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Planning (Scotland) Bill at Stage 1

1. Thank you for your letter of 30 January, addressed to James Hynd, Head of Cabinet, Parliament and Governance Division, seeking a written explanation of a number of issues in the Delegated Powers Memorandum for the above Bill. This has been passed to me as Bill Manager. I am also grateful to you for highlighting the issues which the Committee may wish to explore with the Minister for Local Government and Housing in the oral evidence session on 20 February. Responses to the Committee's questions are set out below.

Section 1: Issues that the Committee would wish a written response to and may also wish to explore during the evidence session with the Minister

Part 1 – Development planning

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

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Negative

The Committee therefore asks the Scottish Government to explain why it is appropriate that the Scottish Ministers should have the power in new section 3CA of the 1997 Act, as inserted by section 7(2) of the Bill, to make provision for the laying of the amended framework before the Scottish Parliament, and that such provision is only subject to the negative procedure. As part of this, the Committee also asks the Scottish Government to explain further why provision on process of the sort currently made in existing sections 3A to 3C cannot be made on the face of the Bill.

2. Throughout the review of the planning system, stakeholders have noted that if development plans, including the National Planning Framework (NPF), move onto a 10 year review cycle, provision needs to be made to update plans between cycles. There is no provision to do this at present; if something changes the plan as a whole has to be reviewed

and cannot be updated in part. This lack of flexibility was raised as a key issue by the independent panel, who called for development plans to become more agile and responsive to their wider context. It is therefore considered appropriate to allow for both NPF and local development plans to be updated in part between full review cycles.

3. Regulation making powers were considered appropriate to provide for the process of making amendments to development plans, as a range of circumstances could arise in the future that may require procedures to be amended, or new procedures developed.

4. In particular, the Scottish Government has convened a digital task force to advise on scope for technological innovation to support planning reform. The group recently discussed their ideas for the next NPF to be informed by live data, and to be updated more regularly so that it becomes a platform for real time spatial information. We would like to explore the scope for this type of innovation further. If NPF were to develop in this way, amendments may be frequent without changing the overall policy substantially, suggesting the need for a proportionate and manageable process to handle them. Digital advancements could also significantly improve public engagement and greater flexibility in defining the consultation procedures for amendments would therefore be helpful. As new digital approaches can develop quickly and unpredictably, we do not wish the procedures for amending the NPF to be constrained in future by provisions in primary legislation.

5. In contrast, other circumstances may arise which require a more substantive change to the NPF. This might include the addition of a national development or the need to reflect a resolution by Parliament on a specific, nationally significant issue. In such cases, we would want the procedure to allow for much greater consultation with the public and with Parliament. We therefore envisage the regulations potentially providing for different procedures for different levels of amendments.

6. Since these regulations relate to a level of practical and administrative detail we consider that negative procedure is appropriate.

Section 7(3), inserting new section 20AA(2) into the 1997 Act – Direction to amend local development plans

Power conferred on:	Scottish Ministers
Power exercisable by:	Direction
Parliamentary procedure:	None

The Committee asks the Scottish Government whether it would be more appropriate that additional safeguards apply to a power of this nature, such as: (a) a requirement to publish any directions given; and (b) a requirement to report to the Parliament on the use of the power.

7. This new power will support a more flexible and responsive approach to local development plans. Scottish Ministers can at present, via section 16(1)(a)(i), require a planning authority to prepare a new development plan. The Bill enables a planning authority to amend their local development plan, and this power mirrors that by enabling Ministers to intervene where such an amendment is required but not proposed by the planning authority. Examples of circumstances that might trigger Ministerial intervention could be where evidence is showing a clear shortfall in the availability of housing land, or where an economic issue of national significance is considered to require action.

8. Ministers already have powers to direct planning authorities to consider modifying their local development plans at the Notice of Intention to Adopt stage following Examination. Policy relating to these directions is set out in Circular 6/2013. It notes that “*Scottish Ministers have a default power under the Act (section 20) to direct the planning authority to consider modifying a LDP, or for Scottish Ministers to approve the plan themselves. Ministers expect they will rarely use this power.*” We would update and publish any such guidance to address the policy on new powers following enactment of the Planning Bill and associated secondary legislation.

9. With regard to the Committee’s concern about directions being published, we can confirm that all directions made under planning legislation are a matter of public record and are published routinely by Planning and Architecture Division on the Scottish Government’s website. In relation to the question of requiring a report to Parliament, we do not consider it would be an appropriate use of the Scottish Government’s or the Parliament’s time to require this. However, the Scottish Parliament could ask Ministers to account for their use of these powers at any time.

Part 2 – Simplified Development Zones

Section 10(2) and (3), inserting schedule 5A, paragraph 3(1) and (2) into the 1997 Act – Land that cannot be included in a scheme

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative

The Committee asks the Scottish Government to consider whether it would improve the transparency of the provisions relating to SDZ schemes in section 10 of the Bill (as it amends the 1997 Act) if the types of land that may not be included in an SDZ scheme were set out on the face of the primary legislation (as they are currently for simplified planning zones), with a power included to add or remove entries by regulations subject to the affirmative procedure.

10. We thank the Committee for their consideration of this issue. The key difficulty that we had wanted to address here is that the types of land that cannot be included in simplified planning zones are set in the primary legislation and cannot easily be amended, and we did not wish to replicate this difficulty for simplified development zones. However, setting out the types of land that may not be included on the face of the Bill, while allowing for entries to be added or removed by regulations, would equally address our concern and so we are content to adopt this approach instead. We will bring forward an amendment to this effect at Stage 2.

Section 10(2) and (3), inserting schedule 5A, paragraphs 6 and 19 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

The Committee asks the Scottish Government whether it would be more appropriate that additional safeguards apply to the power in paragraph 6(1) of new schedule 5A,

such as: (a) a requirement for the Scottish Ministers to provide reasons for giving such a direction; (b) a requirement to publish any directions given; and (c) a requirement to report to the Parliament on the use of the power.

11. As mentioned in the DPM, we consider that the power for Ministers to direct a local authority to make a SDZ scheme could be used in relation to key sites or projects of national or regional importance to try to drive forward development. It is likely that such projects would have a link to the NPF, which will be subject to Parliamentary consultation. Ministers could also make such a direction where a person has requested that a scheme be made or altered and the case has been referred to them.

12. With regard to the Committee's concern about directions being published, we can confirm that all directions made under planning legislation are a matter of public record and are published routinely by Planning and Architecture Division on the Scottish Government's website. They also routinely include the reasons for giving the direction. In relation to the question of requiring a report to Parliament, we do not consider it would be an appropriate use of the Scottish Government's or the Parliament's time to require Ministers to report to the Parliament on the use of direction-making powers. However, the Scottish Parliament could ask Ministers to account for their use of these powers at any time.

Section 10(2), inserting section 54C into the 1997 Act – Scheme may also control advertisements

Power conferred on:	Planning authorities / the Scottish Ministers
Power exercisable by:	Making or altering an SDZ scheme
Parliamentary procedure:	None

The Committee asks the Scottish Government to explain why it considers these provisions to be appropriate in terms of the removal of parliamentary oversight.

13. It is our intention is that SDZs should be able to grant a range of consents in addition to planning permission, including advertisement consent. This will provide a streamlined approach, avoiding developers having to apply for separate consents, and enhance the attractiveness of the scheme. However, we appreciate the concerns of the Committee that inserted section 54C disapplies the controls on advertisements set out in regulations under section 182 of the 1997 Act. We will re-examine the wording of this section and consider whether any amendments are appropriate.

Part 4 – Other matters

Section 25(1) – Power to transfer functions where insufficient trained persons

Power conferred on:	Scottish Ministers
Power exercisable by:	Direction
Parliamentary procedure:	None

A transfer of functions direction relates to functions which are, prior to the direction being made, exercised by members elected for a particular area. In light of this, the Committee asks the Scottish Government whether it would be more appropriate that additional safeguards apply to a power of this nature, such as: (a) a requirement for the Scottish Government to explain the circumstances that have led to the planning

authority being unable to exercise a function because of a prohibition created by section 24(1); (b) a requirement to publish any directions given; and (c) a requirement to report to the Parliament on the use of the power.

14. It is important, to maintain public trust in the planning system, that elected members who will sit on planning committees or on local review bodies will have been sufficiently trained in planning matters to confidently make sound decisions that are rooted firmly in clear planning principles and policies. We do not expect this power to be used frequently, if at all, but it is necessary to have in reserve to relieve pressure on the planning system if the situation arises that a planning authority is unable to carry out its functions due to a lack of members who have met the training requirements. We consider that it would be for the planning authority to explain the circumstances that have led to this situation.

15. A direction-making power is appropriate because it will be used to address individual circumstances and may be required at short notice. With regard to the Committee's concern about directions being published, we can confirm that all directions made under planning legislation are a matter of public record and are published routinely by Planning and Architecture Division on the Scottish Government's website. They also routinely include the reasons for giving the direction. In relation to the question of requiring a report to Parliament, we do not consider it would be an appropriate use of the Scottish Government's or the Parliament's time to require Ministers to report to the Parliament on the use of direction-making powers. However, the Scottish Parliament could ask Ministers to account for their use of these powers at any time.

Section 25(5) – Power to transfer functions where insufficient trained persons

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative

The Committee therefore asks the Scottish Government to consider whether the modifications that can be made should be limited to: (a) enactments that are specified on the face of the Bill; and (b) those that are *necessary* in connection with a transfer of functions direction (or such a direction as modified or revoked).

16. When any planning functions of an authority are transferred due to the lack of fully trained members, it is important that the body in receipt of the transfer should not be hindered by the lack of the necessary legislative powers to make that decision and to take other actions such as requiring information or notifying relevant people. These powers may sit in other legislation beyond that of planning, and may be affected by new legislation in the future. Limiting this provision to enactments specified on the face of the Bill could therefore potentially cause difficulties or effectively prevent the functions being transferred.

17. We do not consider that the modifications of legislation should be limited to those that are "necessary". It is already a clear implication of the terms of section 25(5) that the power to apply enactments with modifications only applies in connection with the transfer of the function, and so any modification would have to be limited to allowing the function to be exercised by another local authority or the Scottish Ministers. The regulations are subject to affirmative procedure, so the Parliament will have ample opportunity to scrutinise the modifications proposed. Necessity is a stringent legal test, and it may be that some modifications are simply desirable in order to make the transfer operate in a transparent and effective way without risk of challenge.

Section 26, inserting new section 251B(3) into the 1997 Act – National planning performance co-ordinator

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative

As the functions of the person appointed are specified broadly in new sections 251(1) and (2), the Committee asks the Scottish Government whether it would be more appropriate for the enhanced oversight afforded by the affirmative procedure to apply to regulations which would make such further provision.

18. As the general functions of the national planning performance co-ordinator are set out on the face of the Bill, the regulations made under this section will provide further detail at a technical and administrative level for which we consider the negative procedure to be appropriate.

Section 26 – Directions to planning authority following an assessment of performance

Power conferred on: Scottish Ministers
Power exercisable by: Direction
Parliamentary procedure: None

The Committee asks the Scottish Government whether it would be more appropriate that additional safeguards apply to a power of this nature, such as: (a) a requirement to provide reasons explaining why the direction is being issued; (b) clarifying that the steps that may be required are limited to those recommended in the performance assessment report; and (c) a requirement to report to the Parliament on the use of the power.

19. The review of planning maintains a very clear focus on improving the overall performance of the planning system, addressing concerns about matters such as efficiency and patterns of decision-making in some authorities. Our intention is that the approach should be supportive and collaborative, led by the Planning Performance Co-ordinator whose role is to monitor and advise authorities on improvements. However, in the event that concerns are sufficiently serious to trigger an assessment, and the authority fails to take effective action in response to the recommendations of the performance assessment report, it is appropriate that Ministers should have powers to require the authority to take action.

20. We consider that the circumstances in which the power to issue a direction under new section 251G could be used also operate to constrain the manner in which the power could be used. It is clear that the intention is that any direction given must be to address an issue raised in paragraphs (1)(a) to (c). However, we do not feel it would be appropriate to limit the steps that may be required to those recommended in the performance report. Ministers may wish to require other steps; for example, the authority might propose an alternative approach in the response report, and Ministers might wish to accept that with further adjustments. We would not want to constrain such flexibility.

21. With regard to the Committee's concern about directions being published, we can confirm that all directions made under planning legislation are a matter of public record and are published routinely by Planning and Architecture Division on the Scottish Government's

website. They also routinely include the reasons for giving the direction. In relation to the question of requiring a report to Parliament, we do not consider it would be an appropriate use of the Scottish Government's or the Parliament's time to require Ministers to report to the Parliament on the use of direction-making powers. However, the Scottish Parliament could ask Ministers to account for their use of these powers at any time.

Part 5: Infrastructure levy

Section 27 – Power to provide for infrastructure levy

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument 7
Parliamentary procedure:	Affirmative

The Committee therefore asks the Scottish Government, in the absence of any explanation in the DPM, to explain why it is appropriate that these limits [on penalties that can be created by the infrastructure levy] are set at these high levels.

22. The levels have been set at a maximum permissible amount to allow for flexibility at this stage. Further discussion of the appropriate levels of penalties for different offences would take place during future consultation on regulations, and many penalties may be set at lower levels. However, attempts to evade the levy on major developments could deprive the infrastructure fund of significant sums, and therefore substantial penalties may be necessary to reflect the impact of the offence. (For information, Level 5 is £5,000 and the statutory maximum is £10,000.)

The Committee therefore asks the Scottish Government to provide examples of when the Scottish Ministers might consider it expedient to modify legislation to enhance the effectiveness of the infrastructure levy as a means to raise revenues.

23. The introduction of the infrastructure levy may require adjustments to many aspects of the planning system, for example in relation to information required in applications or the operation of SDZs. Other powers might also potentially be used to require payments from developers or to impose burdens that could conflict with the effective operation of the levy. The power is therefore drawn widely to enable regulations to respond to issues that may arise.

The Committee therefore asks the Scottish Government to consider if it would be appropriate for primary legislation to define, for example, when it would be appropriate for an agreement under section 75 of the 1997 Act (as amended by the Bill) to impose a planning obligation requiring payment of a sum and when the infrastructure levy should be used instead.

24. Further work to define the regulations for an infrastructure levy will be taken forward and will inform the approach to be taken in regulations. Given that we have not defined and consulted on a detailed methodology for the infrastructure levy it is neither possible nor appropriate to set out its relationship with section 75 planning obligations out in primary legislation. In addition, the regulation making powers aim to allow for the definition of infrastructure to change over time to reflect changes in priorities and practice, potentially requiring associated adjustments in the relationship with section 75 within the same regulations.

The Committee therefore asks the Scottish Government to consider whether a form of super-affirmative procedure would be appropriate for the infrastructure-levy regulations to allow appropriate consultation of those affected and enhanced parliamentary scrutiny of the proposed policy to be adopted.

25. We recognise that the introduction of an infrastructure levy will be a substantial issue. As with any legislation of this kind, it will be subject to extensive public consultation on the draft regulations, together with a range of impact assessments. We consider that the affirmative procedure is appropriate to ensure that the regulations are not introduced without the active approval of Parliament.

Section 2: Issues of detail on which the Committee is content to receive a written response only

Part 3 – Development Management

Section 16 – Schemes of delegation: Inserted section 43AB(2)(c) – further provision and guidance - directions

Power conferred on:	Scottish Ministers
Power exercisable by:	Direction
Parliamentary procedure:	None

The Committee asks the Scottish Government to explain why new section 43AB(2)(b) is expressed as a power in regulations for the Scottish Ministers to specify modifications that a planning authority are required to make to a draft scheme of delegation and why a different approach has been taken to the direction-making power in new section 43AB(2)(c).

26. There are different circumstances behind the powers introduced in section 43AB(2)(b) and section 43AB(2)(c).

27. Section 43AB(2)(b) covers the potential for the Scottish Ministers, at the end of the process, to require particular modifications to the detailed substance of a scheme of delegation (i.e. the circumstances in which a local planning application is to be delegated for officer decision, or not), after the scheme has been drafted but before it is adopted. To support greater consistency and appropriate levels of delegation, section 43AB(3) introduces a requirement for planning authorities to have regard to guidance issued by the Scottish Ministers. It is the intention that the guidance will reflect policy support for more substantial delegation of minor local applications, in the interests of both operational efficiency and increased local decision-making. Section 43AB(2)(b) provides a means to add some weight to the policy set out in the guidance, while still allowing for local flexibility as appropriate.

28. Section 43AB(2)(c) relates more to setting out the parameters for the process to be followed by a planning authority, which could include matters such as the expected style and matters covered by a scheme of delegation, as well as any particular engagement activity. This is essentially an administrative matter for which the Scottish Ministers could, where appropriate, direct specific actions to be carried out in the preparation of a scheme, to reflect the individual circumstances of the planning authority, and would be likely to occur at an early stage in the scheme preparation.

Part 4 – Other matters

Section 21 – Fees for planning applications etc.

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Negative

The Committee asks the Scottish Government to explain why new section 252(1ZA)(b) is necessary and in what circumstances it is envisaged that it would be used instead of the power in new section 252(1ZA)(a).

29. We have included the provision in new section 252(1ZA)(b) to allow for Scottish Ministers to charge for a service which they have provided on behalf of Planning Authorities on a national scale, which supports the planning service but is not a planning function required by the legislation. An example of this is the eDevelopment.scot service and its support desk currently operated and resourced by the Scottish Government on behalf of planning and building authorities. The service, comprised of the ePlanning and eBuildingStandards portals, allows users to make planning and building warrant applications online to each authority through a single service. As it continues to evolve, it may become necessary for the Scottish Government to ask authorities to contribute further to the provision of the service. This provision within the Bill provides for those circumstances.

The Committee asks the Scottish Government whether it is intended that the Scottish Ministers should also have the new power to waive or reduce a fee and could this provision be clearer.

30. We thank the Committee for their consideration of this point. We consider that the power currently only allows planning authorities to waive or reduce a fee. We will consider further whether it would be helpful for the Scottish Ministers to have the same power.

The Committee asks the Scottish Government to explain whether it would be more appropriate for either the Bill to set a cap on the level of surcharge that can be imposed in the regulations or the affirmative procedure to be applied to those regulations (or some other measure to ensure sufficient oversight).

31. We did not consider it appropriate to set out the level of surcharge in the Planning Bill, or any cap, as we have committed to consulting on the planning fee regime, including any proposals for a surcharge, following the passage of the Planning Bill. While regulations setting out levels of fees for any activity are normally subject to the negative procedure, we recognise that the surcharge presents a slightly different issue, as it is not subject to the restriction set out in section 252(8). As the complete fees package would normally be brought forward in a single instrument, we will consider further whether additional restrictions or greater scrutiny should be applied to the surcharge provisions.

Part 5 – Infrastructure levy

Section 30 – Power to change meaning of “infrastructure”

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative

The Committee asks the Scottish Government, as a minor point of technical clarity, whether the reference to the "schedule" in section 30 would be clearer if it referred to schedule 1 ("infrastructure-levy regulations")?

32. We agree that section 30 should refer to "schedule 1" rather than "the schedule" and we will bring forward an amendment to this effect at Stage 2.

Regards,

Andy Kinnaird
Bill Manager