



Law Society  
of Scotland

# Consultation response

## Local Development Planning – Regulations and Guidance

March 2022



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Planning Law Sub-committee welcomes the opportunity to respond to the Scottish Government's consultation on *Local Development Planning – Regulations and Guidance*<sup>1</sup>. We have the following comments for consideration.

## General comments

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While we welcome this consultation, we consider that it would have been of greater utility had it been brought forward at such time as National Planning Framework 4 (NPF4) is finalised. There remain a number of uncertainties arising from the NPF4 consultation which make it difficult to fully assess the proposals relating to Local Development Planning (LDP) Regulations and Guidance. The lack of synchronisation on the timescales for NPF4 and the LDP regulations and guidance being finalised as well as the lack of cross-referencing is of concern. This means that there is a lack of clarity as to how the development of LDPs will work in practice going forward.

In addition, we note that the concurrent running of these consultations has resulted in pressures on time and resources for stakeholders and it may be that some parties have not been able to consider both consultations in as much detail as might otherwise have been possible as a result of these running to the same timescale.

## Consultation response

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### **1. Do you agree with the principle that regulations be kept to the minimum necessary and that more detail be provided in guidance and kept updated?**

In principle, we agree with this, however, it is important that the Regulations contain sufficient information so as to provide certainty and clarity in the law, in particular, the regulatory framework for new LDPs. It is important that the content provided in guidance is consistent with the Regulations otherwise there is a risk of disparity and uncertainty for all parties involved, particularly DPEA Reporters who are expected to undertake

<sup>1</sup> <https://consult.gov.scot/planning-architecture/local-development-planning/>

the 'gatecheck' process and examination. We do not consider that the status of the guidance is clear – while it is clear that this is not a Circular, it seems to be unclear when guidance is going beyond the regulations, and this gives rise to concern that the guidance seeks to expand on the legal scope of aspects of the LDP process.

We consider that the draft Regulations presented for consultation lack clarity and detail. Given the extent of changes to the regime, we consider that it would be most appropriate for a fresh set of Regulations to be drafted.

## **2 i) Do you have any views on the content of the interim assessments?**

We have no comment.

## **2 ii) Do you have or can you direct us to any information that would assist in finalising these assessments?**

We have no comment.

## **3 i) Do you have any views on the Fairer Scotland Duty and Strategic Environmental Assessment screening documents?**

We have no comment.

## **3 ii) If you consider that full assessments are required, please suggest any information sources that could help inform these assessments.**

We have no comment.

## **4. Do you agree with the proposals for regulations relating to the form and content of LDPs?**

We note that paragraph 8 of Part B of the consultation document states that “We expect new style LDPs to be more map based, rather than focusing on written policy content.” It is not clear what this means in practice. We note that the consultation later provides that LDPs should set out the methodology for developer obligations which seems to be inconsistent with a map-based approach.

We consider that there remains uncertainty as to the interaction between the NPF and LDPs. The extent of detail to be included in the LDP is not clear from the respective consultations – it appears that content is to be included in the LDP where the policy differs from that in NPF, however, the documents lack clarity as to the point at which a policy differs. It is not clear as to where content on spatial strategies is to be provided.

We consider that the regulations should tie in with the requirements of section 15 of the 1997 Act which, following passing of the Planning (Scotland) Act 2019, now require a number of additional matters to be included in LDPs. Regulation 8 does not appear to have been updated to cover the additional background information which we presume will require to be considered in order to comply with the requirements of section 15 as amended.

## **5. Do you agree with the proposals for regulations relating to the preparation and monitoring of LDPs?**

We note that paragraph 16 of Part A of the consultation document concerns the amendment of LDPs. We consider that the provisions of section 20AA of the 1997 Act would merit being commenced in line with the introduction of the LPD Regulations and guidance as these provide a degree of flexibility which may be of assistance in addressing issues arising with an LDP. It is important that the relevant regulations and guidance are in place immediately so that a Reporter who is considering this option can understand how the process will work. If it is anticipated that the provision will work in similar way to current steps where a Reporter does not wish to add new sites for housing land supply and as a result, an approved LDP will be out of date almost immediately, then not being able to make use of the provisions of section 20AA would seem to negate their value.

## **6. Do you have views on additional information and considerations to have regard to when preparing and monitoring LDPs?**

We refer to our answer at Q4 and suggest that the matters addressed in section 15 of the 1997 Act should be included – for example, public conveniences, water refill locations, culture, older people and disabled people's needs, health and education.

We also refer to our answer at Q7 in connection with what is required for the Evidence Report.

## **7. Do you agree with the proposals for regulations relating to the Evidence Report?**

We consider that greater detail and clarity is needed across the regulations and guidance as to what is required and expected in relation to the Evidence Report. The purpose of the Evidence Report and Gatecheck process remains unclear. There appears to be a fundamental misunderstanding in the draft guidance about the legislative boundaries of the Evidence Report. As we understand it, the Evidence Report is intended to collate sufficient evidence to allow policy decisions to be taken in the LDP but not to undertake policy considerations and set policy itself. However, the guidance appears to suggest that the Evidence Report should do the latter. It is crucial that this is clarified so that all those operating within the system can fully understand its purpose.

While we note that the draft guidance sets out an indicative list of sources and types of information to inform the Evidence Report, we consider that the regulations should set out minimum requirements that need to be addressed in the Evidence Report so as to provide consistency and certainty in the preparation of such Reports.

Paragraph 14 of Part B of the consultation document refers to section 15(5) of the 1997 Act. We consider greater detail is needed as to how this is expected to operate in the Evidence Report and Gatecheck process. For example, with reference to section 15(5)(cd) and (ce), how is a planning authority to set out the likely effects of development and use of land on those needs when the extent, nature and location of development is unknown at the Evidence Report stage? In relation to section 15(5)(c) and (ca), this information would require to be based on what the planning authority understand the current position to be at the time of the Evidence

Report. In connection with section 15(5)(f), we expect that the evidence to be brought forward in the Evidence Report must be based on what the planning authority think may occur without any policy intervention as the policy decisions will not be made until the examination stage. We consider that the Regulations and Guidance need to clearly set out the content that is to be included in the Evidence Report to demonstrate the factors as listed in section 15(5).

We suggest that a critique of existing sites that have failed to come forward should be part of Evidence Report and Gatecheck process. We note that Annex B of the draft NPF4 sets out MATHLR numbers for each planning authority area – what is the status of this information in the context of the Evidence Report? We anticipate that the spatial strategy will be required to work back to that information with the Evidence Report setting out any justification to increase the housing land supply from the MATHLR provided in NPF4.

We consider there is a lack of clarity as to where in the process the housing delivery pipeline might be challenged. It appears that this would need to be at the Evidence Report stage, but this could only be done in terms of effective sites at that stage as new sites would be still to come forward.

It appears that there is very little scope for engagement on the draft Evidence Report.

We note that under paragraph 4(3) of the draft Regulations, a Reporter can seek further information, however, there is no general right to make submissions at the Evidence Report stage. We question whether there should be a statutory requirement for a call for sites.

In relation to the requirement for consultation under section 16B of the 1997 Act, the Act sets out broadly who is to be consulted by the planning authority in preparing the Report, however, we consider that the regulations could usefully set out other prescribed parties under 16B(2)(c). In addition, no detail is provided as to what parties are to be consulted on. We suggest that this could usefully be set out in guidance.

Under section 16B(4)(c) of the 1997 Act, the Evidence Report is to include a statement on the extent to which views of the public at large and community councils (under 16B(4)(a) and (b)) have been taken into account in the report. However, it does not appear that the Reporter is to be made aware of the views that have been given and so would not be able to fully consider the position where a planning authority indicates that it has taken little, or no account of the view given. We suggest that this should be a matter prescribed under section 16B(3)(e).

## **8. Do you agree with the proposals for regulations relating to the preparation and publication of the LDP?**

We have no comment.

## **9. Do you agree with the proposals for regulations relating to the examination of the LDP?**

While we agree with the proposals, we consider that some clarification could usefully be provided.

We are aware that DPEA Reporters commonly issue requests to planning authorities during the course of an LDP examination to provide further information to them relating to planning decisions taken on any of the sites under consideration through the LDP Examination. We understand that there have been examples of such matters where the Reporter reached conclusions on the basis of information provided by the planning authority without inviting representations from the planning authority or any parties that might be affected by the information. We suggest that the regulations could usefully be amended to make it clear that where an appointed person receives further representations and considers that these should be taken into account, they must consider which persons may be affected by the further information and invite them to make representations on the matter should they wish to do so.

**10. Are there matters you wish to highlight relating to amendment of the LDP which may have bearing on the proposals for regulations being consulted on in this document?**

We refer to our comment above in connection with section 20AA of the Town and Country Planning (Scotland) Act 1997.

**11. Do you agree with the proposals for regulations relating to Development Plan Schemes?**

We have no comment.

**12. Do you agree with the proposals for regulations relating to Delivery Programmes?**

While the requirement for a delivery programme is not new, more emphasis is being placed on delivery under the reforms, so does that not suggest that it might need more than just changing the name? See also relationship with delivery programmes in NPF4, which of course is missing a delivery programme itself! SFT is currently carrying out consultation on delivery programmes on behalf of SG, so the regs would appear to be a bit premature.

**13. Do you agree with the proposals for regulations relating to the meaning of 'key agency'?**

We have no comment.

**14. Do you agree with the proposals for regulations relating to transitional provisions?**

The lack of detail on the transitional provisions provided is of concern. We note the intention to bring forward separate regulations making saving and transitional provisions. Given the principle that the later policy prevails under the Town and Country Planning (Scotland) Act 1997 as amended, we consider that there is a potential for conflict between the policies set out in NPF4 and those within existing LDPs or what may be emerging in LDPs. If a latter LDP trumps the national planning policy, this has the potential to undermine the approach and so clarity and certainty on the transitional arrangements is necessary.

We question the wisdom of keeping supplementary guidance for all planning authorities for 24 months after the Regulations come into force. The requirement for Scottish Ministers to approve supplementary guidance often means that the process of framing and agreeing guidance takes a long time. While it seems appropriate for LDPs that have already been approved to be able to make continuing use of supplementary guidance for 24 months following the Regulations entering into force, we do not consider it of benefit for those planning authorities without an approved LDP.

## **15. Do you agree with the general guidance on Local Development Plans?**

We refer to our comments at Q1 in particular and our comments generally in the questions above concerning the interaction of regulations and guidance. We note that the guidance provides substantial detail beyond the legal requirements set out in the regulations. It is important to recognise that the Regulations are the primary source of the requirements for the LDP process, and it should be clear when guidance is going beyond these.

In addition, it is difficult to comment on the delivery programme guidance when the regulations are not clear on what is required.

We note that the guidance provides at para 49 that the authority should engage with the public at large and seek the views of particular organisations and societal groups, including disabled persons. It is important that all members of the community have an opportunity to engage and provide views at all stages in the preparation of the LDP. This includes individual disabled people, and the representative groups and organisations which are more likely to know and understand particular circumstances and needs of disabled people. Steps should be taken to facilitate engagement with organisations for disabled people, organisations of disabled people, and with individual disabled people.

We note that statutory guidance on effective community engagement is currently being prepared and will be subject to public consultation in due course. We would suggest that this guidance should highlight the importance of ensuring that engagement takes place in a way that is fully accessible and supports participation. The full range and diversity of disabilities should be recognised, both in ways to notify disabled people and to support them in expressing their views. The resource implications of such engagement should be recognised and supported.

## **16. Do you agree with the guidance on Development Plan Schemes?**

We have no comment.

## **17. Do you agree with the guidance on the Delivery Programme?**

We have no comment.

## **18. Do you agree with the guidance on Local Place Plans?**

We are not clear as to whether having invited a community to prepare a Local Place Plan (LPP), the planning authority needs to wait for any possible LPPs to be prepared and brought forward for consideration. We note

that there is the potential for issues around timing which could affect the progress of the LDP – for example, what if an LPP is registered after the Evidence Report is prepared or before the examination?

## **19. Do you agree with the guidance on the Evidence Report?**

No. We refer to our comments at Q7.

The terms of paragraphs 107 – 114 seems to suggest that the evidence on which the Evidence Report is based will not be provided as part of the Report itself. We consider that it is essential for the evidence itself to be made available to enable consideration by consultees (see further below). We anticipate that if the Evidence Report is only a summary of the planning authority's assessment based on the evidence, this has the potential to result in dispute.

We consider that it could be usefully stated in the guidance that the evidence used to prepare the Report should be recent, for example, from within 12 months of the compilation of the Evidence Report, in order that it is relevant to the matters under consideration.

We note the terms of paragraph 123 which highlights that there is no requirement to consult on the Evidence Report itself. While we appreciate such a requirement is not set out in the legislation, we consider that without an opportunity for members of the public and others to consider and comment on the draft Evidence Report, there will be significant risks that Reports will be produced and submitted to examination without scrutiny or full understanding of areas of disagreement. The purpose of the Gatecheck process was to resolve issues at any early stage and we suggest that paragraph 123 be revised to make it clear it is expected is that all interested parties will be afforded an opportunity to comment on the background evidence and the Evidence Report itself before the Report is submitted to the Gatecheck.

We note that paragraph 126 of the draft guidance states: "The Evidence Report stage aims to improve the consistency in the approach to evidence and Plan making across Scotland". It is difficult to see how this aim will be achieved when there are no minimum requirements set for the Evidence Report. We consider that this statement needs to be supported by provisions in the regulations to govern how an Evidence Report is prepared.

## **20. Do you agree with the guidance on the Gate Check?**

No. We note the reference in paragraph 138 that the [LDP] examination is "not an opportunity to revisit the Evidence Report itself". We do not consider that this is correct in law as the scope of the LDP Examination depends on the nature of the representations made to the proposed LDP. For example, where a significant new piece of evidence becomes available between the approval of the Evidence Report at the Gatecheck and production of the LDP, a third party may make a representation to the proposed LDP to the effect that a relevant policy was inappropriate because the evidence on which it was based is out of date, and the Reporter at the LDP examination would require, as a matter of law, to consider the Evidence Report itself.



## 21. Do you agree with the guidance on the Proposed Plan?

We have no comment.

## 22. Do you agree with the guidance on Local Development Plan Examinations?

No.

In reference to housing land, we note that paragraph 190 restates the law in Section 19ZA(6) of the 1997 Act that where a notice required the planning authority to prepare another Proposed Plan has been issued, “the Evidence Report already prepared may be used to inform the new proposed Plan”. While we consider this may be appropriate in some circumstances, it may not be appropriate for this approach to be taken in all cases (for example, as an Evidence Report may have been prepared several years before the LDP Reporter reached their conclusion and so may be outdated) and it would be useful for the guidance to set this out.

The Town and Country Planning (Grounds for Declining to Follow Recommendations) (Scotland) Regulations 2009 set out the grounds on which a planning authority can decline to accept a Reporter’s recommendations to make modifications to a proposed LDP. Paragraph 193 of the draft guidance seeks to set out the grounds and suggests that one of those grounds is that “the modification would have the effect that the Plan would not be consistent with the NPF or any adopted National Park Plan”. The 2009 Regulations currently allow a planning authority to decline to accept a recommendation where it would result in a modification that is not consistent with the relevant Strategic Development Plan to which the Local Development Plan relates, however, there is no equivalent provision related to the NPF. We note from paragraph 26 of Part B of the consultation documents that it is Scottish Government’s intention to amend the 2009 Regulations to deal with NPF consistency, yet this is not set out in the draft regulations. This should be set out clearly in revised draft Regulations in order that a full consultation can take place on relevant issues.

In connection with the scope of examination, we do not agree with the terms of paragraphs 204 and 205 which sets out a summary of the Reporter’s powers. Paragraph 204 suggests that the Reporter can “refine or redefine the issues to be assessed, but at all times these must be limited to issues raised in the original representations”. This implies that the Reporter may be able to narrow the scope of the issues raised by representations, however, this is not permitted under the relevant legislation. In connection with paragraph 205, the legislation does not simply task the Reporter with “modifying those parts that are clearly inappropriate or insufficient”, but rather they must make recommendations on the unresolved representations. This means that the nature of the Reporter’s duty will vary between representations. We therefore consider that the summary provided in paragraph 205 is potentially misleading. We note that a similar issue arises in respect of paragraph 210.

We consider that paragraph 206 could be usefully clarified. We are aware of cases where Reporters have suggested that they are unable to recommend modifications to an LDP because a particular site was not subject to strategic environmental assessment (SEA) and public engagement during the preparation of the LDP, relying upon the terms of equivalent provisions in current guidance. This is not legally correct – see Section 19(11) of the 1997 Act which allows the local authority in appropriate circumstances post-examination

to undertake further strategic environmental assessment and to consult upon a site that a Reporter recommends should be added to the Plan. We recommend that guidance is clarified as to the ability of a Reporter to recommend allocations for sites which have not been through equivalent processes to those in the original SEA given the provisions within the Act.

We note that paragraph 208 states that: “Ministers do not expect the Reporter, within the scope of the Examination, to have to consider making wholesale changes to the plan”. While this may be Scottish Ministers’ expectation, we are concerned that this could be interpreted as providing guidance that imposes limits on the legal duties of Reporters. In some cases, it may be necessary for a Reporter to consider making representations that would result in wholesale changes to an LDP depending on the nature of the representations that have been made and are unresolved. We suggest this is removed or clarified.

### **23. Do you agree with the guidance on Adoption and Delivery?**

We have no comment.

### **24. Do you agree with the proposed guidance on the Evidence Report in relation to the section on Sustainable Places (paragraphs 240 – 247)?**

No. In reference to the ‘nature crisis’ as referred to in paragraphs 245 and 246, we consider greater explanation is needed as to the meaning of this as highlighted in our response to the NPF4 consultation.

### **25. Do you agree with the proposed guidance on the Evidence Report in relation to the section on Liveable Places (paragraphs 248 – 283)?**

We refer to our comments at Q7, in particular around the purpose of the Evidence Report stage in connection with gathering evidence, rather than undertaking policy considerations.

### **26. Do you agree with the proposed guidance on the Evidence Report in relation to the section on Productive Places (paragraphs 284 – 296)?**

We have no comment.

### **27. Do you agree with the proposed guidance on the Evidence Report in relation to the section on Distinctive Places (paragraphs 297 – 310)?**

We have no comment.

### **28. Do you agree with the proposed guidance on the Proposed Plan in relation to the section on Sustainable Places (paragraphs 317 – 328)?**

No. As per our comment at Q24 and in reference to the ‘nature crisis’ as referred to in paragraphs 319 and 324, we consider greater explanation is needed as to the meaning of this as highlighted in our response to the NPF4 consultation.

**29. Do you agree with the proposed guidance on the Proposed Plan in relation to the section on Liveable Places (paragraphs 329 – 400)?**

We have no comment.

**30. Do you agree with the proposed guidance on the Proposed Plan in relation to the section on Productive Places (paragraphs 401 – 424)?**

We have no comment.

**31. Do you agree with the proposed guidance on the Proposed Plan in relation to the section on Distinctive Places (paragraphs 425 – 466)?**

We have no comment.

**32. Do you agree with the proposed thematic guidance on the Delivery Programme (paragraphs 467 – 482)?**

No. We consider that paragraph 474 is inconsistent with policy 9(i) of draft NPF4. Paragraphs 474 and 475 should acknowledge that it may be necessary and would be appropriate for unallocated sites to be developed in order to achieve the agreed programming.

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