



The Scottish Parliament
Pàrlamaid na h-Alba

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Planning (Scotland) Bill as amended at Stage 2

The Delegated Powers and Law Reform Committee considered the above Bill on 19 February 2019 and seeks an explanation of the following matters:

Development planning

Section 1(6), inserting new section 3ZAA into the 1997 Act – Guidance in relation to “section 3A()”

Power conferred on: Scottish Ministers

Power exercisable by: Guidance

Parliamentary procedure: None

Revised or new power: New

Section 1(6), as amended at Stage 2, inserts new section 3ZAA into the 1997 Act. It requires the Scottish Ministers to issue guidance to local authorities dealing with the matters to be addressed under section 3A().

Reference (as it appeared in amendment 187) to section 3A(3A) changed to 3A(). Amendment 187 was referencing provisions in amendment 83 which was not agreed to, therefore the reference is empty.

Given that the guidance-making requirement is redundant, does the Scottish Government propose to amend the Bill to remove new section 3ZAA of the 1997 Act, inserted by section 1(6) of the Bill as amended at Stage 2?

Section 3(2)(ca), inserting new section 15(6) into the 1997 Act
Cross-reference to regulations made under non-existent delegated power

Section 3(2)(ca) of the Bill as amended at Stage 2 inserts new section 15(6) into the 1997 Act. It provides that the terms “rural areas” and “substantial decline” used in section 15(5)(cf) of the Bill as amended at Stage 2 “*are to be construed in accordance with any regulations made under section []*”.

Reference (as it appeared in amendment 192) to section 3AG(4) of the 1997 Act has been removed. Amendment 192 was referencing provisions in amendment 116 which was not agreed to, therefore the reference is empty.

Given that the cross-reference to “*regulations made under section []*” is redundant, does the Scottish Government propose to amend the Bill to remove new section 15(6) of the 1997 Act, inserted by section 3(2)(ca) of the Bill as amended at Stage 2?

Section 3(4), inserting new section 16A(1A)(b) and (10) into the 1997 Act – Evidence report for preparation of local development plan

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by SSI
Parliamentary procedure: Negative
Revised or new power: New

New section 16A(10) of the 1997 Act, inserted by section 3(4) of the Bill as amended at Stage 2, provides that “Gypsies and Travellers” has the meaning specified in regulations made by the Scottish Ministers.

- (a) Does the Scottish Government intend to keep this new power, and, if it does, does it intend to widen the scope of the power to include reference to other groups such as the Roma community?
- (b) Please reconsider whether the affirmative procedure would provide a more appropriate level of scrutiny for a power to define a term that has not been defined in any detail on the face of the Bill or indeed at all in Scots law previously.
- (c) Does the Scottish Government consider that it would be appropriate to amend the power to include a requirement to consult before the regulations under new section 16A(10) of the 1997 Act are made?

Section 7(2), inserting new section 3CA(2A) into the 1997 Act – Amendment of National Planning Framework

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by SSI
Parliamentary procedure: Negative
Revised or new power: New

Section 7(2) of the Bill, inserting section 3CA into the 1997 Act, has been amended at Stage 2 to include new subsection (2A).

In its Stage 1 report, the Committee called on the Scottish Government to amend the Bill to require that significant amendments to the National Planning Framework (“NPF”) resulting in a change to the overall policy become subject to specific public and parliamentary consultation requirements set out on the face of the Bill.

In the event that the Scottish Government were not willing to set the threshold on the face of the Bill, the Committee considered that the Scottish Government should apply the affirmative procedure to the scrutiny of regulations setting the scrutiny procedures. The Committee nevertheless considered this secondary option to be unsatisfactory as it should not be for Ministers in regulations to decide the form of parliamentary scrutiny that will apply to the NPF.

- (a) Please explain why the definition of what are significant changes to the policies and proposals for the development and use of land of the most recent NPF are not set out on the face of the Bill.
- (b) Please also reconsider whether the affirmative procedure would be more appropriate for the scrutiny of regulations made under new section 3CA(2A) of the 1997 Act insofar as those regulations determine what level of parliamentary scrutiny will apply to amendments to the NPF.

Masterplan Consent Areas

Section 10(2), inserting new section 54CA into the 1997 Act – Masterplan consent area schemes may make provision for land value capture by compulsory purchase of land

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by SSI
Parliamentary procedure: Affirmative
Revised or new power: New

Section 10(2) as amended at Stage 2 introduces new section 54CA (“Scheme may also make provision for land value capture by compulsory purchase of land”) into the 1997 Act. This provides that a Masterplan Consent Area scheme, if it so provides, has the effect of permitting a local authority to purchase land within the zone to which the scheme relates.

The Scottish Ministers would be required under subsection (2) to make regulations containing further provision about land that may be purchased in a Masterplan Consent Area and the process the local authority must follow in the purchase of such land. The regulations must also make provision for the compensation that is payable in respect of land that is purchased under new section 54CA and disapply, or apply with such modifications as the Scottish Ministers consider appropriate, any provisions of the Land Compensation (Scotland) Act 1963.

- (a) Is it sufficiently clear that new section 54CA of the 1997 Act permits compulsory purchases of land, or is it limited to voluntary purchases of land?
- (b) Assuming that the provision authorises a compulsory purchase of land under a Masterplan Consent Area Scheme, if it so provides, does it enable an adequate level of compensation to be paid in all circumstances in compliance with article 1 of protocol 1 of the European Convention on Human Rights (“A1P1”)?
- (c) In principle, is compulsory purchase a proportionate means of achieving the policy objective of creating a land value capture mechanism under A1P1? Are there other less intrusive means of achieving the same objective?
- (d) In the Scottish Government’s view, is a power to disapply, or apply with such modifications as the Scottish Ministers consider appropriate, any provisions of the Land Compensation (Scotland) Act 1963 a potentially wide power that would be better suited to being set out in full in primary legislation?
- (e) Powers of compulsory purchase are significant insofar as they relate to the rights of property holders. Would the Scottish Government intend to amend new section 54CA of the 1997 Act at Stage 3 to remove the regulation-making power? Would it instead set out details on the face of the Bill about the matters that are covered by the regulation-making power?

Section 10(3), inserting paragraph 6(1A) of schedule 5A into the 1997 Act - Duty to seek to make or alter a scheme when directed to do so

Power conferred on: Scottish Ministers

Power exercisable by: Direction

Parliamentary procedure: None

Revised or new power: Revised

Paragraph 6(1) of schedule 5A of the 1997 Act, as inserted by section 10(3) of the Bill, confers power on the Scottish Ministers to direct a planning authority to make or alter a Masterplan Consent Area scheme.

New paragraph 6(1A), inserted by non-government amendment at Stage 2 of the Bill, requires that any such direction must be in writing and be published in such manner as the Scottish Ministers consider appropriate as soon as reasonably practicable after it is given.

However, section 26B of the Bill, inserting new section 275B into the 1997 Act, now requires any direction made under the 1997 Act to be published and for reasons to be provided with the published direction. Accordingly, does the Scottish Government propose to amend the Bill at Stage 3 to remove that part of section 10(3) of the Bill that inserts paragraph 6(1A) of schedule 5A into the 1997 Act?

Culturally significant zones

Section 11A(4), inserting new section 56A into the 1997 Act – Designation of culturally significant zones; request to designate

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by SSI
Parliamentary procedure: Negative
Revised or new power: New

Section 11A(4) of the Bill inserts new section 56A into the 1997 Act. This requires a planning authority to designate a Culturally Significant Zone if a valid request to do so has been received.

Section 56A(5) provides that a request is valid if the requirements prescribed in regulations made by the Scottish Ministers have been met in relation to the request. Such regulations may include requirements as to how a request is to be made and the steps that must be taken before a request may be made.

- (a) The power conferred by section 56A(5) appears to be capable of allowing the Scottish Ministers to tightly define the requirements that must be met for a request to designate a culturally significant zone to be valid.

Accordingly, please consider whether it would be more appropriate that the affirmative procedure applied to the power in new section 56A(5) to afford the Parliament the opportunity to conduct enhanced scrutiny of such provision.

- (b) The Supplementary DPM states that the requirements and steps to be followed will be subject to consultation. However, there is no requirement to do so on the face of the Bill.

Please consider whether it would be more appropriate to insert such a consultation requirement on the face of the Bill.

Section 11A(4), inserting new section 56A(7) into the 1997 Act – Designation of culturally significant zones; discharge of functions and meaning of “culturally significant zone”

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by SSI
Parliamentary procedure: Negative
Revised or new power: New

Section 11A(4) of the Bill as amended at Stage 2 introduces section 56A(7) into the 1997 Act. This confers power on the Scottish Ministers by regulations to make further provision on how planning authorities are to discharge their functions and on the meaning of “culturally significant zone” for the purposes of section 56A.

- (a) Currently, the negative procedure applies to regulations making such provision. However, there is a lack of detail on the face of the Bill on the significant matter

of how planning authorities are to discharge their functions. Furthermore, such regulations would allow Ministers to make further provision about the meaning of a key term contained in primary legislation; i.e. on the meaning of “culturally significant zone”.

Accordingly, please consider whether it would be more appropriate that the affirmative procedure applied to the power in new section 56A(7) to afford the Parliament the opportunity to conduct enhanced scrutiny of such significant provision.

- (b) The Supplementary DPM indicates that the Scottish Government intends to consult before regulations made under new section 56A(7) are made. However, in the absence of any requirement to consult on the face of the Bill, please consider whether such a requirement should be included.

Section 11B(2), inserting new section 26(8) into the 1997 Act - Meaning of “development”: use of dwellinghouse for short term holiday let - guidance

Power conferred on: Scottish Ministers
Power exercisable by: Guidance
Parliamentary procedure: No procedure
Revised or new power: New

Section 11B(2) amends section 26 of the 1997 Act (meaning of “development”) to provide that the use of a dwellinghouse for the purpose of providing short-term holiday lets involves a material change in the use of the building. New section 26(8) allows the Scottish Ministers to issue guidance on the interpretation of “providing short-term holiday lets.”

The interpretation of this important concept, which will involve various policy considerations, does not appear to be appropriate for guidance. For example, it is not clear what duration of let would amount to a “short-term” holiday let.

Does the Scottish Government agree that it would be more appropriate that the meaning of “providing short-term holiday lets” is set out on the face of the Bill, or in regulations subject to the affirmative procedure?

Section 12A(2), inserting new section 40A into the 1997 Act – Assessment of health effects

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative
Revised or new power: New

Section 12A of the Bill introduces new section 40A into the 1997 Act. It requires the Scottish Ministers to make provision in regulations about the consideration to be given to the likely health effects of a proposed national development or major development before planning permission can be granted.

The Supplementary DPM acknowledges that there are a potentially very wide range of considerations that may fall under the heading of health. Does the Scottish Government consider that it would be more appropriate that the scope of this power is further defined on the face of the Bill?

Section 14E, inserting new section 38(1A) into the 1997 Act – Consultation in connection with the determination of applications

Power conferred on: Scottish Ministers
Power exercisable by: Regulations or development order
Parliamentary procedure: Negative
Revised or new power: New

New section 14E of the Bill, as amended at Stage 2, inserts section 38(1A) into the 1997 Act. This requires that regulations or a development order are to prescribe that, before determining an application for planning permission where the development involves any land on which there is a music venue, the planning authority must consult the Music Venues Trust (registered charity number 1159846).

- (a) Would it be more appropriate that this requirement should include a power to prescribe the manner and timescales within which such consultation is to take place?
- (b) Would it be appropriate to include a power to modify the identity of the Music Venues Trust to account for circumstances where that charity changes its name and to allow an equivalent body to be designated in the event the charity ceases to exist?
- (c) Does the Scottish Government know whether the Music Venues Trust is content for there to be a requirement on a planning authority to consult it on an application for planning permission where the development involves any land on which there is a music venue?

Section 20B, inserting new section 77A into the 1997 Act – Withdrawal of planning permission granted by development order

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by SSI
Parliamentary procedure: Negative
Revised or new power: New

New section 20B of the Bill introduced at Stage 2 inserts new section 77A into the 1997 Act and repeals existing section 77 of the 1997 Act. In broad terms, new section 77A confers a regulation-making power on the Scottish Ministers to make the provision currently made in section 77 of the 1997 Act, read together with the detailed compensation provisions in section 76 of that Act.

Careful consideration will need to be given to ensuring that the scheme of compensation made in the regulations under the power in new section 77A of the 1997 Act complies with A1P1 rights.

The regulations may also apply or disapply any provisions of primary legislation, namely Part IV of the 1997 Act, with or without modification.

- (a) Given the significance of these provisions, does the Scottish Government agree that the affirmative procedure would be more appropriate to the scrutiny of regulations made under new section 77A of the 1997 Act?
- (b) In light of the significance of these provisions, does the Scottish Government also agree that provision should be made on the face of the Bill to require that Ministers consult planning authorities and others who may be affected before making regulations under this power.

Section 21(1A), inserting section 252(1)(aa) into the 1997 Act – Fees for planning applications etc.

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by SSI
Parliamentary procedure: Negative
Revised or new power: Revised

Section 21(1A) of the Bill inserts section 252(1)(aa) into the 1997 Act.

Section 252(1) currently provides that the Scottish Ministers may by regulations make provision for the payment of a charge or fee to a planning authority in respect of certain specified matters. This already includes, among other things, the performance by the planning authority of any of the authority's functions (section 252(1)(a)) and anything done by the authority which is calculated to facilitate, or is conducive or incidental to, the performance of any such function (section 252(1)(b)).

The Bill as amended at Stage 2 now inserts section 252(1)(aa) into the 1997 Act, which adds to the list of specified matters anything done by the authority for the purpose of monitoring compliance with conditions imposed on the grant of, or obligations entered into in relation to, planning permission.

Is the provision made in new section 252(1)(aa) necessary? What does it add to the provision made in existing section 252(1) of the 1997 Act?

Section 26C, inserting new section 1A into the 1997 Act – Chief planning officers

Power conferred on: Scottish Ministers
Power exercisable by: Guidance
Parliamentary procedure: No procedure
Revised or new power: New

Section 26C introduces section 1A into the 1997 Act. Section 1A(4) requires planning authorities to have regard to guidance issued by the Scottish Ministers on what constitutes appropriate qualifications and experience for the role of chief planning officer.

The Supplementary DPM states that consultation would be utilised in deciding whether there is a need for guidance. It identifies professional bodies (Royal Town Planning Institute Scotland), Heads of Planning Scotland, CoSLA and others as bodies that could be consulted.

There is no requirement on the face of the Bill to consult. Please consider whether it would be more appropriate for new section 1A of the 1997 Act to include a requirement to consult on the face of the Bill before guidance is made on appropriate qualifications and guidance, along the lines identified in the Supplementary DPM.

Section 32(4) – Requirement to consult before making regulations under section 27

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by SSI
Parliamentary procedure: Affirmative
Revised or new power: Revised

Section 32(4) of the Bill as amended at Stage 2 requires that before making infrastructure-levy regulations under section 27 of the Bill as enacted, the Scottish Ministers must consult any local authority that may be affected by the regulations and any other persons they consider appropriate.

In its Stage 1 Report on the delegated powers in the Bill, the Committee recommended that a form of super-affirmative procedure would be appropriate to guarantee a requirement to consult publicly and to ensure that the Parliament can control the exercise of the wide powers in schedule 1 to make infrastructure-levy regulations. However, as was the case at Stage 1, section 32 of the Bill provides that the infrastructure regulations under section 27 are subject to the affirmative procedure.

The Committee also called on the Scottish Government to reconsider certain powers (listed at paragraphs 72(a) to (c) of its report) with a view to ensuring that they are framed more clearly and are no more than are necessary and proportionate. No amendments have been forthcoming to those powers.

The Committee considers that the consultation requirements inserted by amendments to section 32(4) of the Bill are insufficient to address the Committee's specific concerns and its more general concern about the wide powers in schedule 1 to make substantial policy in the infrastructure-levy regulations.

The Committee suggests that the Scottish Government considers again whether infrastructure-levy regulations under section 27 of the Bill should be subject to a super-affirmative procedure.

Schedule 2 – Minor and consequential amendments and repeals, Part 4 – Regulations, paragraph 10(2) of the Bill, inserting section 275(7BD) into the 1997 Act

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by SSI
Parliamentary procedure: Affirmative procedure
Revised or new power: Revised

Paragraph 10(2) of schedule 2 of the Bill (minor and consequential amendments and repeals) inserts new subsection (7BD) into section 275 of the 1997 Act.

New section 275(7BD) of the 1997 Act applies the affirmative procedure to regulations made under the powers in “*sections [] and 251B(3)(a) and paragraph 3 of schedule 5A*” of the 1997 Act.

Reference (as it appeared in amendment 157) to section 3AB(2) changed to section “[]”. Amendment 157 was referencing provisions in amendment 116 which was not agreed to, therefore the reference is empty.

Furthermore, section 26 of the Bill was removed at Stage 2. The application of the affirmative procedure to regulations made by section 251B(3)(a) of the 1997 Act is therefore now redundant.

In light of the above, does the Scottish Government propose to amend paragraph 10(2) of schedule 2 of the Bill to remove reference in new section 275(7BD) of the 1997 Act to sections “[]” and 251B(3)(a)?

Please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on 5 March 2019.

Yours sincerely

Andrew Proudfoot
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