepare Local Place Plans (LPPs) and the assistance provided by the authority for this purpose. We support this initiative in order to stimulate LPPs. However, it remains unclear as to how planning authorities will resource this invitation and support communities to prepare LPPs. We note that the Financial Memorandum to the Bill states: “The costs of preparing local place plans are to be found by the community in the first place.....There will be no separate costs to the Scottish Government or to planning authorities from the inclusion of LPPs in LDPs.”<sup>10</sup> It seems likely that there will be separate costs to planning authorities in the circumstances and those costs should be taken into account. There is also the potential for conflicts of interest (including those at a professional planning level) to arise depending on the assistance given by a planning authority to communities to prepare LPPs where this results in a conflict with the LDP or is at odds with the advice of a professional planning officer employed by the Planning

<sup>10</sup> Financial Memorandum, paragraphs 59 and 60.

Authority. There is a strong case for a community to have separate advice and representation and resources would need be made available by Scottish Government for this purpose.

In addition, this section now contains a proposed amendment to the 1997 Act requiring a planning authority to assess, in preparing an evidence report, the sufficiency of play opportunities in its area for children. While a laudable objective, it is unnecessary for this to be legislated for as it will inevitably form part of the framework.

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

The Bill abolishes statutory supplementary guidance which currently forms an important part of the development plan. We understand the concerns of SG that a number of planning authorities have produced voluminous statements of supplementary guidance to the extent that their policies are difficult to locate and follow. We do not consider that the intention is that all policy from Supplementary Guidance will be enshrined in the NPF, or LDP. It would seem to be at odds with the aim of simplifying plans to put such detail into the NPF or LDP. The outcome may be a return to the pre-2006 position whereby supplementary guidance will largely form non-statutory policy.

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 policy on a variety of matters, for example local design guidance, developer contributions and guidance on affordable housing. Planning authorities may be reluctant for policy on such important matters to be included only in non-statutory guidance and may therefore be included in the LDP. We consider that the financial memorandum accompanying the Bill overstates savings from the abolition of statutory guidance as the central requirement for this will remain and will require to be promoted as non-statutory planning policy.

#### **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” may imply a greater or lesser duty. We do not know whether “take account of” is intended to reflect a higher duty than “have regard to” and how the decision-making on these terms would differ. For example, do the provisions entitle a planning authority to disregard the NPF which has been approved by the Parliament? We anticipate that any potential significant conflict between the NPF and LDP would be picked up during the evidence report examination process however this is not clear from the terms of the Bill.

#### **Section 8 – Development Plan**

The Bill provides that the NPF will form part of the development plan along with any SDP and LDP applicable to the area. 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, SDP and LDP will be dealt with, and at what point, given that the evidence report examination 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.

## **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. On the whole, we welcome Local Place Plans (LPPs) and the role they will have in shaping the LDP. 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 legal requirements there will be in the preparation of LPPs, including requirements for publicity, consultation, objection and approval. The amendments seeking to strengthen the LPP by requiring its instigation before commencing an LDP might on one view be considered welcome. However, this points to the enhanced role of the planning authority in offering detailed support to communities in the preparation of these plans with consequential resource implications.

It is somewhat unusual that an LPP should be afforded, at least at a technical legal level, the same status as the NPF which has been approved by Parliament. That is because a planning authority must “take into account” an LPP and NPF in preparation of the LDP (as well as any local outcomes improvement plan).

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. It will be important for LPPs to be stimulated in all communities and not just those which are more affluent. We consider that there are delivery models set out in the Community Empowerment (Scotland) Act 2015 which could be replicated here.

We note that there is a possibility of LPPs emerging during the 10 year lifespan of the LDP and it is unclear as to whether the planning authority will need to decide what position to take on such LPPs as they emerge. In addition, consideration will require to be given as to the approach to be taken if competing LPPs are provided by different community bodies or where updated LPP may be considered appropriate by community bodies.

As referred to above, there is a potential for a conflict of interest to arise depending on the assistance given by a planning authority to communities to prepare an LPP where this results in a conflict with the LDP. There is a strong case for a community to have separate advice and representation.

Consideration should also be given to the possibility of an LPP requiring a Strategic Environmental Assessment and guidance is needed.

## Part 2 – Masterplan Consent Areas

The Bill contains provisions to provide for areas where planning permission is automatically deemed to have been granted. This was referred to in the Bill as introduced as Simplified Development Zones and was rebadged at stage 2. 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 such zones.

It is questionable however whether planning authorities have both the personnel and the financial resources to carry out the necessary preparation work required for a Masterplan Consent Area (MCA). The Bill is unclear on whether planning authorities will seek to recover the costs of MCAs from developers.

The Bill does not provide for an independent check on the MCA provisions, although consultation is required. The scheme is to be decided upon by a hearing of the relevant authority. 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.

We note the amendment made to this part of the Bill relating to land value capture. We consider that the amendment is unclear in its terms, particularly with regards to the compensation payable. The provision appears to attach little weight to the value of development potential in calculating the compensation due to the person from whom the land is purchased and is a divergence from the existing regime for compulsory purchase orders, found in both legislation and case-law. Current provisions provide that compensation shall be assessed on a number of factors including that “the value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise”<sup>11</sup>. We consider that a departure from the current regime in the proposed terms has the potential to conflict with Protocol 1, Article 1 of the European Convention of Human Rights (ECHR) which concerns the right to peaceful enjoyment of property.

The limited weight accorded to the development value may also create an incentive for planning authorities to make masterplan consent areas, given the proposed option for the authority to obtain land at less than its development value. Conversely, land owners are likely to resist them for this reason. It is also unclear as to how this provision interacts with the infrastructure levy, developer contributions, and land value capture more generally. We are aware of ongoing work in relation to land value capture and consider that this matter merits full consideration and consultation.

## Part 2A – Culturally Significant Zones

This part of the Bill was introduced by amendment at stage 2. Culturally significant zones (CSZs) are already given a degree of protection under Ministerial policy. We note that there is no clear definition of a

<sup>11</sup> Land Compensation (Scotland) Act 1963, section 12

CSZ and discretion is given to planning authorities to make their own determination of such zones within their area. It is considered in the Bill that Planning authorities are best placed to consider the appropriate approach for their area. We note that it is important to recognise that some of the issues arising in relation to CSZs, in particular noise impact, may be similar to those which arise in other areas, for example, manufacturing or industrial areas or near to renewable energy developments. It is important to recognise that this matter cannot be considered in isolation due to existing noise nuisance and licensing regimes. We have concerns as to what a CSZ will consist of and its scale – it could include land or buildings. The 100 metre consultation zone<sup>12</sup> needs to be carefully considered particularly in relation to urban development. We have concerns that if applied inappropriately, this proposed legislation could undermine important urban regeneration projects. We consider it more appropriate that CSZs should have the protection afforded under the letter<sup>13</sup> from the Chief Planner in relation to the Agent of Change principle, which allows for a protective but flexible consenting regime.

## Part 3 – Development Management

### Section 11B – meaning of “development”

This section was introduced to the Bill by amendment at stage 2. We consider that there is a great deal of uncertainty around the current treatment of short-term lets, in particular, how the term is defined. City centre planning authorities in Edinburgh and Glasgow are or have taken planning enforcement action on the basis that operating a short term commercial let is a material change of use requiring an express grant of planning permission. The Bill does not clarify what is meant by “short-term holiday lets” other than by making two specific exclusions. There requires to be certainty around the definition, particularly given the potential for an individual to commit a criminal offence in the event that an enforcement notice is served and not complied with.

We suggest that this matter merits greater consideration and consultation with stakeholders. We note the wide range of existing regimes within which short term lets may currently operate and be controlled, for example, planning, licensing, enforcement of real burdens and title conditions, and taxation, to name a few. If the matter is to be dealt with within the planning system, there requires to be clarity as to the basis for a planning application, for example a change of use and what factors must be taken account of in deciding if that has occurred.

There is perhaps the potential for this to be addressed by an amendment of The Town and Country Planning (Use Classes) (Scotland) Order 1997. However, the practical difficulty is in assessing when a change of use has actually occurred and the factors that must be taken into account in reaching such a conclusion. We note that legislation for greater London<sup>14</sup> indicates a change of use where the property is

<sup>12</sup> Planning (Scotland) Bill, Section 11A.

<sup>13</sup> 16 February 2018.

<sup>14</sup> Deregulation Act 2015, section 44

used as temporary sleeping accommodation for an aggregate of more than 90 nights in any calendar year. We understand this restriction arose due to the difficulty in providing a set of criteria that would fit all circumstances. Short term letting is a relatively new phenomenon which has taken off ahead of legislative and policy reforms, particularly in city centres, yet forms an important part of the tourist economy. For example, on the Airbnb platform, there are around 9,000 listed properties in Edinburgh and the Lothians. We consider it necessary that if this amendment is removed, Scottish Government set out in clear terms how they intend to provide advice and guidance to planning authorities, operators, and the wider public as to how short term lets should be approached.

### **Section 14D – Determination of Applications: Brownfield Land**

This section was introduced by amendment at stage 2. This amendment attempts to provide statutory protection to the greenbelt by the inclusion of a test requiring the developer to have first considered and discounted use of brownfield land. Existing development plan policies and national policies provide strong protection to greenbelts and a policy presumption in favour of development on brownfield land. We consider that enshrining this in statute is unnecessary and lacks flexibility and suggest that such detailed provision may be better placed within the NPF, SDPs and LDPs.

The allocation of land for development (in development plans and national policy) already favours brownfield land with development on greenbelt land being limited to those proposals which do not compromise the purpose of greenbelts (such as providing settings for outdoor recreation and access). Occasionally, development requires to be made on greenbelt land and there are examples of such developments being authorised where there is a compelling social and/or economic need. We consider that the proposed amendment sets the bar far too high in regard to protection of green belt land as development could not take place “if the application would, in their opinion [the planning authority], be likely to have an adverse effect on any intrinsic natural or cultural heritage value of the proposed green belt land.” In practice, this is a test that simply is unlikely to be able to be overcome and may stifle important development that is needed for social and economic reasons.

### **Section 14G – Conditional Grant of Planning Permission**

This section was also introduced by amendment at stage 2. This is undoubtedly an important requirement however we suggest that it may be more appropriately dealt with within building control regulations rather than in the high-level framework set out in the Bill. There are certain duties under The Equality Act 2010 and associated regulations which may also be relevant. We note the potential for future improvements in the design of such facilities which could result in the legislation becoming outdated and requiring amendment.

### **Section 16 – Schemes of Delegation**

While we consider there is merit in extending the scope of schemes of delegation (against which decisions will be referred to a Local Review Body), to certificates of lawfulness and advertisement consent, such certificates frequently give rise to complex legal circumstances and because of this, we consider that additional training of Review Body members will be essential.

## **Section 16D – Meaning of “material considerations”**

“Material considerations” are of importance in any planning decision, however, they are wide in scope having been addressed in a number of court cases. Fundamentally, any consideration that affects the use of land or development is capable of being a material consideration. We consider it to be an unnecessary task for Scottish Ministers to define “material considerations” which could result in the definition being too restrictive or too wide to carry any useful purpose.

## **Section 17 – Duration of Planning Permission**

Section 17 amends the period allowed for implementation from the date on 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 may be applied for after the five year period.

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 - 20 – Planning Obligations**

The Bill contains provisions which would allow departure from the current statutory requirement of a clear link being made between any payment and a restriction or regulation on the development or use of the land. Section 19(2) seeks to introduce a new section 75(1A) into the 1997 Act which enables a planning obligation to require the payment of money although it does not regulate the development or use of land. This appears to have been influenced by the decision in *Elsick Development Co Ltd v Aberdeen City and Shire Strategic Development Planning Authority*.<sup>15</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. However, this case could be used to potentially undermine the lawfulness of section 75 agreements where they are being operated solely as a mechanism to enforce developer contributions out with the statutory requirement to regulate or restrict the use of land or development.

The amendment seeks to overcome this potential issue. However, decoupling the requirement for a planning obligation to regulate or restrict the use of land or development from payment may result in

<sup>15</sup> [2016] CSIH 28.

planning obligations becoming detached from the regulation or restriction of land or development and we have concerns that this may weaken application of the policy tests<sup>16</sup> which provide important checks and balances on the application of developer contributions. The policy tests set out that planning obligations made under section 75 of the 1997 Act should only be sought where they meet all of the following tests:

- necessary to make the proposed development acceptable in planning terms
- serve a planning purpose and, where it is possible to identify infrastructure provision requirements in advance, should relate to development plans
- relate to the proposed development either as a direct consequence of the development or arising from the cumulative impact of development in the area,
- fairly and reasonably relate in scale and kind to the proposed development, and
- be reasonable in all other respects.

We welcome the introduction of section 19B at stage 2 which requires the publication of planning obligations by a planning authority.

Section 75A of the 1997 Act currently provides that an agreement can only be modified or discharged by way of an application. Section 20 of the Bill will alter this current arrangement with the result that a section 75 agreement will be able to be modified or discharged either by agreement between the parties or by application under section 75A. We consider that this change is merited. In circumstances where the planning authority and the person against whom the section 75 is enforceable are in agreement about the modification or discharge, this will likely result in a faster and more efficient process.

## **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.

<sup>16</sup> Circular 3/2012 Planning Obligations

We acknowledge that currently many planning 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 note that these sections were removed from the Bill at stage 2. We are supportive of the requirement for training of 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 as introduced contained important provisions to require planning authorities to report on the performance of their functions. This section has been removed at stage 2. 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 and improve public confidence. We appreciate that there has been a greater focus in recent years on planning authorities reporting voluntarily on their performance but this would merit being formalised. Improvements in performance require sufficient resourcing for planning authorities.

### **Section 26B – Publication of Directions**

We welcome the introduction of this section at stage 2 which concerns publication of directions made by the Scottish Ministers. By requiring such directions to be published, this introduces increased accountability and transparency of decisions taken by Scottish Ministers. We would suggest that the Scottish Ministers be required to publish such directions as soon as reasonably practicable after they are given.

### **Section 26C – Chief Planning Officers**

This section was also introduced by amendment at stage 2. While we support the important role of the Chief Planner as the person who will lead the planning service, it appears unnecessary for the qualifications and experience of that person to be prescribed by statute; such matters could be introduced by secondary legislation or guidance or left to the judgement of planning authorities. It seems unlikely that a person appointed to such a senior post of this nature would not have the necessary qualifications and/or experience and we are unaware of any such issues that may have arisen.

We note the condition that:

“A planning authority may not appoint a person as their chief planning officer unless satisfied that the person has appropriate qualifications and experience for the role.”

We consider that this could give rise to practical challenges should existing heads of planning not hold a qualification(s) for their role but have appropriate experience.

## Section 26D – National Scenic Areas

We consider that this amendment to the Bill at stage 2 is unnecessary and question whether in practice it would provide greater protection of National Scenic Areas (NSAs). It is not clear as to whether there is evidence to suggest that NSAs are under threat. They are afforded significant legislative protection under existing arrangements including mandatory consultation with Scottish Natural Heritage and a clear trigger for Scottish Ministerial call-in should the advice of Scottish Natural Heritage not be accepted.

## Part 5 – Infrastructure Levy

We offer qualified support for the introduction of an infrastructure levy which if operated appropriately, would provide an open and transparent basis for covering costs of new infrastructure.

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. There is considerable complexity and controversy for planning authorities, either individually or in a conjoined manner, imposing what may be considered as a local tax on new development, operated through the planning system. The experience of England and Wales in the roll out of the Community Infrastructure Levy has proven to be challenging although lessons no doubt can be learned from that.

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(d) suggest that the levy could 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. 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 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. Consideration will need to be given as to whether the levy will be collected upfront or retrospectively. We note that Regulation 9 of Schedule 1 provides that the regulations “may preclude planning permission for the carrying out of development from being granted, or being deemed to have been granted, until there has been payment in full of the payable amount...” We recognise the difficulties for planning authorities in being able to front-load funding for infrastructure, but it would be helpful if the provisions expressly allowed regulations to provide for stage payments (ie back loaded) to ease the burden on development in the early stages.

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 require no direct link between the intended development and the infrastructure required. The consequence of this may be that a developer is being required to contribute to infrastructure that is not necessary for that development to proceed.

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.

Finally, we welcome the 'sunset clause' introduced by section 30A at stage 2. Given the high level provisions of the Bill in relation to the infrastructure levy, we consider it appropriate that the provisions lapse if no regulations are made within the period of 10 years of the Bill receiving Royal Assent.

## **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)