



The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

28th Report, 2012 (Session 4)

Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill

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The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

(Standing Orders of the Scottish Parliament, Rule 6.11)

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The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 8, 15 and 22 May, the Subordinate Legislation Committee considered the delegated powers provisions in the Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill (“the Bill”) at Stage 1. The Committee submits this report to the Local Government and Regeneration Committee as lead Committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government has provided a delegated powers memorandum (DPM)¹ setting out the need for the delegated powers, how they may be exercised and the choice of procedure applicable to their exercise.
3. Scottish Government officials also provided oral evidence to the Committee at its meeting on 15 May 2012. The *Official Report* of the meeting is available on the Parliament website.²

OVERVIEW OF THE BILL

4. The Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill was introduced in the Parliament on 26 March 2012 by Alex Neil MSP. It is a Government Bill which seeks to amend the law regarding non-domestic rates and council tax in respect of unoccupied properties. For non-domestic rates, it allows the Scottish Ministers greater flexibility to vary the rates payable in relation to such properties, by varying the discount available (section 1). For council tax, the Bill introduces the ability to increase the tax payable in respect of unoccupied dwellings in addition to the current power to offer such properties a discount on the standard rate applicable to occupied dwellings.

¹ Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill. Delegated Powers Memorandum. Available at: http://www.scottish.parliament.uk/S4_Bills/Local%20Government%20Finance%20Unoccupied%20Properties/Local_Govt_Finance_DPM.pdf

² Scottish Parliament Subordinate Legislation Committee, *Official Report*, 15 May 2012. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7026&mode=pdf>

5. The Bill also inserts some enabling powers to make regulations into paragraph 4 of Schedule 2 to the Local Government Finance Act 1992 (“the 1992 Act”). This is done so that local authorities can require the provision of information, in order to establish whether properties are subject to the varied council tax rate (sections 2 and 3).

6. The Bill also repeals the provisions which allow housing support grants to be paid to local authorities to allow them to balance their housing revenue account (section 4).

7. Section 5 (commencement) brings the Act into force on the day of Royal Assent, apart from section 4, which comes into force on 1 April 2013. Section 6 has the short title.

DELEGATED POWERS PROVISIONS

8. The Committee considered each of the delegated powers provisions in the Bill. The Committee was content with the delegated powers contained in section 1(2) and (3), and section 3(3).

Section 2(2) and (3) – power to provide for variation of council tax liability for unoccupied dwellings

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	affirmative procedure

Background

9. Section 33 of the Local Government in Scotland Act 2003 (“the 2003 Act”) gives the Scottish Ministers the power to provide for a council tax discount in respect of unoccupied dwellings. Section 33 also enables the Scottish Ministers to confer power on local authorities to vary the level of council tax discount provided for such dwellings in their own areas. The Council Tax (Discount for Unoccupied Dwellings) (Scotland) Regulations 2005 (SSI 2005/51) allowed local authorities to set the discount applicable to empty dwellings and second homes between a maximum amount of 50% and minimum amount of 10%.

10. Section 2 of the Bill amends section 33 of the 2003 Act by substituting the various references in section 33 to “discount” with “variation”. This enables the Scottish Ministers to vary the amount payable, or permit local authorities to vary the amount payable, in relation to such classes of unoccupied property as may be specified in the regulations. Ministers will therefore be able to allow local authorities to charge more council tax in respect of unoccupied homes than occupied homes.

11. The substitution of “variation” for “discount” in section 33 means that the Scottish Ministers could prescribe the amount of the variation for any day, where there is no resident of the dwelling. Alternatively, they may prescribe that each local authority has powers—

- (a) to disapply the regulations from their respective areas or parts of them; and/or
- (b) to modify the application of the regulations in their areas so they can differentiate between circumstances in which there is no resident of a dwelling.

12. This can include circumstances deriving from the use to which a dwelling is put, and the personal circumstances of the owner.

13. Any such power may not permit councils to modify the regulations so as to set the amount of variation for their area at an amount outside any maximum discount or maximum increase, as may be specified in the regulations. There is no requirement to put such a maximum in the regulations.

The maximum level of any increase in council tax amount

14. In an oral evidence session with Scottish Government officials, the Committee explored certain issues in relation to the powers in section 2(2) and (3) of the Bill. The Committee queried why the powers are expressed very widely to permit any variation of council tax amount, in respect of unoccupied properties.

15. In particular, the Committee observed that paragraphs 33 and 36 of the Policy Memorandum which accompanied the Bill state that the intended policy on the imposition of increases has two particular limitations within it, but these are not set out in the Bill. Paragraph 36 states that it is intended that “no owner should be required to pay the council tax increase unless their home has been empty for at least 12 months and, even where a local authority uses the power to vary, in some cases homes would not be liable for the increase until they have been empty for longer.” Paragraph 33 also states that it is intended that regulations would confer on councils a power to charge up to a maximum tax increase of 100% (double) the standard tax rate.³

16. In explaining the unlimited scope of the power as framed in the Bill, Colin Brown, from the Scottish Government Legal Directorate, said—

“It is simply to give discretion for the implementation of the policy. The Scottish Government would be interested in views from this committee and, of course, from the subject committee on any maximum.”⁴

17. He went on to note—

“It is important to remember that there will be two levels of discretion. There will be what the Scottish Government decides is the area within which local authorities should be able to exercise powers, and there will be the ability of local authorities to exercise those powers in their areas in such manner as they see fit, albeit probably with caps and controls. Until there is experience of the operation of the provisions, it will not be easy to know exactly where

³ Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill. Policy Memorandum, paragraphs 33 and 36. Available at: http://www.scottish.parliament.uk/S4_Bills/Local%20Government%20Finance%20Unoccupied%20Properties/b12s4-introd-pm.pdf

⁴ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 406.

local authorities might encounter difficulties in the exercise of the powers. Therefore, at this stage it seems desirable to have breadth to allow tailoring or amendment if, for example, particular concepts prove to be difficult in operation.”⁵

18. The Committee accepts that some flexibility beyond the current policy objectives would be required. The regulations could require to specify the levels of permitted council tax increase in respect of unoccupied properties (or classes of them), or the levels within which local authorities would require to operate. The regulations would be subject to the affirmative procedure. Those levels might be altered, in the light of experience, and the affirmative procedure would be applied in the scrutiny of any such changes.

19. However, the Committee considers that there is a fundamental question of principle as to whether the Parliament should confer an unlimited power to increase liability to council tax for certain properties. The Committee observes that the ability to permit discounts within the council tax regime operates within certain limits at present. Discounts are also by their nature inherently limited in their effect on the individual, so far as they reduce tax amounts from those otherwise prescribed. The same is not true of an unlimited power to increase the liability to tax.

20. The Committee considers that the Parliament should itself legislate for the maximum amount of liability that can be imposed rather than delegate this matter to Ministers. In so far as the proposed enabling power to increase tax amounts in relation to unoccupied properties, is unlimited in amount, (or the possible percentage increase), the Committee considers this is not acceptable in principle, nor is it transparent.

21. The Committee therefore considers that the Bill should state a suitable maximum level of permitted council tax increase in relation to unoccupied dwellings, beyond which any levels specified in the regulations could not go. The specific level of that cap, and whether there could be more than one for different classes of dwelling, is a policy matter on which the Committee makes no recommendation.

Section 74 of the 1992 Act

22. The Committee sought clarification of how section 74 of the 1992 Act relates to section 2 of the Bill. Section 74 of the Local Government Finance Act 1992 states that the amounts of council tax payable in respect of dwellings situated in any local authority’s area and listed in different valuation bands shall be in set proportions—

6: 7: 8: 9: 11: 13: 15: 18,

23. where 6 is for dwellings listed in valuation band A, 7 for dwellings in band B, and so on. (These proportions can be varied by order).

⁵ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Cols 406-407.

24. Section 74 therefore controls the proportionate amounts payable between the different valuation bands. The 1992 Act (and the 2003 Act) contain further provisions in relation to discounts and exemptions which operate, once the “standard” amounts of tax payable have been determined in accordance with the specified proportions. There is no provision in section 74 which relates to the effect of any permitted increase in tax amount, whether any increase relates to unoccupied properties generally, or properties within a particular valuation band.

25. The Committee sought clarification from the Scottish Government officials of the effect of any increases in charge on the operation of section 74. Sam Baker, Policy Manager in the Housing Supply Division, explained—

“if a council was to impose a 50 per cent discount, it would be imposed on the standard council tax rate for each property band—band B, for example. Similarly, if there was a 50 per cent increase, the amount would be 50 per cent above the standard council tax rate for the band that a property is in. For example, if a property was in band B, the amount would be 50 per cent higher than a couple living in a band B property would already be paying.”⁶

26. The officials indicated that the Government considered that no conflict arose as section 74 gives the starting point for the calculation of the “standard” council tax amounts payable across the various valuation bands. After that calculation, various discounts and exemptions from payment may be applied, as set out in other provisions in the 1992 and 2003 Acts. It was considered that the same approach would apply to permitted increases under section 2 of the Bill (amending section 33 of the 2003 Act). Any increases would fall to be applied, after section 74 calculates the “standard” amounts.

27. The Scottish Government officials undertook however to consider further the relationship between section 74 and section 2 of the Bill (in advance of Stage 2). The Committee considers that the understanding of the connection between those sections is complicated by the requirement to consult various different enactments. On enactment of this Bill, these tax calculation provisions would require consideration of the powers in section 2, as well as the relevant provisions in the 1992 Act, the 2003 Act, and the subordinate legislation to be made under section 2 which would specify the permitted level/s of any increased tax amounts. In addition any determination made by the individual local authorities would also be relevant.

28. The Committee also notes, on considering the oral evidence provided by the officials, that section 78 of the 1992 Act sets out the “basic amount” of council tax payable per day. This is the amount imposed by the relevant local authority for the financial year, in relation to the particular valuation band listed for a dwelling, divided by the number of days in the financial year. (This applies once the proportionate amounts have been calculated by section 74). Section 78 is expressly subject to sections 79 and 80, which have the principal enabling provisions on discounts and reduced amounts of tax. It is clear therefore that the basic amount of tax is subject to discounts and reduced amounts. The Bill does

⁶ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 409.

not however make a similar qualifying provision, in relation to any increases in tax amounts which would be enabled by section 2 of the Bill.

29. The Committee therefore notes that the Scottish Government has undertaken to consider the terms of section 74 of the Local Government Finance Act 1992 in relation to section 2 of the Bill. The Committee asks for a response to this point as part of the Government's response to this report.

Affirmative procedure

30. The Committee requested clarification why the affirmative procedure would be the appropriate level of Parliamentary scrutiny of regulations made under the powers in section 2 of the Bill, rather than a form of "super-affirmative procedure". Such procedure would require a defined period of consultation on an initial draft of the regulations, which would be laid before the Parliament prior to the final regulations being laid. Other procedures could be imposed, such as a requirement to lay an explanatory document with the initial draft regulations.

31. The Scottish Government expressed the view that the affirmative procedure is considered appropriate, taking into account that the existing powers in section 33 of the 2003 Act to provide for discounted amounts of council tax in respect of unoccupied dwellings are subject to the same procedure.

32. There is also a statutory obligation already provided for in the 2003 Act to consult on the draft regulations with the Convention of Scottish Local Authorities, and such other persons as the Scottish Ministers consider appropriate (section 33(7)). Officials also noted that a longer timescale in relation to making any regulations subject to a super-affirmative form of procedure may also raise difficulties for the planned implementation of the changes from April 2013.

33. Colin Brown, Scottish Government Legal Directorate, explained—

"There is no doubt that, if more extended procedures for making regulations became available, our timetable for allowing councils to implement the changes from April 2013 would not be met—the timetable is already quite tight."⁷

34. In relation to consultation, the Committee has noted that the Scottish Government's policy intentions for future regulations under section 33 of the 2003 Act as amended by section 2 of this Bill will involve a complex mixture of new rules involving existing exemptions, revised discount arrangements, new provisions for increased amounts, local authority powers in relation to discounts and increased amounts, and possible modification of definitions such as "empty" or "long term empty". It appears to the Committee therefore that in due course a suitable period of consultation upon the planned set of draft regulations will be particularly useful.

35. The Committee is content that the affirmative procedure is proposed for Parliamentary scrutiny of the powers in section 2 of the Bill.

⁷ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 411.

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