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Planning (Scotland) Bill as amended at Stage 2

Thank you for your letter of 20 February, addressed to James Hynd, Head of Cabinet, Parliament and Governance Division, seeking a written explanation of a number of issues relating to delegated powers in the amended Planning Bill. This has been passed to the Planning Bill team to reply. Responses to the Committee's questions are set out below.

Development planning

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

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

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?

I can confirm that the Scottish Government intends to bring forward amendments that would remove these redundant provisions.

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

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?

The Scottish Government promoted the amendment that introduced section 16A(2A)(a)(i) of the 1997 Act, requiring the evidence report to include a statement on the steps taken to seek the views of Gypsies and Travellers, and the power in section 16A(10) to specify the meaning of the term “Gypsies and Travellers” in regulations. This was in response to specific evidence that more needs to be done to engage this group in the planning system. I can therefore confirm that is our intention to retain these provisions.

The definition of “Gypsies and Travellers” specified in regulations could potentially include the Roma community, subject to consultation with the community. However, the power only allows that term to be defined. We have no plans at present to add other groups to the requirement in section 16A(2A) of the 1997 Act. The Scottish Ministers may prescribe “other persons” whose views must be sought under section 16A(1A)(b), if this appears to be desirable.

- (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.

The Scottish Government considers that the negative procedure is appropriate for matters of detail such as a power to define terms. Terms relating to the community are already used in Scots law without definition, and are widely understood, but the power will allow regulations to clarify the boundaries of the term.

- (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?

The Minister for Local Government, Housing and Planning confirmed in the debate on this amendment on 26 September 2018 that it is the Scottish Government’s intention to consult with the community on the definition. In terms of making this a statutory requirement, we thank the Committee for the suggestion and will consider whether to bring forward an amendment at stage 3.

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

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.

Section 3CA sets out that the Scottish Ministers may amend the National Planning Framework and may by regulations make further provision about the procedures for such amendments. Subsection (2A) added at stage 2 adds a requirement for the Scottish Ministers to make regulations that set out the circumstances in which they consider that an amendment would result in a significant change to the National Planning Framework to the extent that the full process for reviewing and revising the National Planning Framework should be followed.

The Scottish Government proposed amendment 116 at stage 2, which would have provided that all amendments to the National Planning Framework were subject to the full scrutiny procedures, except those specified or of a kind described in regulations. Those regulations were to be subject to the affirmative procedure. However, the Local Government and Communities Committee did not agree amendment 116, and preferred the amendment that inserted section 3CA(2A), with regulations subject to the negative procedure.

With regard to (a) above, we do not believe it is appropriate to set out the definition of significant changes to the NPF in primary legislation. A wide range of circumstances could arise in the future that may lead to significant changes to the policies and proposals in the NPF. These circumstances could change over time and may mean that regulations need to be adjusted in the future, for example where planning is required to respond to new types of developments or technologies that emerge over time and had not previously been anticipated.

With regard to (b), the Scottish Government agrees that it would be more appropriate for these regulations to be subject to the affirmative procedure, and we will bring forward an amendment accordingly.

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

- (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?

The Scottish Government's initial assessment is that this section (as it stands) does not permit compulsory purchase but operates only to regulate purchase of land by agreement.

- (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")?

As stated by the Minister for Local Government, Housing and Planning at Stage 2, we have concerns that the provision may not provide for adequate levels of compensation to be paid in all circumstances to comply with ECHR requirements.

- (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?

Land value capture is a broad concept and there are a range of possible ways of achieving the same objective. The Infrastructure Levy provided for in Part 5 of the Bill is one mechanism, and the Scottish Government has asked the Scottish Land Commission to investigate options for effective land value capture in Scotland. The Commission are due to report on this issue by the end of March, following which we will consider what further action (including legislative changes) may be appropriate.

- (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?

It has traditionally been the case that provisions related to the expropriation of private property rights have been set out in primary legislation to provide as full an opportunity as possible for Parliamentary scrutiny. While it is sometimes necessary for regulations to be able to disapply or modify the application of primary legislation, this does appear to be a particularly wide use of that approach.

- (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?

The Scottish Government is still considering its approach to this issue in advance of stage 3.

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

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?

The Scottish Government is grateful to the Committee for highlighting this duplication, and we will bring forward an amendment to remove the relevant wording.

Culturally significant zones

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

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”

The Committee asks the Scottish Government to consider points in relation to Parliamentary procedure and consultation on regulations made under these powers.

The Scottish Government did not support the introduction of Culturally Significant Zones at stage 2, and is considering its approach to section 11A and related sections in advance of stage 3.

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

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?

The Scottish Government agrees that the definition of “providing short term holiday lets” in this provision is critical. We are considering our approach to section 11B in advance of stage 3.

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

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?

The Scottish Government did not support the amendment that inserted this provision into the Bill, on the basis that planning authorities are already required to consider health when determining a planning application where it is a material consideration. The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 also include requirements to consider significant environmental impacts on, among other things, population and human health. However, the Local Government and Communities Committee agreed the amendment. Given the range of issues that may be included under health effects, the Scottish Government considers that it is helpful that this requirement is broadly drawn.

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

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?

The Scottish Government is still considering its approach to this section in advance of Stage 3. However, all other requirements requiring planning authorities to consult particular bodies

before determining an application for planning permission are set out in secondary legislation: regulation 25 and schedule 5 of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013. This allows for the manner and timescales for consultations to be specified, and also allows for the bodies listed to be modified or replaced in case they change their name or cease 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?

We understand that the Music Venues Trust was not consulted prior to the amendment being lodged, and that the Trust has some concerns around the level of resources that would be required in order to fulfil the role.

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

- (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.

The Scottish Government thanks the Committee for these suggestions and will consider them in our preparations for stage 3.

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

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?

The Minister for Local Government, Housing and Planning made clear during the debate on this provision that it is not necessary, and in fact the Town and Country Planning (Fees for Monitoring Surface Coal Mining Sites) (Scotland) Regulations 2017 already provide for fees to be charged for site visits to monitor whether planning controls are being complied with. Nonetheless, the Local Government and Communities Committee voted to agree the amendment.

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

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.

The Scottish Government does not agree that there should be a statutory requirement to consult on this guidance. In practice, we have already stated that consultation with key bodies in defining the qualifications and experience that would be appropriate for the role of the chief planning officer would be beneficial. This guidance would be relatively narrow and technical, and of very limited interest and relevance, other than to a small number of relevant professional bodies and local authorities. However, if the consultation requirement was drafted to specifically relate to only those limited interested parties it may lack flexibility to accommodate any further relevant professional or representative organisations that may emerge over time. For this reason we consider that a statutory requirement for consultation would not be helpful.

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

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.

As indicated in response to the Committee's stage 1 report, the Scottish Government does not agree that super-affirmative procedure would be appropriate in this situation. In line with our comments in that response, an amendment to require consultation was brought forward at Stage 2, and this was agreed by the Local Government and Communities Committee. An amendment was lodged (by Andy Wightman MSP) to introduce a form of super-affirmative procedure, but following the debate on amendments to Part 5, this amendment was not moved.

In relation to the powers listed at paragraphs 72(a) to (c) of the Committee's report, again the Scottish Government maintains its view that the provisions included in the Bill as introduced are appropriate. We note that, despite the Committee's recommendation, no non-Government amendments were lodged on this point at stage 2.

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

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)?

The Scottish Government is aware of the issues highlighted and is considering the best manner in which to resolve them. It is not the Government's intention to leave empty or erroneous references.

I hope these responses will be of assistance to the Committee.

Yours sincerely,

Jean Waddie

Planning Bill Team