Local Government and Communities Committee

Planning (Scotland) Bill

Submission from John Watchman

I welcome the opportunity to make submissions about the December 2017 Planning (Scotland) Bill (‘the Bill’). A statutory purpose for the land-use planning system in Scotland is not included in the Bill.

Qualifications etc

I have experience of over 35 years of working as a solicitor (in local government, central government and private practice) predominantly in relation to planning and development related matters. The accompanying brief CV sets out relevant details. In February 2006, as a member of the Law Society of Scotland’s Planning Law Subcommittee, I gave evidence to the Scottish Parliament about the 2005 Planning etc. (Scotland) Bill. The opinions set out below are mine. They are not necessarily those of any entity that I am associated with.

General approach in this submission

As submissions are restricted to six pages of A4 I have commented briefly on issues which I anticipate will be more fully addressed by others. The remainder of my submission focuses on Part 4 of the Bill (“Other Matters”).

General comments: people make the land-use planning system work

The Scottish Ministers and the Scottish Government have the responsibility of overseeing the effective functioning of the land-use planning system in Scotland. The operation of that system is shaped by primary and secondary legislation; is supplemented by the plans, policies and guidance of the Scottish Government and planning authorities, and is influenced by the culture of those who are involved in and with that system.

The Scottish Government has, correctly, stated that the redesign of development planning and development management alone will not guarantee improvements in the effectiveness of the planning system and it has identified that it is people who make the land-use system work. It is not, as the questions posed by the Committee appear to suggest, that it is the Bill’s provisions themselves which will make the land-use planning system in Scotland better.

General comments: credibility and reliability of proposals

In 2005 the government’s policy-makers promoted main issues reports, the use of statutory supplementary guidance etc as key elements of the last planning reform. These are now being repealed. What guarantee is there that the current proposals are credible and reliable?
General comments: shortcomings of the proposals

The Bill is in the form of amendments to the Town and Country Planning (Scotland) Act 1997 (“1997 Act”).

Too much is left to secondary legislation and/or guidance and advice which are to follow. This undermines a thorough examination and consideration of the Bill’s proposals.

There are multiple amendments (including consequential amendments) to the same sections of the 1997 Act. Public involvement in the making of new legislation is hindered by the fact that a consolidated version of the key parts of the 1997 Act as amended by the Bill has not been produced.

Important proposals, such as the proposals about the “gatecheck” assessment and the related LDP examination thereafter, lack clarity.

The proposals lack transparency. For instance the Scottish Government’s June 2017 Position Statement included the proposal that the National Planning Framework (“NPF”) guide the level of housing land required in any Local Development Plan (“LDP”). This was opposed by many including planning authorities. The Bill’s Policy Memorandum indicates that the housing land required will feature as part of the LDP process and there is no mention of it being a feature of the NPF. However the Bill’s Financial Memorandum indicates that housing supply and demand figures will be a feature of the NPF!

General comments: the need to reintroduce rigour into land-use planning

The Development Plan must be subject to examination in public and must be as good as it can be. We must get away from the current position of “examination by correspondence” and any examination being limited to whether Development Plan provisions are “clearly inappropriate or insufficient”.

Issues other than planning authority resources and performance

My comments on various issues are set out below.

Legislative competence

In 2007 Professor Mark Poustie indicated that rights issues had not been properly considered in the passing of the Planning etc. (Scotland) Act 2006. He highlighted that the provisions of that Act about local reviews and temporary stop notices may not be compatible with the European Convention on Human Rights (“ECHR”) and the legal requirement that hearings must undertake a thorough examination of the issues involved to ensure a full and fair hearing. Professor Poustie cast doubt on the view, expressed in the Policy Memorandum which accompanied the 2005 Planning etc. (Scotland) Bill – which is not repeated in the Bill’s Policy Memorandum – that the availability of a legal challenge to the Court of Session ensured that the provisions were compatible with the ECHR.
The Court of Session has not been called upon to consider the issue of compatibility of the provisions about local reviews or temporary stop notices with the ECHR or EU law.  

Provisions for local reviews which determine whether or not to grant Certificates of Lawfulness (based on facts and law with no element of planning judgment) are more susceptible to being incompatible with the ECHR. The “Simplified Development Zone” proposals are incompatible with the ECHR and inconsistent with other provisions of the Bill.

The National Planning Framework

The NPF will have an enhanced status, have a much wider scope and will, in practice, probably be almost binding on a local planning authority in making its LDP. The proposed 90 day Scottish Parliament scrutiny is inadequate. There should be a statutory right to participate in the making of the NPF, relevant details about the relevant process and provisions about a robust public examination of the NPF which aims to make the NPF as good as it can be.

Local Place Plans

These have the potential to divide communities. An LDP must have regard to any relevant Local Place Plan (“LPP”) and presumably any relevant LPP must be a relevant (material) consideration in the determination of a planning permission application. Unless there is any indication that a LPP will be given significant attention in plan-making or decision taking it is unlikely that a “community-controlled body” is likely to proceed to produce a LPP (assuming it has the resources to do so) and if it does the raised expectations of being able to shape its place might be crushed.

“Simplified Development Zones”

A useful flowchart about SDZ provisions has been published by the Scottish Government. It illustrates that the proposals are anything but simple. Save in exceptional circumstances there is unlikely to be any private sector appetite for this mechanism. Further the planning authority promotes the SDZ scheme, considers the representations and given in most cases it will decide whether to make the SDZ scheme. There will be at least the perception that objectors will not have a fair hearing.

Schemes of Delegation and extension of jurisdiction of Local Review Bodies

Increasing the percentage of delegated decisions from the current 95.3 per cent will be challenging. The Scottish Government has apparently ignored the trenchant criticisms made by many including the Scottish Committee of the Administrative Justice and Tribunals Council and the Royal Incorporation of Architects in Scotland about the operation of Local Review Bodies. Further it has not commissioned any study about LRBs in operation.
“Infrastructure Levy”

The proposals are not for an “infrastructure levy”. They are for a land development tax which, using a formula set nationally, will “capture a proportion of land value uplift”, to be paid to local authorities and to be used to fund the provision and maintenance of infrastructure (including the non-local authority infrastructure of for example Transport Scotland, Scottish Water and the NHS but not Police Scotland or the Scottish Fire and Rescue Service) which supports development.

In the time available I have not been able to consider the question of legislative competence of this land development tax. However there are practical questions. For instance, will local authorities ring fence the receipts for infrastructure spending? Will they charge a fee for administration of any monies received which it pays to third-parties including Transport Scotland? Will the monies received be expended on local authority infrastructure projects first? There is no requirement that the infrastructure be delivered in advance of, or in parallel with, the occupation of development. Consistent with the centralisation approach would it not be better to establish a national infrastructure delivery body? The Regional Partnership working “duty to co-operate” might not be sufficiently strong to ensure delivery of cross-boundary infrastructure.

Charges and fees

Fees for planning applications were first introduced by the Thatcher government. Raising revenue from planning permission application fees is now firmly embedded in government culture. However it should not be forgotten that the principal justification for statutory controls over land use is that it is, or should be, society as a whole that benefits from the existence those controls. This suggests that society as a whole, and not simply those engaging with the planning system as an applicant for planning permission or otherwise, should bear the costs of land-use controls.

The current planning permission application fees must be put into context. The legal fee for buying a home – £384 (£320 plus VAT)⁴ – can be less than the basic planning permission application fee (£401) for a planning permission application for an extension to that home. Further the Scottish Government’s Planning and Environmental Appeals Division (“DPEA”) charges a daily fee of £400 for a Reporter carrying out a LDP examination.

The Scottish Government’s standard approach to setting charges for public services is full cost recovery and that charges for information are generally low or waived as a matter of policy.⁵

It is noted from the Bill’s Policy Memorandum that there will be “a move towards full cost recovery” and therefore, presumably, there will not be full cost recovery (perhaps on the basis that users of the system contribute to the running of a the planning system by national taxation (income tax, capital gains tax, corporation tax etc and the proposed development land tax (see above) and local taxation (council tax and business rates)).
The drafting of the Bill suggest that fees and charges may be introduced for the performance of any planning function and anything done which facilitates or is conducive of incidental to the performance of any such function. This goes way beyond the current scope of fees relating to the development management function.

However, unfortunately, neither the Bill nor its supporting documents make reference to any requirement for the economic, efficient and effective delivery of planning services.

Consideration has to be given to, for instance, aligning resources to workload; adopting standardised approaches across Scotland (such as model Reports on Handling/Committee reports); long-overdue reviews of Scottish Government Circulars and Advice such as Circular 4/1998 The Use of Conditions in Planning Permissions and its related Annex of Model Planning Conditions; identifying tasks within the planning system which could appropriately be delegated to staff who are not qualified planners; and outsourcing work to the private sector. May question whether a proportionate approach is always taken. For instance Fife Council has published an A4 “Validation Checklist”. In October 2017 Heads of Planning Scotland published a 51-page guide on national validation standards.

Surely the charges and fees should fairly and reasonably relate to the cost of an economic, efficient and effective delivery of the service provided? The approach adopted should not simply be taking the cost of a planning service and seeking to fund it through fees and charges.

*Evidence-based policy-making?*

Up-to-date statistics about all relevant matters are not readily available. Even when relevant statistics are not available they are not always intelligible. For instance, the Audit Scotland 2011 report “Modernising the planning system” noted, at paragraph 99, that:

“Over the six years to 2009/10, total spending on processing planning applications increased from £31.4 million to £41.5 million – a 17 per cent real terms increase. This has happened over a period when the number of applications has fallen [by 29 per cent]. The reasons for this increase are not clear.”

However, inexplicably, it appears that the Scottish Government has failed to ask Audit Scotland to provide an up-to-date report on relevant information.

The accompanying “Scottish Planning Performance Statistics” indicate that:

- the productivity of planning authorities as measured by the number of applications determined annually has slumped dramatically;
- the percentage of delegated decisions has risen significantly (to over 95 per cent – there appears to be little further scope for the growth of delegated decisions);
- only around six per cent of applications are not approved;
a reduction in the quality of first instance decisions (rate of first instance decisions being upheld on appeal/review has fallen from about two thirds to one half and the rate of challenging those decisions has increased); and
there does not appear to be an alignment between productivity as measured by the number of decisions issued and the number of planning authority staff.

The Scottish Government has signalled that there will be another extension of the permitted development regime and this, in turn, will lead to fewer planning permission applications and related fees and charges to finance the costs of the planning system.

Improving and assessing the planning authorities’ service

The Memoranda accompanying the Bill note that there are continuing concerns about matters such as efficiency and patterns of decision-making in some [planning] authorities and that delays and uncertainty in the planning system are considered to cause significant costs to the development industry.

Can efficiency and effectiveness of the planning service be improved?

The efficiency and effectiveness of the planning service can be improved. In the first instance officers in planning authorities with poor performance can consider how they might improve their own performance. Those authorities can seek to learn from the better performing planning authorities. They could commission an appropriate person to assess their current performance and to advise how to improve their performance. This does not need legislation.

Can the quality of planning permission decisions be improved?

The Bill’s proposals for the training those taking planning decisions is referred to below.

As noted above it appears that there has been a diminution in the quality of first instance planning permission application decisions.

In 2002 the Royal Commission on Environmental Pollution recognised that a limited right of appeal against the grant of planning permission appeal is a tool which would bring about an improvement in the quality of planning decisions.

Professor Mark Poustie has said that front-loading community participation is undoubtedly positive but the absence of a safety net remedy in the form of a limited appeal against the grant of planning permission where poor decisions are made remains problematic.

A Development Plan-led system suggests that there ought to be a right to a merits based appeal/review where either a planning permission application is refused where the proposed development accords with the Development Plan or a planning permission application is granted where the proposed development does not accord with the Development Plan.
The continuing failure to introduce such a merits based right of appeal/review will only continue to encourage court applications challenging the lawfulness of planning decisions; complaints by any person disappointed by the planning authority’s decision to the Commissioner for Ethical Standards in Public Life in Scotland and complaints to the Scottish Public Services Ombudsman. Further, and perhaps more importantly, it will continue to erode trust in a Development Plan-led system and more generally in the land-use planning system.

The power to grant planning permission for proposed developments which do not accord with the Development Plan and the absence of an merits based reconsideration of such decisions might be considered to provide a disincentive for a landowner/developer to participate in plan-making and an incentive to instead focus resources on the quality of the planning permission application submitted and, in particular, to justify a proposed development which does not accord with the development plan.

Does the Scottish Government believe that introducing a limited right of appeal against the grant of planning permission will mean that individuals, community groups and communities will not participate in development planning or development management?

As regards discouraging investment is there any evidence that investment has been discouraged in jurisdictions, such as New Zealand and states in Australia, which have rights of appeal against the grant of planning permission?

As regards is delaying investment it ought to me far quicker to get an appeal decision from the Scottish Ministers (acting through DPEA) than the delay occasioned by an application for judicial review of a grant of planning permission.

Training for taking planning decisions

The Licensing (Scotland) Act 2005 introduced provisions about training and examining Licensing Board Members. It is believed that these requirements have led to improvements in decisions about licensing. Similar requirements for planning authority members, which should lead to better informed and better quality decisions, should be welcomed. The indication that the Scottish Government will design the training appears to be unnecessary and underlines the approach of the centralisation of power in the Scottish Government evidenced elsewhere in the Bill. There is a lack of clarity about whether planning authority members, like Licensing Board Members, will need to pass an examination before being able to take planning decisions.

However, inconsistently with the above provisions, there is no requirement for training of the Scottish Ministers taking planning decisions.

Performance of planning authorities: annual report

The Bill includes a requirement that all planning authorities provide an annual report of performance. The form and content of reports and the process for producing reports will be set out in secondary legislation. This should provide relevant performance information.
Performance of planning authorities: appointment of national planning performance co-ordinator

The Scottish Ministers will be empowered to appoint a national planning performance co-ordinator to monitor planning authorities’ performance and to advise planning authorities about how they may improve the performance of their functions.

The appointment should not be made from within the Scottish Government as suggested in the Bill’s Financial Memorandum. The Scottish Government should not both advise planning authorities and determine appeals against their decisions. Further the performance of the Scottish Government (acting through DPEA, PAD or otherwise) has not been free from adverse comment. A planning authority officer should not be appointed. It might at least be perceived that personal connections might place such an officer in an invidious position.

Performance of planning authorities: appointment of planning performance assessors

The Scottish Ministers will be empowered to appoint persons to conduct an assessment of any planning authority’s performance, and to direct planning authorities to take steps to improve their performance if the assessment finds this is necessary. The £160 daily fee is not enough.

Performance of the Scottish Ministers as planning authority

Current provisions about assessing the performance of the Scottish Ministers as planning authority, reporting on that performance and scrutinising that performance should also be reviewed. Consideration ought to be given to there being a statutory requirement for a report or reports on both the Scottish Ministers planning performance and the planning performance of planning authorities to be made to, and scrutinised by, the Scottish Parliament.
### Scottish Planning Performance Statistics

Data taken from Scottish Government Planning Authority Performance Statistics unless otherwise indicated

<table>
<thead>
<tr>
<th>Year</th>
<th>Context</th>
<th>Number of applications determined</th>
<th>Percentage of (a) delegated decisions and (b) percentage approval rate</th>
<th>Total number of appeals and reviews determined</th>
<th>Percentage of first instance planning permission application decisions upheld</th>
<th>Annual totals for: (a) fees income; and (b) cost of planning service; (c) planning authority staff</th>
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<tbody>
<tr>
<td>2004/5</td>
<td>Last reporting year before publication of 2005 White Paper</td>
<td>56,720</td>
<td>(a) 83.5% and (b) 92.7%</td>
<td>1,032 (SEIRU Review 2004/05)</td>
<td>65% (SEIRU Review 2004/05)</td>
<td>(a) £22m; (b) £98.3m (£29.4m DM); and (c) 1,673 in 2003.6</td>
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<tr>
<td>2009/10</td>
<td>Transition year from previous to current development management regime</td>
<td>39,536</td>
<td>(a) 84.4% and (b) 92.9%</td>
<td>1,115 (DPEA Review 2009/10)</td>
<td>67% (DPEA Review 2009/10)</td>
<td>(a) £30.4m; (b) £105.5m (£54.6m DM); and (c) 2,129 at July 2010.7</td>
</tr>
<tr>
<td>2016/17</td>
<td>Latest reporting year</td>
<td>36,248d</td>
<td>(a) 95.3% and (b) 94.2%</td>
<td>929 (LRB: 550 and DPEA 379: DPEA Review 2016/17)</td>
<td>52% (average of LRB and DPEA Review 2016/17 rates)</td>
<td>(a) (b) (c)</td>
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**References**


3 In Sally Carroll v Scottish Borders Council [2015] CSIH 73 it was not part of Ms Carroll’s case that the LRB system is incompatible with the European Convention on Human Rights or EU law.

4 https://www.conveyancingdirect.co.uk/

5 http://www.gov.scot/Topics/Government/Finance/spfm/feescharges#top


8 This figure should be treated with caution. It does not appear to be calculated on the basis of the earlier statistics. Further it includes, for instance, figures for processing agreements (1,503), leading to a higher figure than expected.