Local Government and Communities Committee
Planning (Scotland) Bill
Submission from Cushman and Wakefield

Thank you for the opportunity to comment on the Planning (Scotland) Bill 2017 - Legislation to amend The Town and Country Planning (Scotland) Act 1997 and introduce further reform to Scottish Planning practice.

Cushman and Wakefield is a leading global real estate and professional services company. The company has two offices located in Scotland and recently hosted a series of presentations to existing clients including investors, landowners, developers and other consultants who regularly engage with the planning system.

At these presentations, Cushman’s Development and Planning Team introduced and summarised the significant changes proposed by Bill and encouraged direct feedback from those attending the events and therefore obtained a sample of views from the development sector that we represent as planning agents.

Interim Comments

It is difficult to offer meaningful comment on specifics affecting the procedural changes proposed – since much of the proposed reform has yet to be detailed fully in secondary legislation that has yet to be published. However, please see below some initial observations and an outline of some concerns about the new Bill.

The view is sometimes expressed that the administration of planning control is broken – this is an unfair exaggeration often levelled by critics of the current system but there is a sense, borne of practical experience, that the planning system in practice is not functioning well presently because it is too complex and tries to do too much. This Bill presents an opportunity for root and branch reform to simplify procedures and consolidate planning and environmental controls, ensure transparency and fairness, to promote good governance and engender public confidence.

Planning Reform – Radical Approach Required

Unfortunately, the Legislation as introduced is not very radical, nor is it likely to transform the current system by any significant degree to facilitate development and boost Scotland’s economy. It has been described by some of those attending the presentations as a “fine tuning” or an evolution of existing practice. The Bill amends the 1997 Act though a new Principal Act would have been more welcome at this point.

The reform agenda was initially driven by a desire to: promote better planning performance, improve built outcomes, support economic growth; also, a desire to
promote greater public confidence and wider engagement in planning. When the process commenced some few years ago there appeared to be the promise of quite radical reform and so the outcome is disappointing.

The Problem

It is not easy or always practicable to reconcile the conflicts that may arise between private investment and the public interest; cope with the demands and pressures of a modern market economy and still impose reasonable controls over investment decisions affecting the built and natural environment, under democratic oversight. Planning practitioners are expected to make aesthetic, technical, environmental and financial judgements (that they are often poorly equipped or trained to assess), to capture land value for public benefit, administer many different environmental directives and empower communities to have some say in the future planning and development of land.

These conflicts have beset planning practice in Scotland since its modern inception and will likely continue but as planning regulation and practice has evolved and expanded over decades it has become less adept at making sound decisions promptly because it has been permitted to become over-complex.

Over-Complex

The problems with the current system have grown worse as successive Governments, Local Government and the planning profession have sought (and struggled) to achieve more through the administration of planning control than it can deliver well.

Although there is general recognition that the system is not always working capably, this is because Legislation and policy interventions has made it so, yet there is recrimination particularly in political and media circles that either not enough new homes are being built and that excess bureaucracy weakens economic activity or the environment is not adequately protected and communities are unable to stand up to developer pressure.

Planning practitioners, the planning system and the development industry are in turn blamed without real understanding of the problem – a system of land use planning conceived in the post war era is now being asked to do too much whilst the development industry is commercially driven and profit motivated; it is not an instrument of Government. Because the system is so complex, often subjective and there is much at stake commercially and financially, planning practice has become unpredictable, mired in legal challenge, increasingly adversarial and over-cautious. There is scepticism that the new Legislation now before the Scottish Parliament can transform this deeply rooted established order, achieve the desired cultural change or make a significant difference to the frustrations and dissatisfaction about planning practice that can attract so much criticism.
Some of the recent changes in planning practice are very positive and should be welcomed. The use of modern information technology has improved the administration of development management and development planning processes and offered improvements in document handling, stakeholder engagement and introduced significant improvements in public access to information and transparency. However, despite this progress, the system is perceived to be overly cumbersome, capricious and unable to make even straightforward decisions quickly and efficiently.

While speed of caseload handling and development plan preparation are very important, the experience of Cushman and Wakefield Consultants suggests that carping around validation delays, administration and processing times is of secondary concern. Competency, consistency, fair dealing, transparency and meaningful recourse to appeal are more important principles that cannot be sacrificed to achieve speed and efficiency.

Development Planning

The reforms to LDP preparation advocated by the new Bill are generally supported if Plans will be prepared more quickly and kept up to date. The five-year plan cycle is now well understood and working. It encourages regular landowner and community engagement and provides an opportunity to reflect and refresh every few years. A ten-year cycle, advocated by the Bill, will be less responsive to change. Accordingly, this aspect of the Bill should be reconsidered.

It is true that an over-dependence upon complex spatial and strategic plans and the process of plan preparation is very time-consuming and it has sometimes not brought forward adequate opportunities for development in the right places. The plan-led system imposes quite rigid limitations upon the development industry, imposes strict control over land release, and is often frustratingly slow to respond to failure even when the shortcomings are evidenced.

The decision to abolish strategic development plans may assist although some form of strategic planning and coherent intervention at the regional level remains a worthwhile aim, particularly so to address transboundary issues. It would also be a matter of regret if valuable skills and professionalism in strategic planning were lost to be replaced by a new emphasis on community-led planning which is likely to be far less rigorous.

The decision to abolish Supplementary Planning Guidance is broadly welcomed as there is now a plethora of poorly conceived, highly detailed policy that is difficult to interpret and often over-reaches. Technical and Design Guidance is helpful and necessary but it should be measured and undergo proper scrutiny at the proposed Assessment of Evidence stage of LDP preparation.
Most disappointingly, the Scottish Government remains aligned to the plan-led system introduced in 1991. Since the decision nearly 30 years ago to give primacy to the Development Plan and reverse the previous presumption in support of development, the process of obtaining land allocations and planning approvals has become progressively more challenging.

Section 25 of the Act should be reformed; the principle of Development Plan primacy should be discontinued and a clear statutory presumption that supports sustainable development and sustainable economic growth should be substituted – which is not very different to the approach to planning law and practice for the period between 1947 and 1991.

The reforms to Development Planning and LDP preparation suggested in the Bill do not address this fundamental issue. Development Plans should help guide development and set out clearly the broad policies against which development will be assessed by Planning Authorities but planning decisions about the development of land above all should be merit and evidence based and involve professional judgement.

**Development Management**

The Scottish Government should restore the principle and presumption that development is supported, unless demonstrably injurious to the public interest, also confront overuse of the precautionary principle that that is hostile to innovation and change.

There are now so many different processes involved to obtain permission to build – the discharge of increasingly complex and suspensive planning conditions, Listed Building Consent, building warrant requirements, environmental assessment requirements, road construction consent, technical approval and introduction of overlapping environmental regulations, for example, controlled activity licensing and marine licensing (the list is not exhaustive) illustrate how difficult the development approvals and diligence process has become. A review is required to streamline and simplify the regulatory landscape.

The Town and Country Planning (General Permitted Development) (Scotland) Order 1992, intended to simplify and exclude various categories of development from the requirement to obtain express permission, is itself now over-complex and difficult to interpret. Perhaps this entire procedure could be reviewed to permit very broad entitlements to develop land and buildings without hindrance unless there are material objections; also, resist the bureaucratic urge to impose riders unless there is a clear public interest to do so.

As a suggestion, one quite radical reform would be to introduce a new concept of presumed consent for a broad range of development proposals - unless there is objection from a neighbouring proprietor or a statutory consultee. Possibly a fourth
“Minor” Category of development could be introduced under the Hierarchy Regulations to exclude most small housing applications, householder and small commercial development, including change of use, from the formal assessment by the Planning Authority unless there is neighbour or wider public concern about a material planning issue. Existing prior approval and advertisement procedures could be modified to allow implementation of such a scheme to liberalise planning controls over minor development. The role of Community Councils and Residents’ Associations could also be broadened and reinforced to give local communities greater influence and a say about proposals and if here are material objections this would initiate formal planning assessment. Legislation could direct Planning Authorities to have special regard to the views of Community Councils and Residents’ Groups – this might also help allay persistent calls for third party rights of appeal.

Rights of Appeal

The current system of development hierarchy and modified rights of appeal (review) introduced by the 2006 Act regrettably fettered access to independent and fair appeal in the event an applicant is unhappy with a planning decision. Introduced to speed up planning and reduce referrals to the DPEA this is still an important issue and applicants remain uneasy with the principle that a Planning Authority Appointed Officer and Elected Members are the final arbiters, leaving no further recourse other than a costly Judicial Review process.

Local Review Bodies (LRB) should not be made up of elected members. Local Authority Councillors appointed to an LRB simply cannot exercise objectivity when reviewing a decision of an Appointed Officer in the employ of the same Local Authority. Members of such bodies ideally should be appointed independently on merit, possess suitable experience and judgement and be trained and supported to undertake this important role, perhaps like the rating appeal panels or the system of Justice of the Peace Courts that already operate in Scotland. The panels should be advised by an independent Planning Solicitor or Consultant. The judgement of a Local Review Body or the Reporter appointed by the DPEA should be final, subject to review of the Courts but not under direct political interference as this undermines confidence that the planning system can operate fairly and objectively.

The decision to reject third party rights of appeal (TPRA) is welcomed as this would introduce further unwelcome delay and risk to planning determination. The current system would struggle with the vagary of third party rights of appeal. Although lobbying for TPRA is likely to continue, the introduction of such a reform would subvert attempts to simplify and streamline the planning approvals process and place Scotland at a competitive disadvantage. There are alternative ways to ensure that the views of private interests and the wider community are considered.

There may also be a role for fair and reasonable charging and cost recovery to administer and meet the cost of appeal proceedings.
Developer Contributions and infrastructure levy

The plan-led system and an over-reliance upon major development and strategic land release and associated planning gain (to fund public infrastructure, provide affordable housing and cross-funding support in areas that were once considered to fall firmly under the public sphere) has acted as a drag on private sector investment and commercial development activity in Scotland, posing a competitive disadvantage.

Extreme development lag has been experienced by Planning Authorities that over-rely upon strategic greenfield release and this has posed problems for short-term land supply and is one of several factors involved explaining lackluster housebuilding activity.

While larger development companies partly benefit from the current strategy and generally accept developer contributions and upfront investment in infrastructure and community assets as a business cost, the difficulties are experienced most acutely by small builders and developers with limited access to finance and are more likely to struggle to fund a new levy that is demanded before grant of permission. Often debt finance can only be secured following the grant of planning permission. This aspect of the proposed levy is concerning though we may have misunderstood the intention. Further clarification is needed. The workings of the infrastructure levy, infrastructure body and means of disbursement should be roughed out and discussed as soon as possible with key stakeholders including landowners, small builders and developers, Homes for Scotland and Scottish Property Federation and the major funders. It should be introduced carefully to ensure that the proposed reform is workable, supportive of the development industry and will not act as an economic brake.

The proposed introduction of an infrastructure levy is not opposed in principle if it helps bring clarity and simplicity to the process of obtaining planning permission and is used to substitute for unpredictable and unquantifiable planning contribution demands locally.

However, if the levy is regarded as supplementary to planning gain it could further aggravate the existing problem. To raise significant amounts required to fund new schools, roads and other major public assets, the levy will likely be set at a high level, for otherwise it will make little practical impact. An infrastructure levy cannot be used as a substitute for capital investment though public expenditure and financed through general taxation.

Developer contributions through planning agreements also cannot be used to fund significant public infrastructure locally without significant discount to land value or development would become unviable. Although it is received opinion that a land taxes on developers will drive land values down and allow capture of betterment
achieved through grant of planning permission, the historic evidence is not encouraging. Closer scrutiny of the operation of the Community Infrastructure Levy in England and failed historic attempts to tax land values and betterment should be considered before introduction of a levy in Scotland - to better understand possible consequences for development activity and economic impact and to avoid repeat of past mistakes.

Outside Central Scotland and the major cities, development land values may not be particularly high. A levy intended to raise significant amounts to support infrastructure delivery risks adverse impact upon development activity across many parts of Scotland where house and land prices are currently subdued and may distort an already fragile funding model. This could have a very serious and corrosive effect upon landowner and developer sentiment, slow housebuilding including the delivery of affordable housing.

It is also unclear if the funds raised under the proposed levy will be hypothecated and reinvested in communities that are asked to absorb new development. Unless there is a clear commitment to do so communities may also not be persuaded that development should be welcomed and promoted.

Much more needs to be done to challenge public apathy on the one hand but also a culture of objection and local and environmental activism that is dedicated to opposing new development, particularly new homes. The infrastructure levy may have a role to play, if money raised locally is invested locally, but the concern is that implementation will also become very complicated and difficult to understand, applied inconsistently and too often regarded as supplementary to the planning gain demands that are already a feature of planning practice in the UK.

While not opposed to the principle of a levy we are concerned about introduction of any new tax on development without a proper impact assessment and very careful consideration of the potential economic effects.

**Simplified Development Areas**

Simplified Planning Zones, again introduced under 1991 legislation have never gained traction. Instead of tinkering with and renaming the concept to exempt or provide relief from planning controls in some areas (Simplified Development Areas) - a concept that has failed to garner any real enthusiasm over the past three decades it would be preferable to address the regulatory landscape entirely - to lighten the regulatory burden perhaps by exempting many more categories of development from express planning control and address areas of unnecessary regulatory overlap.

**Planning Performance**

Any efforts to improve planning performance and quality of service is welcomed. Rising fees, however, are a concern to developers and applicants without deep
pockets. Increased fee income should be matched by performance and customer service standards. Rebates should also be a required feature of the system where service performance falters.

One concern raised by attendees at a recent presentation is frustration around the quality of early engagement now being offered by planning departments. There is sometimes no consistency in the quality and cost of pre-application discussions, where this is offered.

There is an unfortunate new trend towards charging sometimes significant sums for pre-application advice, otherwise reluctance to offer meaningful advice or even agree to meetings or accept phone calls. This practice is unacceptable and must be challenged.

While this is usually evidence of lack of resource and workload stress, it is an unwelcome barrier to engagement. Improved understanding. Better built outcomes can only be achieved if clear, consistent advice is available at the early stages.

Since planning authorities are now in receipt of higher fees for the processing of planning applications, charging for routine advice and the introduction of new barriers to normal discourse with public officials is not reasonable and should be avoided.

Conclusion

These initial comments are drafted in response to the Planning (Scotland) Bill 2017, based on feedback from attendees to presentations and our practical experience in dealing regularly with Planning Authorities across Scotland. Meaningful reform that speeds up development planning, lightens the regulatory burden and removes workload from hard pressed planning authorities is broadly welcomed but this Bill is disappointing in its scope and ambition.

The current system of Local Review is not fair to applicants as it is not independent. Further reform is needed to the appeal procedures and particularly the system of Local Review. There is merit in planning applications being determined locally and appeals also considered and settled locally but this principle and the desire to speed up decision-making should not be at achieved through compromise of a more important principle – that applicants should have access to a fair and public hearing by an independent tribunal.

The spectre of third party rights of appeal increases the risk of opposition to development on non-planning grounds, rather than because of an issue with the merit or substance of the proposal. The Scottish Government is prudent and correct to resist repeated lobbying for such a change.
Increased fees and introduction of charging must be answered by a step-up in planning performance and quality, also willingness to engage with applicants as customers. Rebates should be available if reasonable performance cannot be delivered.

The introduction of an infrastructure levy, although widely predicted, is still rather vague and further information is required urgently to scope out the possible financial implications for landowners and developers and the long-term practical consequences for the Scottish economy and health of the construction and property sector.

If properly conceived and implemented the proposed levy could help bring clarity to a confused and varied approach that currently exists but any new tax on development activity must be introduced with extreme care and the amounts raised should be disbursed locally to enable development or otherwise mitigate the effects of development.

Please continue to consult and seek views on the Legislation at it progresses through the next stages of Parliamentary scrutiny.

Yours faithfully

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