



# The Scottish Parliament

## **Subordinate Legislation Committee**

### **41st Report, 2006 (Session 2)**

### **Planning (Scotland) Bill as amended at Stage 2**

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# The Scottish Parliament

## Subordinate Legislation Committee

### Remit and membership

#### Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

(a) any-

(i) subordinate legislation laid before the Parliament;

(ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter,

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; and

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

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

#### Membership:

Dr Sylvia Jackson (Convener)  
Mr Adam Ingram  
Gordon Jackson (Deputy Convener)  
Mr Kenneth Macintosh  
Mr Stewart Maxwell  
Euan Robson  
Murray Tosh

**Committee Clerking Team:**

**Clerk to the Committee**

Ruth Cooper

**Senior Assistant Clerk**

David McLaren

**Assistant Clerk**

Jake Thomas

**Support Manager**

Andrew Proudfoot



# The Scottish Parliament

## Subordinate Legislation Committee

### 41<sup>st</sup> Report, 2006 (Session 2)

#### Planning (Scotland) Bill as amended at Stage 2

The Committee reports to the Parliament as follows—

#### Introduction

1. At its meetings on 7 and 14 November 2006, the Committee considered the inserted or substantially amended delegated powers provisions in the Planning (Scotland) Bill as amended at Stage 2. The Committee reports to the Parliament on such provisions under Rule 9.7.9 of Standing Orders.
2. Under Rule 9.7.10, the Executive provided the Parliament with a revised delegated powers memorandum<sup>1</sup>.
3. Correspondence with the Executive is published in the Annex.

#### Delegated powers

4. The Committee considered all of the powers as set out in the Revised DPM and is content with section 2 – new section 7(1)(d) and (2)(a) of the 1997 Act, section 2 - new section 23D, section 5 – new section 27C, section 36, section 46A – new section 263A into the 1997 Act, section 48(13)(za) and section 48(13)(e).

#### **Section 2 - new section 12 of the 1997 Act – Examination of proposed strategic development plan**

5. At Stage 1, the Committee recommended that the Executive reconsidered the drafting of new section 12(3). It did not consider this section to be clear, as it appeared to both prescribe the form of hearings and leave it to the examiner's discretion. In particular, the Committee wished to clarify the definitions of the terms “form of examination”, which as drafted is to be at the discretion of the examiner, and “procedures to be followed” which as drafted are to be set out in regulations. The Committee was concerned that, should these terms have the same meaning, there could be confusion where the discretion of the examiner could allow for that person to choose, for example, whether a hearing is in public, without such matters appearing in regulations.

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<sup>1</sup> [Revised Delegated Powers Memorandum](#)

6. The Executive has explained that regulations would set out the procedures for each of the components of a hearing and that the discretion relates to the examiner's choice on the balance of the different approaches. The reporter's role in relation to the "form of examination" is simply the selection of different components, the procedures for which are to be prescribed in the regulations.

7. The Executive believes that the drafting is appropriate and has stated that it will ensure that the subsequent secondary legislation is clearly worded to flow from section 12(3).

**8. The Committee welcomes the helpful clarification from the Executive and is content with the provision.**

**Section 2 – new section 18 of the 1997 Act – preparation and publication of proposed local development plan**

9. The Committee noted that new section 18 has been amended at Stage 2 to include new delegated powers conferred by subsection (3A) and (3B). It was content that the power as to the manner of publication and notice was delegated appropriately. However, it noted that the power at section 18(3B) enables regulations to prescribe what modifications trigger the second round of notification. It noted that paragraph 33 of the revised DPM implies that modifications which are major will be prescribed but wished to ask the Executive for further explanation.

10. In its response, the Executive explained that the provision was added to ensure that further neighbour notification takes place where a planning authority intends to make a major change to the plan, following the consultation on the proposed plan. This might be required where a site included in the proposed plan attracts a large amount of objection and an alternative site is proposed by a landowner or developer. The Executive wished to ensure that everyone affected by an alternative site has an opportunity to comment on the plan and that further neighbour notification is carried out. The Executive considers that the regulations under section 18(3B) are therefore likely to centre on circumstances where new sites or issues emerge at the proposed plan stage.

**11. The Committee accepts the Executive's response and is content with the provision as drafted.**

**Section 2 – new section 19 of the 1997 Act – Examination of proposed local development plan**

12. The Committee considered section 19(5) at Stage 1 and recommended that the Executive should reconsider its drafting. As with section 12(3), the Committee was concerned that there may be potential conflict between procedures prescribed in regulations and the examiner's discretion.

13. In its response, the Executive explained that the provision and clarification of the relationship between prescribing the procedures to be followed, together with the reporter's discretion to decide on form of the examination, are as set out in relation to section 12(3) above. The Executive confirms that it did reconsider the

drafting of section 19(5) but for the reasons given in relation to section 12(3), chose not to amend it.

**14. The Committee is content with the explanation given by the Executive in relation to this power.**

**Section 2 – new section 19(10)(a)(i) – prescribing grounds for rejecting examiner’s modifications**

15. At Stage 1, the Committee considered that criteria for rejecting examiner’s modifications should appear on the face of the Bill, together with a power to amend the criteria from time to time. If that approach was to be adopted, the Committee recommended that such a power should be subject to affirmative procedure. At its stage 2, as amended, consideration of the Bill, the Committee asked the Executive what consideration it had given to this recommendation and also to provide justification for taking this significant power.

16. In its response, the Executive explained that it did examine whether the criteria should be included on the face of the bill but it considered it important to set out, in secondary legislation, the precise set of circumstances where departures will be allowed. This would provide scope to extend or reduce the criteria in light of experience as the new system progresses. The Executive is currently in the process of consulting on what the criteria should be.

**17. The Committee is concerned at the lack of specification on the face of the bill and therefore recommends strongly that the Executive amends this power to be subject to affirmative procedure on the first exercise of the power and negative procedure thereafter.**

**Section 2 - new section 22 of the 1997 Act – supplementary guidance**

18. The Committee noted that new subsection (9) responds in part to the Committee’s original concern in relation to the balance struck between planning authority discretion and Ministerial intervention. The Committee was concerned as to whether new subsection (9) will limit the flexibility that local authorities currently have in relation to guidance on local plans and make it necessary for them to incorporate policy advice, such as that contained in planning advice notes and policy planning papers, in supplementary guidance under proposed section 22 of the 1997 Act. The Committee therefore asked the Executive what matters it intends to specify, under proposed section 22(2)(b) of the 1997 Act, as matters to be dealt within supplementary guidance.

19. In its response, the Executive explained that while work has been done to examine the scope of current supplementary guidance, further discussion and consultation with planning authorities and others is required before the agreed list of matters for supplementary guidance can be finalised. That said, it considers that such guidance is likely to include more detailed and locally specific policies than would be seen in the development plan itself. The Executive explained that the overall objective is to ensure that unnecessary detail is removed from development plans, whilst at the same time ensuring that key planning policies are

not excluded from the development plan process and the additional scrutiny that this brings.

20. The Committee also requested information on the type of guidance that it is envisaged can be adopted and issued by a planning authority in connection with its local development plan, without recourse to section 22(2)(b).

21. In its response, the Executive explained that while authorities may find it advantageous to prepare statutory supplementary guidance so that it has increased status, they will still have significant discretion to bring forward non-statutory guidance. It considered that this might prove a useful route for detailed local matters which are relatively uncontroversial. The Executive indicated that it would not wish to prescribe the matters for non-statutory guidance, only to specify what must be in either the development plan or supplementary guidance, to ensure appropriate scrutiny.

22. The Committee also asked the Executive whether the exercise of the power in proposed section 22(2)(b) would result in the need for wholesale change to such plans in consequence of the requirement to alter non-statutory guidance on which they may be reliant.

23. In its response, the Executive explained that the changes to supplementary guidance must be seen in the context of the wider changes to development planning. Both are likely to come into force at the same time. As a result, planning authorities will in any case be looking again at the form and content of their development plans, in order to meet the new requirements for 5-yearly review and, taking into account the new provisions on the content of development planning and supplementary guidance, they will need to consider the most appropriate route to take forward their policies.

**24. The Committee notes the consultation to be undertaken by the Executive and accepts the Executive's position in relation to this power.**

#### **Section 4 – new section 26A – Hierarchy of developments**

25. The Committee considered this provision at Stage 1 and recommended that the first set of regulations made under this power should be subject to affirmative procedure, with subsequent exercises of the power being subject to negative procedure. The Committee asked the Executive to explain why it had not adopted this suggestion at Stage 2.

26. In its response, the Executive confirmed that after reconsideration, it proposes at Stage 3 to lay an amendment to new section 26A (4) requiring the regulations to follow affirmative procedure.

**27. The Committee welcomes the Executive's commitment to lay an amendment at Stage 3.**

**Section 5 – new section 27A – notification of initiation of development**

28. The Committee noted that this is a new power but that the revised DPM did not offer any explanation of the need for it, or what matters are intended to be prescribed. The Committee therefore asked the Executive what matters it intends to prescribe under this power, and for what purpose.

29. The Executive provided a full explanation of the need for the power (as detailed in the Annex) centring on enforcement monitoring, with which the Committee was content.

**30. The Committee is content with the power as drafted.**

**Section 15 – manner in which applications for planning permission are dealt with (amendment to section 43 of the 1997 Act)**

31. The Committee asked the Executive to provide an explanation as to why sub-delegation to directions was considered necessary, given that such directions are not subject to Parliamentary procedure. The Committee also sought justification for the use of negative procedure.

32. The Executive explained that the choice of direction-making power as opposed to regulations relates to the fact that the circumstances in which a direction will be used will arise on a case by case basis.

**33. The Committee, although not agreeing with the Executive's views in relation to sub-delegation, is content with the power as drafted.**

**Section 16 - new section 43A of the 1997 Act – local developments – schemes of delegation**

34. The Committee noted that section 16 has been amended at Stage 2 by the addition of matters which may be covered in regulations, but that these are subject to negative procedure. Given that this provides for the procedures for dealing with reviews of decisions of officials, the Committee asked the Executive why it considered negative procedure to be appropriate.

35. In its response, the Executive explained that the regulations to be made under section 43A will set out the procedures for a review conducted by virtue of section 43A(7) and the form that such a review will take. The regulations will provide a framework for handling reviews which, combined with the right of challenge to the courts, will provide an article 6 compliant procedure. The Executive considers that regulations under section 43A have the same essential characteristics as any rules or regulations which govern the procedure at hearings and inquiries, for which negative procedure is normally used.

36. The Executive added that the procedures for handling reviews will be developed with key stakeholders and will be subject to full public consultation before the regulations are laid.

**37. The Committee is content with the explanation given and the power as drafted.**

**Section 23A – new sections 136A and 145A of the 1997 Act – fixed penalties**

38. The Committee was content that the powers in these new sections are delegated, given that the level of penalty will be liable to shift with changes in the value of money. It did, however, observe that there is no restriction on the amount which may be prescribed and that the DPM offers no explanation of what limits are to apply.

39. The Executive explained that Fixed Penalty Notices (FPNs) are intended to offer planning authorities an alternative to prosecution for breaches of either Enforcement Notices or Breach of Condition Notices. It added that the intention on setting amounts for FPNs is that Ministers prescribe an incremental scale of fines with the amount of the fine reflecting previous convictions or payment of FPNs.

40. The Executive indicated that the incremental points on the scale and the criteria for determining these points have yet to be determined and will be consulted upon before implementation. The scale of fines in respect of Enforcement Notices should be between a minimum of £1,000 and a maximum of £5,000, subject to a discount of 25% for prompt payment. The maximum fine on summary conviction of an offence of breach of an Enforcement Notice is £20,000.

41. Although the Executive has indicated the range of amounts that it intends to prescribe, this is not reflected in the bill itself. The Committee considers that the power is not expressly restricted to maximum or minimum amounts or to changes in value of money. The Executive pointed to the Transport (Scotland) Act 2005 as a precedent, where it creates penalties under the New Roads and Street Works Act 1991 and the Roads (Scotland) Act 1984. However, fixed penalties under the 1991 Act are restricted in amount so as not to exceed 30% of the maximum fine for the relevant offence. Fixed penalties under the 1984 Act are also restricted.

**42. In the absence of any restriction to the amount which may be prescribed, the Committee recommends strongly that the power should be subject to affirmative procedure rather than negative procedure.**

**Section 36A – entitlement to vote in ballot**

43. The Committee noted that the new power in subsection (8) is a Henry VIII power enabling alteration of the Bill, but is subject only to negative procedure. The Committee considered that the DPM did not offer justification for the need for this power and asked the Executive for explanation.

44. In its response, the Executive indicated that subsection (8) of section 36A permits Ministers by regulations to alter who is to be an eligible person under subsection (5). This does not permit who is an eligible ratepayer under subsection (4) to be altered. Subsections (5), (6), (7) and (9) to (12) together provide what the Executive regards as a necessarily complex definition of those tenants and owners in the BID area who will be entitled to vote on proposals (where the BID proposal so provides) and of the order in which those eligible tenants and owners are

identified, for the various lands and heritages in the area. Given the required complexity of this, the Executive considers that there must be scope for Ministers in regulations to alter the definition of who is an eligible person under subsection (5), if this were to be required in future.

45. The Executive does not consider that it is necessary for this power to extend to altering subsection (6) or (7). It explained that subsection (8) is a power to alter who the eligible person under subsection (5) is, rather than a power to replace text in that subsection or in subsections (6) and (7). Whether section 51(1) and (2) could be used to further amend the Bill would depend on the nature of any future proposal to alter who the eligible person is under subsection (5).

46. The Executive noted the Committee's comment in relation to use of negative procedure for a Henry VIII power, and as a result of this, it is arranging to lay a Stage 3 amendment to the effect that the exercise of this power shall be subject to affirmative procedure.

**47. The Committee accepts the Executive's justification for the power and welcomes its commitment to lay an amendment at Stage 3 in order that the power will be subject to affirmative procedure.**

### **Section 37 – Approval in ballot**

48. The Committee noted that the DPM explains that the new powers at section 37 are needed to cover situations where ratepayers and tenants will each require to pay a levy or to determine how the rateable value element of voting will be distributed. However, the Committee noted that the power in subsection (8B) is a wide-ranging power which will enable variation of proportions of votes which can approve proposals in different situations.

49. The Executive has explained the need for the power in subsection (8A) and (8B) in detail and the Committee acknowledged that where the proposals affect a mix of eligible ratepayers and other eligible tenants or owners, some adjustment will be required. However, the Committee found it very difficult to anticipate what the resulting regulations will actually contain and how Scottish Ministers intend to alter the meaning of rateable values.

**50. The Committee therefore, whilst acknowledging the need for the power, recommends strongly that it should be subject to affirmative procedure when it is first used and subject to negative procedure thereafter.**

### **Section 39**

51. The Committee noted that the criteria at subsection (2B) may be amended by subsection (2C). It therefore asked the Executive why this Henry VIII provision is subject to negative procedure. The Executive acknowledged that the power should be subject to affirmative procedure and has agreed to lay an amendment at Stage 3 in this regard.

**52. The Committee welcomes the Executive's commitment to lay an amendment at Stage 3 in order that the power will be subject to affirmative procedure.**

**Section 43 – regulations about ballots**

53. The Committee asked the Executive what, if any, interaction there is between the power at section 43(2)(b) and those in sections 36A and 37.

54. In its response, the Executive explained that it considers it proper for the power in section 43(2)(b) to be restricted to renewal ballots, as section 36A makes all the provision that is needed in respect of initial ballots.

**55. The Committee welcomed this clarification and is content with the power as drafted.**

## **ANNEX**

**The Committee asked the Executive the following questions:**

### **Section 2 - new section 12 of the 1997 Act – Examination of proposed strategic development plan**

1. At Stage 1, the Committee recommended that the Executive reconsider the drafting of section 12(3). It did not find this section particularly clear, as it appeared to both prescribe the form of hearings and leave it to the examiner's discretion.

2. The Committee noted the Executive's explanation of the provision – namely that the examiner cannot invent new procedures but can select an appropriate procedure from those provided in Regulations. It considers that to apply the Executive's explanation, "form of examination" must mean the same as "procedures to be followed". However, quoting examples of form might be misleading if those particular features quoted – i.e. whether the hearing is to be in public or the making of oral or written representations – do not appear in the resulting regulations, or appear in a different way. Accordingly, the Committee considers that the provision is ambiguous.

**3. The Executive is asked whether it did reconsider the drafting of section 12(3) in this regard and, if it did, whether it concluded that the provision was sufficiently clear.**

### **Section 2 – new section 18 of the 1997 Act – preparation and publication of proposed local development plan**

4. The Committee notes that new section 18 has been amended at Stage 2. It considers that the delegated powers as to manner of publication and notice are appropriate. The power in s18(3B) however, is potentially more significant as it enables regulations to prescribe what modifications trigger the second round of notification. It notes that paragraph 33 of the revised DPM implies that modifications which are major will be prescribed.

**5. The Executive is asked to explain which modifications are likely to be prescribed.**

### **Section 2 – new section 19 of the 1997 Act – Examination of proposed local development plan**

6. The Committee considered section 19(5) at Stage 1 and recommended that the Executive reconsidered the drafting of section 19(5) in order to clarify it. The same point arises in relation to this section as arises on section 12(3) above (i.e. the conflict between procedures prescribed in regulations and the examiner's discretion). The Committee notes that no clarification of the provision has been provided by the Executive.

**7. The Executive is asked whether it reconsidered the drafting of section 19(5) and, if so, why it has chosen not to amend it.**

**Section 2 – new section 19(10)(a)(i) – prescribing grounds for rejecting examiner’s modifications**

8. At Stage 1, the Committee questioned why no criteria appeared on the face of the Bill along with a power to amend the criteria from time to time. If that approach was to be adopted, the Committee recommended that such a power should be subject to affirmative procedure.

9. The Committee notes that the revised DPM offers no justification for the power as drafted, nor has it been amended. It considers that this is a significant power, which the Executive has not justified.

**10. The Executive is asked what consideration it gave to the Committee’s recommendation at Stage 1; and to provide justification for taking this significant power.**

**Section 2 - new section 22 of the 1997 Act – supplementary guidance**

11. At Stage 1, the Committee asked the Executive about the voluntary nature of adopting supplementary guidance and whether local authorities might avoid issuing such guidance to avoid regulation by Ministers. It also asked about the freedom of local authorities to adopt supplementary guidance where they saw fit, subject to the procedural requirements set out in regulations.

12. In its response, the Executive stated it was looking again at the detailed drafting of this section, and in particular the balance between planning authority discretion and Ministerial intervention.

13. New subsection (9) responds in part to the Committee’s concern. Whilst it is now clear that non-statutory guidance may be issued, the Committee notes that it must not overlap with the matters which statutory guidance will cover. It may be thought this is necessary to avoid potential conflict between statutory and non-statutory guidance, however, it does mean there might be very little residual need or advantage in producing non-statutory guidance.

14. The Committee is concerned as to whether new subsection (9) will limit the flexibility that local authorities currently have in relation to guidance on local plans, and make it necessary for them to incorporate policy advice, such as that contained in planning advice notes and policy planning papers (which currently may be integrated into non-statutory guidance), in supplementary guidance under proposed section 22 of the 1997 Act.

**15. The Executive is asked what matters it intends to specify (under proposed section 22(2)(b) of the 1997 Act) as matters to be dealt with in supplementary guidance.**

**16. Further, the Committee requests information on the type of guidance that it is envisaged can be adopted and issued by a planning authority in connection with its local development plan, without recourse to section 22(2)(b).**

**17. In particular, will the exercise of the power in proposed section 22(2)(b) result in the need for wholesale change to such plans in consequence of the requirement to alter non – statutory guidance on which they may be reliant?**

**Section 4 – new section 26A – Hierarchy of developments**

18. The Committee considered this power at Stage 1 and recommended in the absence of an adequate explanation from the Executive, that the first set of regulations made under this power should be subject to affirmative procedure, with subsequent exercises of the power being subject to negative procedure.

**19. The Executive is asked to explain why it has not adopted the suggestion made by the Committee.**

**Section 5 – new section 27A – notification of initiation of development**

20. The Committee notes that this is a new power but that the revised DPM does not offer any explanation for the need for the power or what matters are intended to be prescribed.

**21. The Executive is asked what matters it intends to prescribe under this power, and for what purpose.**

**Section 15 – manner in which applications for planning permission are dealt with (amendment to section 43 of the 1997 Act)**

22. At Stage 1, the Committee was concerned that the Executive had provided no justification for the use of the negative procedure, and had not explained why the prescription of classes of development will be sub-delegated to directions.

**23. The Executive is asked to provide an explanation as to why sub-delegation to directions was necessary (thereby not being subject to Parliamentary procedure). The Committee also seeks justification for the use of negative procedure.**

**Section 16 - new section 43A of the 1997 Act – local developments – schemes of delegation**

24. At Stage 1, the Committee was concerned by the apparent downgrading of decision making to an official and asked for further explanation of ECHR compatibility. The Committee felt it could not judge the use of the powers without seeing the draft regulations and it recommended affirmative procedure should be attached to the power.

25. The Committee notes that section 16 has been amended at Stage 2 by the addition of matters which may be covered in Regulations, but that these are subject to negative procedure.

**26. The Executive is asked why it considers negative procedure to be appropriate.**

**Section 23A – new sections 136A and 145A of the 1997 Act – fixed penalties**

27. The Committee is content that the powers in these new sections are delegated, given that the level of penalty will be liable to shift with the change in value of money.

28. It did, however, observe that there is no restriction on the amount which may be prescribed and that therefore the power is not restricted to such changes. The DPM offers no explanation of what limits are to apply.

29. Without any restriction to the amount which may be prescribed, the Committee considers that affirmative procedure is warranted.

**30. The Executive is asked to justify the use of negative procedure and to explain its intentions as to setting minimum and maximum amounts.**

**Section 36A – entitlement to vote in ballot**

31. The Committee notes that the new power in subsection (8) is a Henry VIII power enabling alteration of the Bill, and is subject only to negative procedure. The DPM offers no justification for the need for this power.

**32. The Executive is asked to justify the need for this power; whether the power should extend to altering subsection (6) and (7) (or whether it considers it could rely on section 51(1) and (2) to amend the Bill to make supplementary/incidental/consequential provision); and why negative procedure is deemed to be appropriate.**

**Section 37 – Approval in ballot**

33. The Committee notes that the DPM explains that the new powers here are needed to cover situations where ratepayers and tenants will each require to pay a levy or to determine how the rateable value element of voting will be distributed.

34. The Committee notes that the power in subsection (8B) is a wide-ranging power which will enable variation of proportions of votes which can approve proposals in different situations.

35. Unfortunately, the receipt of the revised DPM so close to its consideration of the Bill as amended has meant that the Committee has not been able to scrutinise this power in detail.

**36. The Executive is asked to provide further explanation as to how the power is to be used.**

**Section 39**

37. The Committee noted that the criteria at subsection (2B) may be amended by subsection (2C).

38. The Executive is asked why this Henry VIII provision is subject to negative procedure.

**Section 43 – regulations about ballots**

39. The Committee notes that Section 43(2)(b) has been amended.

40. It observed that section 43(2) makes provision for *renewal* of BID arrangements, upon further ballot. Accordingly, the amended provision is restricted only to *renewal* ballots, not the first ballot. The power in section 36A(8) enables regulations to be made altering who of domestic ratepayers is eligible to vote. There does not appear to be an equivalent power as regards non-domestic ratepayers.

**41. The Executive is asked what, if any, interaction there is between this power and those in sections 36A and 37.**

**The Scottish Executive responded as follows:**

**Section 2**

**New section 12 of the 1997 Act – Examination of proposed strategic development plan**

1. The Committee asks the Executive whether it reconsidered the drafting of section 12(3) and, if it did, whether it concluded that the provision was sufficiently clear. I confirm that the Executive did reconsider the drafting of this section. As indicated in our letter of 21 March 2006, the Bill allows for the procedures for development plan examinations to be set out in secondary legislation. The issue is that an ‘examination’ may comprise a range of different components, including: the written submissions procedure for minor issues; hearings and round table discussions for more effective discussion; and inquiries for the more complex technical issues. The secondary legislation would set out procedures for each of these components, but the issue of discretion relates to the reporter’s choice on the balance between all these different approaches in any one examination. In other words, the reporter may decide that written submissions and a hearing will be required, and not an inquiry, but once that is decided he/she must follow the relevant procedures for that approach, as set out in secondary legislation. Therefore the ‘form of the examination’ i.e. the selection of different components, is different from the ‘procedures to be followed’ i.e. the prescribed procedures for each component of the examination. For that reason, we believe that the drafting is appropriate and will ensure that the subsequent secondary legislation is clearly worded to flow from section 12(3).

**New section 18– preparation and publication of proposed local development plan**

2. The Committee asks the Executive to explain which modifications are likely to be prescribed under s18(3B). This provision is added to ensure that further neighbour notification takes place where a planning authority intends to make a major change to the plan following the consultation on the proposed plan. This might be required where a site included in the proposed plan attracts a large amount of objection and an alternative site is proposed by a landowner or developer. The planning authority may now consider this alternative site to be preferable but, in order to ensure that everyone affected by the alternative site has had an opportunity to comment on the plan, further neighbour notification should be carried out. The regulations under s18(3B) are therefore likely to centre on circumstances where new sites or issues emerge at the proposed plan stage.

**New section 19 – Examination of proposed local development plan**

3. The Committee suggested that no clarification of the provision has been provided by the Executive. As the Committee points out, the provision is the same as that in s12(3) and therefore the explanation of the provision and a clarification of the relationship between prescribing the procedures to be followed and the reporter’s discretion to decide on form of the examination, is set out above. As with

s12(3), I confirm that the Executive did reconsider the drafting of section 19(5) but for the reasons given above, has chosen not to amend it.

**New section 19(10)(a)(i) – prescribing grounds for rejecting examiner’s modifications**

4. The Committee asks what consideration was given to the Committee’s recommendation at Stage 1 relating to the inclusion of criteria on the face of the Bill, and to justify the proposal. Turning to the latter point first, the Executive provided justification for this power in its letter to the Committee on 21 March 2006. The justification is that the ability of planning authorities to cast aside the reporter’s recommendations can undermine the purpose of the inquiry and be perceived as unfair, particularly where the council has a financial interest in the sites in the development plan. To add to this, the Executive consulted on the proposal in *Getting Involved in Planning* (2001) where an overwhelming majority of respondents were in favour, including around half of local authorities. We consider the proposal to be one of the key measures to help restore public trust and confidence in the planning system, by giving reassurance that participation in development planning will be meaningful.

5. As also stated in our letter of 21 March 2006, we have considered whether the criteria should be included on the face of the Bill. However, it is considered important to set out the precise set of circumstances where departures will be allowed in secondary legislation, to provide scope to extend or reduce the criteria in light of experience, as the new system progresses. We are aware of a range of views from planning authorities and others about what those criteria should be and, over the coming months, we want to work with them to establish an appropriate and practical list.

**New section 22 – supplementary guidance**

6. The Committee asks the Executive what matters it intends to specify (under proposed section 22(2)(b) of the 1997 Act) as matters to be dealt with in supplementary guidance. While work has been done to examine the scope of current supplementary guidance, further discussion and consultation with planning authorities and others is required before the agreed list of matters for supplementary guidance can be finalised. That said, such guidance is likely to include more detailed and locally specific policies than would be seen in the development plan itself, for example, a development brief or masterplan that provides much more detail on the specific location and type of development sought. Statutory supplementary guidance might also be used to provide an interim policy position in the face of emerging national or international policies, in advance of a full development plan review. The overall objective is to ensure that unnecessary detail is removed from development plans, and at the same time to ensure that key planning policies are not excluded from the development plan process and the additional scrutiny that this brings.

7. The Committee also requests information on the type of guidance that it is envisaged can be adopted and issued by a planning authority in connection with its local development plan, without recourse to section 22(2)(b). While authorities

may find it advantageous to prepare statutory supplementary guidance so that it has increased status, they will still have significant discretion to bring forward non-statutory guidance. This might prove a useful route for detailed local matters which are relatively uncontroversial, such as the design of dormer windows in a conservation area, which would be specific to that planning authority and likely to remain relevant much longer than the development plan itself. The Executive would not wish to prescribe the matters for non-statutory guidance, only to specify what must be in either the development plan or supplementary guidance, to ensure appropriate scrutiny.

8. The Committee also asks whether the exercise of the power in proposed section 22(2)(b) will result in the need for wholesale change to such plans in consequence of the requirement to alter non – statutory guidance on which they may be reliant? The changes to supplementary guidance must be seen in the context of the wider changes to development planning. Both are likely to come into force at the same time. As a result, planning authorities will in any case be looking again at the form and content of their development plans in order to meet the new requirements for 5-yearly review and, taking into account the new provisions on the content of development planning and supplementary guidance, they will need to consider the most appropriate route to take forward their policies.

#### **Section 4– New section 26A -Hierarchy of developments**

9. The Executive considered the merits of using affirmative procedure for making the regulations under new section 26A (2) and has now laid a stage 3 amendment to new section 26A (4) requiring the regulations to follow affirmative procedure.

#### **Section 5 - New Section 27A - Notification of initiation of development.**

10. The proposals to introduce a requirement to submit a Notification of Initiation of Development (NID) prior to commencing development should be viewed as part of a package of measures intended to improve delivery of planning enforcement and promote greater pro-active enforcement; by seeking positive confirmation that development has commenced, the onus will be on the developer to ensure that pre-conditions have been met. Planning authorities will also be made aware of active development in their areas, enabling them to prioritise resources with a view to monitoring development. There would also be a potential 'carrot and stick' incentive to developers in that earlier identification of breaches would enable them to be corrected more easily and cost effectively than if they were identified later in the development process, while there was more likelihood of enforcement action if they were identified to have made a false declaration.

11. The purpose of prescribing further information to be included in a NID would be to further enhance their usefulness in allowing the PA to take an informed view on the level of enforcement monitoring (and therefore resources allocated) they considered appropriate for each individual case. Where it transpired that a developer had a track record of breaching planning conditions, the PA would be expected to pay closer attention to the progress of the development. Requiring

developers to provide this information would also have the effect of increasing awareness of the possibility and consequences of enforcement

12. To this end the prescribed information might include information relating to previous breaches of planning control.

13. A draft list of prescribed information to be included in a NID would be part of a consultation exercise on planning enforcement provision to inform the development of secondary legislation.

**Section 15 – manner in which applications for planning permission are dealt with (amendment to section 43 of the 1997 Act)**

14. Section 15 of the Bill amends section 43 of the 1997 Act to enable Scottish Ministers to give directions to the planning authority requiring certain conditions to be imposed on a grant of planning permission or for further information to be considered prior to determination. There are no new regulations introduced under section 15 of the Bill. The choice of direction making power as opposed to regulations relates to the fact that the circumstances in which a direction will be used will arise on a case by case basis.

**Section 16 – New section 43A - local developments – schemes of delegation**

15. The regulations to be made under section 43A will set out the procedures for a review conducted by virtue of section 43A(7) and the form that such a review will take. The regulations will provide a framework for handling reviews which, combined with the right of challenge to the courts, will provide an article 6 compliant procedure. The Executive consider that regulations under section 43A have the same essential characteristics as any rules or regulations which govern the procedure at hearings and inquiries, and that negative procedure is normally used in such cases.

16. The procedures for handling reviews will be developed with key stakeholders and will be subject to full public consultation before the regulations are laid.

**Section 23A - New sections 136A and 145A - Fixed Penalty Notices**

17. Fixed Penalty Notices (FPNs) are intended to offer planning authorities an alternative to prosecution for breaches of either Enforcement Notices or Breach of Condition Notices. The intention on setting amounts for Fixed Penalty Notices (FPNs) is that Ministers prescribe an incremental scale of fines with the amount of the fine reflecting previous convictions or payment of FPNs.

18. The incremental points on the scale and the criteria for determining these points have yet to be determined and will be consulted upon before implementation. The scale of fines in respect of Enforcement Notices should be between a minimum of £1,000 and a maximum of £5,000 (subject to a discount of 25% for prompt payment). The maximum fine on summary conviction of an offence of breach of an Enforcement Notice is £20,000.

19. For breach of a Breach of Condition Notice, the maximum fine on conviction is currently £1,000 (level 3 on the standard scale) and the level of an FPN issued in regard to a Breach of Condition Notice would be correspondingly lower, at between £100 and £300 (again subject to 25% discount for prompt payment).

20. These penalty maxima would be in line with established precedent (for example The Transport (Scotland) Act 2005) that Fixed Penalties be set at up to a maximum of 30% of the maximum fine that may be imposed on conviction for the offence (following this precedent would have allowed for a maximum fine of up to £6,000 for breach of an Enforcement Notice).

21. Previous legislation introducing fixed penalties has also set a precedent for the use of negative procedure in setting the level of the penalty. We do not see that there are any significant factors in this case that would necessitate the use of positive procedure.

### **Section 36A – Entitlement to vote in Ballot**

22. Subsection (8) of section 36A permits Scottish Ministers by regulations to alter who is to be an eligible person under subsection (5). This does not permit who is an eligible ratepayer under subsection (4) to be altered. Subsections (5),(6), (7) and (9) to (12) together provide what we regard as a necessarily complex definition of those tenants and owners in the BID area who will be entitled to vote on proposals (where the BID proposal so provides) and of the order in which those eligible tenants and owners are identified, for the various lands and heritages in the area.

23. Given the required complexity of this, it is considered that there must be scope for Ministers in regulations to alter the definition of who is an eligible person under subsection (5), if this were to be required in future.

24. We do not consider that it is necessary for this power to extend to altering subsection (6) or (7). Subsection (8) is a power to alter who the eligible person under subsection (5) is, rather than a power to replace text in that subsection or in subsections (6) and (7). Whether section 51(1) and (2) could be used to further amend the Bill would depend on the nature of any future proposal to alter who the eligible person under subsection (5) is.

25. We note the Committee's comment in relation to use of negative procedure for a Henry VIII power. We are arranging to lay a Stage 3 amendment to the effect that the exercise of this power shall be subject to affirmative procedure.

### **Section 37 – Approval in ballot**

26. The Committee requests explanation of how the power in subsection (8B) is to be used. This provision relates to the second of the four voting conditions that require to be satisfied before proposals may be approved. This condition requires the total of the rateable values of the lands and heritages in respect of which a person votes in favour to be greater than the same total voting against.

27. Subsection (8B) is directed at the situation where both eligible ratepayers and other eligible tenants/owners are entitled to vote on proposals. In that situation, the rateable value of lands and heritages for voting purposes requires to be allocated between the ratepayers and the other tenants/owners, upon an appropriate percentage allocation (for example, 75/25). However, that allocation will depend on the respective benefits accruing to ratepayers and the other persons and the respective proportions of the BID levy to be paid as between those persons. That in turn depends on the nature of the particular BID proposal.

28. Subsection (8B) will enable the BID proposers to assess within the BID proposals that appropriate percentage allocation between ratepayers and other persons voting. That mechanism is proposed to be included in the regulations under section 37, but by subsection (8A) Ministers shall retain the ability in regulations to set that percentage allocation between ratepayers and the other persons voting.

### **Section 39 – Power of veto**

29. We note your comments in relation to the use of negative procedure in section 39(2C). Accordingly, we have laid an amendment at Stage 3 of the Bill which will require affirmative procedure for the use of this power.

### **Section 43 – Regulations about ballots**

30. In accordance with the reply above on section 36A, subsection (8) will enable Ministers by regulations to alter who can be an eligible person under subsection (5). That would apply for those BID proposals where both ratepayers and other persons are involved in approving proposals. There is no need to have a power to alter who can be an eligible ratepayer, because ratepayers will always be involved in a BID. Section 36A(3)(b) permits the statement within BID proposals to specify that only those eligible ratepayers or other persons voting in respect of properties of particular descriptions will be entitled to vote. For example, a BID involving retail shop properties.

31. The power in section 43(2)(b) can be limited to renewal of arrangements ballots under section 42(2) because those provisions in section 36A provide for the persons entitled to vote in an original ballot. If necessary, the power in section 43(2)(b) will allow some adjustment of the persons entitled to vote in renewed BID arrangements after several years. That may usefully be required, for example, if the nature of the commercial properties in the BID area were to change substantially between the time of the original ballot and the renewal ballot.



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