

Local Government and Communities Committee

Planning (Scotland) Bill

Supplementary Written Submission from Homes for Scotland

Dear Mr Doris

Planning (Scotland) Bill

Thank you for inviting Homes for Scotland to give evidence to the Committee on 7 March and for encouraging me and other panellists to maintain a relationship with the Committee and send in further information. In this letter I have:

- Addressed the two policy areas on which you specifically requested written information – land value capture and appeals;
- Addressed Committee questions which I'd like to answer more fully; and
- Addressed aspects of the Bill which received no or limited substantive discussion in the meeting – including the all-important collaboration in plan-making

On the first of these points, land value capture, it is Homes for Scotland's strong view that this is not within the scope of this Bill or of this Committee's work thereon. I noted that in the second evidence session on 7 March, you asked the panel whether it would be helpful for the Bill to include the option of taking the power over matters such as land value capture. Homes for Scotland's opinion is that that would not be appropriate. As you may be aware, the Delegated Powers and Law Reform Committee has already published its Report which is critical of the Bill in its approach to dealing with the Infrastructure Levy. Paragraph 76 of the Committee's Report states that "the Committee also notes that this is another example of a Bill being introduced with framework powers where significant policy matters have not been developed and further consultation is necessary. In the Committee's view, such an approach undermines the Parliament's ability to scrutinise policy on a line-by-line basis on the face of the Bill..." Homes for Scotland endorses that view and considers that it applies with even greater force to the suggestion that land value capture might be included as a framework power for secondary legislation. In Homes for Scotland's opinion, much further work is required before any legislation is placed before the Scottish Parliament dealing with such a radical reform of the current property system.

There is nothing in this letter that departs from Homes for Scotland's policy position as set out in our written evidence or earlier submissions on the planning review and that evidence should continue to be considered. I have however elaborated in places on the reason our position on various provisions is as it is, including our views on the potential consequences of current and mooted provisions.

I'll start with the question raised by Graeme Simpson in Committee on how the Bill could be amended to ensure it delivers more homes

Impact of the Bill on Home Building

This Bill is the product of a review that began with a clear aim “to increase delivery of high quality housing developments, by delivering a quicker, more accessible and efficient process”. The Bill itself does not overtly reflect this and where the need and demand for new homes could be referenced, it has been omitted. Homes for Scotland has suggested a number of amendments which would ensure the Bill can deliver on this ambition:

- Housing need and demand to be identified as part of the essential evidence base for both the National Planning Framework (NPF) and Local Development Plans (LDPs)
- LDPs to be consistent with the NPF (and the housing targets therein)
- Removal of the provision on incompatibility between an LDP and the NPF
- A shortfall in the 5-year supply of effective land to be an automatic trigger for the review of an LDP (with Bill powers enabling regulation on this and signposting it as an intention)
- Homes for Scotland to be a statutory partner in collaboration with planning authorities and others in the early stages of LDP preparation (including Evidence Report writing)
- The LDP Evidence Report to be approved by Full Council (to ensure full sign-up to its housing allocations, targets, policies and other provisions)
- Regional strategies and housing targets to be required components of the NPF
- Regional partnerships formally recognised and supported (as their role is essential to informing and gaining sign-up on the NPF and its housing targets)
- Homes for Scotland to be a recognised stakeholder in regional partnerships
- Developer contributions (whether through a Levy or s75) to be clearly identified in LDPs, viability-proofed and spent only on housing-related local / sub-regional infrastructure.
- Homes for Scotland to have a formal role in measuring planning performance
- Removal of the provision for local variation in planning fees

It would be a bad outcome for Scotland if other amendments to the Bill made the delivery of new homes harder. There are a number of changes under discussion that would do that, including the ideas being promoted on changing appeal rights.

The National Planning Framework

Homes for Scotland has supported the use of the NPF to form the strategic tier of the development plan. It is important that the Scottish Government has a stake in articulating the level of home building needed to meet need and demand in Scotland, and planning authorities have more clarity on the importance of their role in ensuring their plans and decisions mean those targets are met. Whilst this gives Ministers a stronger influence on planning across Scotland we anticipate considerable

opportunity for input from new bespoke Regional Partnerships and from organisations such as Homes for Scotland. It is essential that LDPs are required to be consistent with the NPF, just as they are currently required to be consistent with Strategic Development Plans (SDPs). Anything less than this would water down the onus on planning authorities to deliver on housing targets (and other national priorities) and cause confusion, frustration and conflict.

The draft Bill anticipates situations in which a development plan policy might conflict with the NPF and provides that the most recently published will prevail. In other words, a LDP could contain policy which is incompatible with the NPF (for example on housing targets) – and the NPF provision would from that point on have no weight in that area. This cannot be the intention of the Scottish Government and the Bill must be amended to address this problem.

We support the provision that the NPF should be reviewed every five years, but we do not agree it is sensible that if the NPF is not reviewed, it might not be changed again for 10 years or more. This would be possible under existing provisions which have not been revisited in the Bill. If the NPF is to be and remain an effective part of the development plan, and a key part of Scotland's plan-led system, it must keep pace with changing circumstances and provide a helpful and relevant starting point for the LDPs that will be prepared to implement it at planning authority level. So, if Ministers review the NPF at the five-year point and decide that revisions are not required, there should be an absolute requirement that it is replaced within five years of that decision point (and as early as circumstances require).

Regional Partnerships

We maintain our support for the removal of Strategic Development Plans (SDPs) as these have not proven effective on housing delivery. We do not agree with the view that SDPs are still 'bedding-in'. The second SDP for South East Scotland (SESplan) is currently at the examination stage and has still not delivered on the NPF aspiration for it to lead on "a more concerted effort to deliver a generous supply of housing land in this area".

Like others, we agree that a level of strategic planning activity is important. We support the notion that this should involve local authorities and others (including Homes for Scotland) working in collaborative partnerships in regional strategies that should be incorporated in the NPF. This regional partnership working is essential to the success of planning reform and referenced in the policy memorandum to the Bill, but it isn't acknowledged in the Bill itself. We believe these partnerships could be referenced without intruding on the Scottish Government's desire to let them form and operate on a 'bespoke' basis. It would be possible, for example, to refer to Regional Partnerships in the proposed new section 3AA(1) of the 1997 Act, rather

than the more oblique reference to “two or more planning authorities” being required to support the preparation of the NPF.

Regional Partnership working will (hopefully) not be limited to NPF preparation. It may well be that local authorities want to work together on joint planning strategies. It is worth noting that in England, where Regional Plans have been abolished, a number of local planning authorities have opted to prepare joint core strategies. This is supported by the UK Government and in February this year a Joint Working Fund was announced which enables groups of local planning authorities to bid for funds, with priority given to areas with highest housing need.

Local Development Plans

The Planning Bill is silent on the role of collaboration in the early stages of plan-making, though the Policy Memorandum makes it clear this is essential to the success of planning reform. The Bill should be amended to clarify that the Evidence Report must be the production of collaboration with the home building industry and other important stakeholders, and should be open about the extent to which it has been agreed by those stakeholders.

Collaboration is entirely different from the consultation or engagement that has typified plan-making and which has pitched planning authorities against stakeholders in a battle of will. The former – if it is real collaboration – would see the planning authority working jointly with stakeholders to gather evidence and prepare a proposed plan that is mutually understood and accepted, with any necessary arbitration being provided by reporters at the gate-check and examination stages. The Bill needs to address this and acknowledge the role of early and continuing collaboration, particularly as the governance model for LDPs has not changed substantially. As set out, LDPs remain the legislative burden, responsibility and privilege of the planning authority. Collaboration is such an essential component in the success of the new planning system that it must be recognised on the face of the Bill, with a framework being put in place on its role and nature. Key partners should also be identified in legislation. This should include Homes for Scotland and other representatives of key delivery partners.

Local Place Plans

Questions were asked in committee on whether the requirement for LDPs to ‘take into account’ Local Place Plans was strong enough. One committee member stated that this was “not good enough” and that the committees challenge is to “beef it up”. As Convener, you confirmed that no decision had been made on that yet, and we hope that is the case.

The status associated with the provision that LDPs should “take into account” Local Place Plans should not be underestimated. The courts have considered this wording in the past and have found “have regard to” and “take account of” to be similar in meaning and that they require decision-makers to take into account whatever it is they are considering (e.g. a Local Place Plan) and to give clear reasons for departing from it, if that is what they decide to do.

Under the current system, LDPs are required to take the NPF into account and have regard to the following (all of which are prescribed in regulations):

- the resources available or likely to be available for the carrying out of the policies and proposals set out in the local development plan;
- any local development plan prepared for a different purpose for the local development plan area;
- any local development plan or strategic development plan prepared for an area adjoining the local development plan area;
- any regional transport strategy relating to the local development plan area;
- any local transport strategy relating to the local development plan area;
- any river basin management plan relating to the local development plan area;
- any local housing strategy relating to the local development plan area;
- the national waste management plan; and
- where the local development plan area adjoins land in England, any regional spatial strategy or local development framework published in respect of that land.

These are all plans or matters associated with public authorities. Local Place Plans may be produced by Community Councils or other community organisations. Their inclusion in the small family of matters to be specifically taken account of in LDPs preparation is significant.

If the requirement on LDPs was upgraded to being ‘in conformity’ or ‘consistent’ with Local Place Plans, the latter would effectively assume development plan status (as the only other plan an LDP must be consistent with is currently the SDP – the other current component of the development plan). This would necessitate the drafting of limiting checks and balances on Local Place Plan procedure and content and remove the infinitely flexible opportunity they give communities to show how they can play a positive role in plan-making and supporting deliver.

The question of “showing an authority has engaged with communities” is best answered through the approach to collaboration at the early stages of LDP plan-making, as discussed above. In addition, the Evidence Report could be used to acknowledge what Local Place Plans exist in a planning authority’s areas and to

articulate the extent to which the LDP will be consistent with or depart from those plans (and, in the case of the latter, give the reasons for that).

Infrastructure Levy

Scotland needs to build more homes to support its growing population. There is significant reliance on the private sector to deliver those homes – not only those built for sale but a significant proportion of affordable homes too. The number of new homes being built in recent years has not significantly increased, and hovers around just 17,000 homes. It is therefore essential that planning and wider reform, including land reform, does not make home building unviable, or make landowners less willing to part with their land. There are already many challenges to viability arising not only from the within the planning system but from other factors such as increasing construction costs.

There are various tried and tested mechanisms for securing developer contributions for infrastructure including the current s75 (in Scotland) and s106 + CIL (England) approaches. They all ultimately extract money from the same source: developers and landowners. Viability will be an issue whatever mechanism is used. Any rigid mechanism runs the risk of reducing viability and increasing pressure on other policy aspirations such as the provision of affordable homes. This has proven to be the case with CIL.

Research commissioned by the Scottish Government shows that a new Infrastructure Levy would have very limited potential to fill the gap between the amount of money required to fund infrastructure and the contributions that can be secured through development without making that development unviable.

Experience from England shows that the CIL model has not been successful in funding or delivering infrastructure. Once in place they are non-negotiable, and where they have been set too high they have had negative impacts on the delivery of other policy ambitions, in particular policy on the delivery of affordable housing through market developments.

Section 75 agreements and their English equivalents (s106) have the benefit of being an established and well understood part of the system that planning authorities have become increasingly familiar with and adept at using, but with checks and balances in place. An added benefit is that they are infinitely flexible and allow the planning authority to balance the need for new homes and other development against other policy aspirations. They also enable home builders to directly deliver some infrastructure – a role they are arguably better set up to perform than planning authorities. There is a need to improve the way in which developer contributions policy is established, the predictability of what will be sought from particular developments in particular areas, and the speed at which agreement can be come

to. The Bill does not address these issues and it appears unlikely an Infrastructure Levy could help to overcome them.

The Aberdeen City and Shire Strategic Transport Fund exposed a limitation in the use of s75 agreements in that the governing legislation does not allow for the pooling of developer contributions for use across a local or strategic planning authority area if that would result in an absent or trivial connection between the development from which a contribution is sought and the infrastructure on which that contribution is to be spent. The Infrastructure Levy which the Bill makes provision for (and which the Policy and Financial Memorandums describe) goes far beyond that. Its effect could be a selective tax on some developments (e.g. housing development) in some areas to generate funds to be spent on unrelated infrastructure elsewhere in the country. That's because it could be up to a planning authority whether to introduce a levy in their area – but also up to the Scottish Government whether to ingather the income generated and redistribute it to other parts of Scotland. The powers in the Bill would enable that to happen and they must be scaled back.

Furthermore, the powers in the Levy envisages a Land Value Capture approach to setting levy charges. It is inappropriate to introduce Land Value Capture in this relatively covert way. Participants in the planning review process will reasonably have assumed any Infrastructure Levy would work on an evidenced-basis which involves a costed schedule of infrastructure requirements balanced against an assessment of development viability. There is no suggestion in any of the Bill documentation that this work is planned.

We are also very concerned that Infrastructure Levy payments could be required before planning permission is granted. As the Scottish Property Federation explain in its written evidence, this would be unworkable.

If provision for a Levy is retained within the Bill, it should be limited to a mechanism for pooling developer contributions towards infrastructure required at planning authority level which cannot be secured through s75 agreements. The Bill and its supporting documents must recognise the limitations on the ability of home builders and other developers to fully fund infrastructure, and the risks involved in expecting planning authorities to take on the responsibility of being the deliverers of infrastructure.

To fund infrastructure and unblock this significant barrier to home building and other sustainable development, it will be necessary to look beyond the planning system, and beyond contributions from home builders and other developers, to find a means to plan for, fund and deliver infrastructure. The absence of a body with oversight and influence on infrastructure delivery is a gap that the Bill has not sought to fill.

Land Value Capture

Homes for Scotland is surprised that Land Value Capture was discussed by the Committee and that views have been sought on it. We consider it to be outside the scope of this Bill and elsewhere we have raised concerns that Land Value Capture has been referenced in provisions on the Infrastructure Levy.

Homes for Scotland is contributing to the work of the Scottish Land Commission (SLC) and awaits the outcome of the research which Heriot Watt University is carrying out on its behalf on historic attempts to capture land value in the UK but we understand the Scottish Government sees this as a longer-term policy area and has no current commitment to legislate on this and does not intend to introduce Land Value Capture through this Bill.

A move away from s75 developer contributions to a new and, as-yet, undefined method of capturing uplift in land values would be a substantial change in national policy. It is not clear whether Land Value Capture principles would be applied to all types of development or changes of use. Nor is it clear whether it would be used to replace activity already undertaken by private sector companies. If it seen as an additional delivery tool over and above what the private sector is able to do, e.g. a delivery tool for difficult sites or weaker market areas, it is unclear how it would overcome the issue of many such sites having too little land value uplift potential to cover development and infrastructure costs.

Land Value Capture should not be introduced in legislation until it is clear what it is intended to achieve, how it is intended to work, and what its impacts would be, including impacts on home builders.

In the panel session I was part of on 7 March, some Committee members mused on whether the Bill should be aligned with the work of the SLC or provide a hook for whatever recommendations the SLC comes up with. There was also reference to the 1963 Act and the possibility of repealing its provision on taking hope value into account in decisions on compensation for compulsorily-purchased land. Homes for Scotland considers these issues to be outside the remit of this Bill and therefore of the Committee. It would be wholly inappropriate to skip the important stage of consultation followed by full Parliamentary Scrutiny of any legislation the Scottish Government may in the future decide is necessary to implement land reform policy that has not been yet been formed.

Appeals

The **current right of appeal** against a refusal of planning permission (or a failure to determine an application) is a positive and necessary part of the planning system. Most developments, certainly most housing developments, come about because a

willing landowner and a willing developer have come together to promote a project for which they believe there is a need. That may be because the site is allocated in the LDP and has the clear support of the democratically elected planning authority. Or maybe the site is not allocated but is in an area with a shortfall of effective housing land and the LDP (or regional or local policy) makes provision for allowing alternative sites to come forward to fill that gap.

It is seldom, if ever, the case that the number of homes being completed in an area meets or exceeds targets, especially once a development plan has been in place for a few years, and the opportunity for shortfalls will only increase under the move to 10-year development plans. Many planning authorities focus their limited delivery resources on the sites that they have allocated. This does not mean they do not accept there is room for alternative solutions to the housing supply shortfall, and this is shown in the fact plans include policy mechanisms to enable other land to be released and some (though not all) applications for windfall sites are given planning permission by the planning authority. It is possible that, in some cases, planning authorities will refuse planning permission for proposals that they know or suspect will be successful at appeal, as it is easier to allow a reporter to make that difficult decisions that for local politicians to do so. In most cases however, refusals are based on reasoned judgements that relate to the LDP and other material considerations. Often – for example – there are significant differences between a planning authority's view on the adequacy of its housing land supply and the view of an applicant.

The current right of appeal allows disadvantaged applicants, including landowners who are being denied the right to develop their land, to make their case to an independent reporter. Only 30% of those who are refused planning permission choose that path. Others either revise and re-submit their proposals or give up. Only 40% of appeals are successful. In other words, only 12% of planning refusals are overturned through the appeals system.

In 2017 there were 17 appeals allowed for developments of ten or more homes. 14 of those related to sites allocated in LDPs. The other three included a small affordable housing project and two windfall greenfield developments in areas where there was a shortfall in the 5-year supply of effective land. In both of the greenfield cases the reporters found the sites to be development plan compliant. In one of those cases the authority had considered there to be no shortfall when issuing their refusal, but during the appeal conceded they were wrong.

Together, the three unallocated but plan-compliant sites contributed 316 homes to Scotland's housing supply. This one-year snapshot illustrates the limited but important role the appeals process plays in making sure developments that make a positive contribution the supply of new homes (including affordable homes) and are not prevented from taking place simply because they are not specifically allocated in

a development plan. The fact there were no appeal approvals for major housing developments that were not plan-compliant reflects the general feeling in the home building industry that the chance of winning an appeal on an unallocated site is very limited, and that it would be non-existent if planning authorities were more adept at maintaining a five-year supply of effective housing land.

If applicants' appeal rights are removed or significantly scaled back there will be an inevitable impact on housing supply. In addition to the 316 homes mentioned above, over 3,000 further homes were the subject of successful appeals in 2017 (including the 14 development plan site allocations mentioned above and further appeals for which a 'Notice of Intention' had been issued). Removing the part of the planning system which enabled these developments, all of which were found to be in the public interests, cannot be rational in a Bill which aims to increase housing delivery and in a country which is struggling to build enough homes even with the appeal system in place.

The idea of giving communities / third parties / individuals (to be defined) a **new right of appeal** against decisions to grant planning permission would be equally counter-productive. If applied to decisions on residential developments, the result would be at least a delay to and increased cost to developments that have the support of the planning authority. There would also be costs to the planning authority who would have to defend their decision. Any additional costs borne by the applicant would affect the viability of the project and reduce the pool of money available to satisfy policy requirements and make developer contributions. The existence of a third party right of appeal, however framed, would also be a significant worry in the mind of anyone deciding whether to invest in home building in Scotland.

Some argue that it is only fair that appeal rights are available on an equal basis to anyone – or that communities (undefined) are an equal party in (rather than a third party to) any planning application. This is a distortion. Individual citizens and their collective communities are represented in the planning system by their democratically elected representatives. Planning authorities take decisions on behalf of their constituents, largely on the basis of LDP policies which have been the subject of extensive public consultation. They also take into account national and regional policy on the need to meet housing need and demand. That policy has also been the subject of extensive public consultation. Citizens are represented in the planning application by the planning authority and they have the chance to comment on proposals. They are not divorced from planning decisions.

Nowhere in the discussions we have seen so far has there being any genuine attempt to consider the impact a third party or equal right of appeal would have on Scotland's ability to close the significant gap between need and demand and supply by increasing housing delivery. There has however been discussion on the negative impact it would have on attempts to focus communities on the collaborating in the early stages of plan-making, and on preparing their own Local Place Plans. The

home-building industry is by no means the only sector concerned about these negative impacts. We are pleased to note that organisations representing professional planners, council workers, Heads of Planning and many others are in agreement that a third party right of appeal would not be a positive addition to the system.

We do not consider there to be any public benefit in giving individual citizens, acting alone or in groups, the right to undermine positive decisions made by their democratically-elected planning authorities, which will provide much-needed homes or other development in the public interest. During the committee I referred to the example of my own home in a development of 20 homes that won permission on appeal and which is now home to a strong community of families, most of whom moved from elsewhere in the town. A third party right of appeal could have given one person the right to delay or stop a development which is now well integrated with the rest of the town and home to 20 families.

There is also a risk of significant unintended consequence for other developments, including public sector led developments, which may attract opposition from one or more individual. A third party right of appeal could turn into a cottage industry of its own with potential for individuals or groups to be encouraged (and charged) to pursue appeals they are unlikely to win or for rival business interests to appeal against one another's permissions, including those that have not caused concern to communities. Whilst these ideas may sound overly fearful they clearly illustrate the significant scope for conflict and community frustration.

The appetite for a third party or equal right of appeal does make it all the more important that this Planning Bill and wider reform really delivers a more collaborative approach to plan-making that sees communities, developers, planning authorities and others working together to produce LDPs that people recognise and understand, and that can be delivered. There was relatively little discussion in Committee on how we make that happen.

Performance

We support the introduction of an independent performance co-ordinator and would seek to support that person in their role by collaborating positively in a review of the way in which planning performance is measured. There is a particular need to review the way in which housing land supply and housing delivery is monitored as different authorities take different approaches. This exacerbates housing debates at the plan-making, application and appeal stages. It also undermines the operation of the 'presumption in favour of development that supports sustainable development' and causes confusion on whether or not LDPs are up to date and so whether windfall sites are in conformity with or departures from those plans. As discussed elsewhere,

this is a key factor as to why a limited right of appeal based on development plan conformity would be impractical. See below for more on that.

Fees

There is no doubt that allowing planning authorities to set their own planning fees would result in a patchwork of fee schedules across the country and reduce the ability of the proposed performance co-ordinator to arbitrate over a fair and sensible system in which planning authority performance and customer-service is streamlined, efficient and productive across the board, and fees reflect a fair contribution from applicants to the costs of determining planning applications. Variation should only be possible in relation to discretionary services and even then should be closely monitored to ensure fee-setting is not used to discourage development proposals. We would be open to considering a situation where planning authorities can charge a modest premium for making decisions quicker than the statutory maximum timescale, but the expectation should be that all planning authorities provide good services to their paying customers, with appropriate subsidy from public funds given the fact the planning system exists in order to service the public good – not because it is convenient for applicants.

In an opinion piece in today's edition of The National, Committee member Andy Wightman highlights the importance of this Planning Bill and the need to ensure "vision and ambition are delivered through high-quality plans that are developed with full community engagement and energy". Homes for Scotland can agree on those points, but we must take issue with other assertions. Planning authorities do not make their plans in light of "just" economic priorities, and "powerful monied interests" do not hold sway. If they did, our development plans would be different (for example, all of their housing allocations would be deliverable by the private sector). It is unfair to dismiss all applications refused planning permission by councils as "damaging developments that violate local plans" – especially when so many of the plans being adopted by those councils start life with a shortfall of housing land. Any council that knowingly puts itself in that position has a duty to explain to its communities that allowing some developments that are not identified in plans is the only way its housing need and demand can be met. That doesn't happen, and this fuels conflict and community frustration.

Homes for Scotland is not, of course, arguing that planning should focus only on the delivery of new homes. We are promoting a genuinely collaborative approach to plan-making which embraces home-builders and communities alike and which enables everyone to understand not only what we are seeking to protect of the past, but what we must achieve in the future – including for those whose housing need and demand is not currently being met.

I hope that the information provided here helps to supplement our written and oral evidence. Homes for Scotland would be happy to provide further evidence on any of these issues or other matters within the scope of the Bill.

We are very keen to facilitate discussions between Committee members and some of those home builders operating at the coal-face of Scotland's planning system. Several of them submitted their own evidence to the Bill. This could happen either on an individual or cross-Committee basis.

Finally, I am keen to continue my relationship with committee members and would be happy to meet for further discussions during the remainder of Stage 1 and as the Bill continues its progress.

Yours sincerely,

Tammy Swift-Adams
Director of Planning

cc All members of the Local Government and Communities Committee