25 April 2018

Dear Graham,

Thank you for the Committee’s report on the Planning (Scotland) Bill at Stage 1, published on 13 March 2018. I am grateful for the Committee’s careful consideration of the Bill and the additional information provided by officials, and for the opportunity to give oral evidence to the Committee.

I enclose the Scottish Government’s response to your report. I am also copying this letter to the Convener of the Local Government and Communities Committee, for their information.

Yours ever,

KEVIN STEWART
Regulation-making powers

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

19. The Committee therefore calls on the Government to amend the Bill so that significant amendments to the NPF resulting in a change to the overall policy become subject to specific public and parliamentary consultation requirements set out on the face of the Bill.

20. On the basis that these amendments were made, the Committee is content that the negative procedure applies to setting the procedure for minor amendments to the NPF. However, the Committee’s preference would be that any provision for periodic parliamentary consideration of such minor issues was set out on the face of the Bill.

21. If the Government were not willing to set the threshold on the face of the Bill, the Committee considers that the Government should apply the affirmative procedure to the scrutiny of regulations, made under new section 3CA(3) inserted by section 7(2) of the Bill, setting the scrutiny procedures. However, the Committee considers this secondary option to be unsatisfactory as it should not be for Ministers in regulations to decide the form of parliamentary scrutiny that will apply to the NPF.

As the Minister explained in his evidence to the Committee on 20 February, it is hoped in future to use innovative approaches and new technology to allow for rapid updating of the NPF in response to real-time data. This requires flexibility in the procedures for amendments. However, the Scottish Government understands the Committee’s concern that other amendments could make significant changes to policy, and therefore should be subject to greater scrutiny.

We welcome the Committee’s recognition of this distinction between major and minor amendments to the NPF. We will bring forward amendments to the Bill at Stage 2 to place procedures for significant amendments to the NPF on the face of the Bill, and will consider how to make appropriate arrangements for minor amendments.

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

30. Accordingly, the Committee accepts the Scottish Government’s undertaking to amend the Bill at Stage 2 to set out on the face of the Bill the types of land that may not be included in an SDZ scheme, with a power included to add or remove entries by regulations subject to the affirmative procedure.

The Scottish Government welcomes the Committee’s acceptance of this undertaking.

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Section 21 – Fees for planning applications etc.

39. The Committee accepts the Scottish Government’s undertaking to consider further whether the Scottish Ministers should also have a power to waive or reduce a fee that they charge.

41. Accordingly, the Committee encourages the Scottish Government’s to consider applying additional restrictions and greater scrutiny to the surcharge provisions in section 21 of the Bill.

The Scottish Government is grateful to the Committee for highlighting this point. We agree that it would be helpful for the Scottish Ministers to have a power to waive or reduce a fee that they charge, and will bring forward amendments to put this in place.

The Committee mentions the requirement, noted in the Delegated Powers Memorandum, for any penalty to be set at a reasonable level to comply with the European Convention on Human Rights. To be clear, that consideration of compliance would take place when the penalty is set in regulations, and does not of itself require any further restriction in the primary legislation. The Scottish Government will however give further consideration to the Committee’s recommendation in this regard.

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

54. The Committee recommends that the Bill is amended at Stage 2 to ensure that the functions of the National Planning Performance Coordinator are set out in full on the face of the Bill.

55. If the Scottish Government does not lodge an amendment to the Bill to set out the functions of the National Planning Performance Co-ordinator in full, the Committee considers that the affirmative procedure should be applied to the regulation-making power in new section 251B(3).

While the regulations are intended primarily to set out how the National Planning Performance Coordinator will carry out their functions of monitoring and advising on performance, the Scottish Government considers that it is preferable also to have the ability to amend the Coordinator’s functions. This will allow them to be updated in response to changes in performance monitoring developed in discussion with stakeholders. However, given the level of concern expressed on this issue we will bring forward an amendment to the Bill at Stage 2 to make these regulations subject to the affirmative procedure.

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Section 27 – Power to provide for infrastructure levy

74. Accordingly, the Committee recommends that a form of super-affirmative procedure would be appropriate to guarantee a requirement to consult publicly and to ensure that the Parliament can control the exercise of the very wide powers in schedule 1 to make infrastructure-levy regulations.

We welcome the Committee’s recognition that providing for the infrastructure levy in regulations will allow flexibility to adapt to changes in economic circumstances. The Scottish Government does not agree that super-affirmative procedure would be appropriate in this situation. However, we note the Committee’s concern to ensure public consultation on the use of these powers, and would be happy to bring forward an amendment at Stage 2 introducing a statutory requirement for public consultation prior to the Scottish Ministers laying any regulations under these provisions.

75. In addition, the Committee calls on the Scottish Government to reconsider the powers identified at paragraphs 72(a) to 72(c) above with a view to ensuring that those powers are framed more clearly and that the powers are no more than are necessary and proportionate.

In relation to (a) criminal penalties, as set out in the Scottish Government’s written response to the Committee’s questions, attempts to evade the levy on major developments could deprive the infrastructure fund of significant sums, and it is therefore appropriate to have substantial penalties available for such offences. Further consideration and consultation is required, prior to making regulations, as to whether any additional offences should be provided for that would justify penalties capped at a lower level.

(b) and (c) refer to powers to make provision about how other powers relating to planning or development may be exercised. It is not possible to provide detail on the face of the Bill about the relationship between the infrastructure levy and other legislation before the final model for the levy has been determined. The Scottish Government considers that the provision in paragraph 16(2)(a) of Schedule 1, limiting the power to provisions that enhance the effectiveness of the infrastructure levy, does appropriately limit the scope of the powers provided by paragraph 16(1).

76. 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. The application of the affirmative procedure limits the Parliament to accepting or rejecting regulations in their entirety that make provision on substantive policy matters.

The Scottish Government notes the Committee’s views in this matter.

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Section 30 – Power to change meaning of “infrastructure”

81. The Committee accepts the Scottish Government’s undertaking to amend section 30 of the Bill at Stage 2 to refer to "schedule 1" rather than "the schedule".

The Scottish Government welcomes the Committee’s acceptance of this undertaking.

Direction-making powers

Oversight for significant direction-making powers generally

92. In light of the above, the Committee recommends that there should be a requirement on the face of the Bill to publish all directions made under the provisions in the Bill and to give reasons for making those directions.

93. The Committee also calls on the Scottish Government to amend the Bill to include a requirement for it to periodically report to the Parliament on the use of the more significant direction-making powers contained in the Bill identified in paragraphs 90 (a) to 90(d) above.

As has been made clear, all directions made under existing planning legislation are routinely published and include the reasons for making them as a matter of good practice. If a statutory requirement to do so is to be introduced, the Scottish Government’s view is that it would more appropriately apply to all directions made under powers in the 1997 Act, not just those introduced by the Bill. We will bring forward amendments at Stage 2 to put such a requirement in place.

The Scottish Government does not consider it appropriate to require the Scottish Ministers to report to Parliament on the use of direction-making powers. All directions are in the public domain, and this will be guaranteed by a requirement to publish, and the Parliament can call the Planning Minister to account for their use at any time.

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

102. Accordingly, the Committee encourages the Minister to include a requirement in the Bill for the Scottish Ministers to give reasons for the choice of body that the functions are transferred to under a "transfer of functions direction" made in terms of section 25(1) of the Bill.

The Scottish Government notes the Committee’s concern that there should be transparency over the choice of body the functions are transferred to. As explained by the Minister in his evidence to the Committee, on the rare occasion that the power may need to be used, the choice is expected to depend on a range of factors such as the capacity and characteristics of the planning authority, to ensure the authority receiving the functions has similar experience of relevant issues. We are content to bring forward amendments at Stage 2 to implement this recommendation.

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103. Further, the Committee recommends that as a matter of transparency there should also be a requirement on the face of the Bill for the Scottish Ministers to publish an explanation setting out the circumstances that have led to the transfer of functions direction being made.

The Scottish Government would reiterate that the Scottish Ministers could only make a transfer of functions direction where a planning authority was unable to exercise its functions because it did not have sufficient elected members who had undergone the required training. The reason for making the direction would be the lack of trained members in the authority. It will be for the planning authority to ensure that their elected members are aware of the requirements and have the opportunity to undertake the training, and only the planning authority could explain the circumstances that resulted in their inability to exercise their functions. Any requirement to publish an explanation would therefore need to be based on a statement made by the authority, rather than by the Scottish Ministers.

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

113. The Committee therefore calls on the Scottish Government to provide further explanation as to how it intends to address the issue of the removal of parliamentary oversight that would result from an SDZ scheme both disapplying provision contained in the advertising regulations made under section 182 of the 1997 Act and making any alternative provision.

The Scottish Government’s intention in including advertisement consent in SDZs is to reduce the number of separate applications a developer needs to make for different consents. It is not intended that an SDZ scheme should be able to grant consent for advertisements that would not be allowed elsewhere under the provisions of the advertising regulations, but it should be able to grant consent within those provisions, which may be subject to additional conditions or limitations appropriate to the type of development permitted by the scheme. This would be similar to the way in which an SDZ scheme grants planning permission, road construction consent and listed building and conservation area authorisation, under section 54B(3) of the 1997 Act, inserted by section 10 of the Bill. We are working to bring forward amendments to more accurately reflect this intention and to remove the reference to disapplying regulations made under section 182.