Local Government and Communities Committee
Planning (Scotland) Bill
Submission from Shepherd and Wedderburn LLP

1. Do you think the Bill, taken as a whole, will produce a planning system for Scotland that balances the need to secure the appropriate development with the views of communities and protection of the built and natural environment?

1.1 We are concerned that in many places the Bill is extremely vague on how the planning system will operate in future and that some elements of the new system may in fact involve less engagement on critical matters, such as the type and scale of development, than currently exist. We highlight some of these points in more detail below, but there are some points that are worth mentioning as introductory comments.

1.2 The National Planning Framework is to be given a significantly enhanced status and will, apparently, replace the current system of strategic development planning. There are, however, no substantive changes to the current system of preparation, consultation and engagement to reflect the fact that the National Planning Framework will no doubt take on far greater significance and relevance for local communities and the development industry than it has to date. The current system of strategic development planning involves an opportunity for interested parties to formally make representations on the content of the Plan and for those representations to be considered by the independent third party. The National Planning Framework process is far less prescribed and involves no independent scrutiny by a third party. We would question whether communities will feel more engaged by the NPF process than they are at present in dealing with Strategic Development Plans.

1.3 Similarly, when it comes to Local Development Plans, it appears that opportunities for engagement in Plan preparation may be reduced compared to the current system. We are concerned that the evidence report stage of Plan preparation does not involve any opportunity for interested parties to comment on the documents that the Planning Authority will use to prepare its Local Development Plan. If interested parties are disenfranchised from the outset of the Plan making process, there seems little prospect of increased confidence in the operation of the Scottish planning system.

1.4 As a general comment, we were disappointed that the proposed “root and branch” review of the planning system has been implemented by detailed topiary of the existing legislation. Whilst we are well used to interpreting legislative amendments of this sort, we can only imagine that the approach to Bill drafting taken by Scottish Government in this case has left many others struggling to understand what the effects of multiple amendments to individual sections actually mean in practice.
2. To what extent will the proposals in the Bill result in higher levels of new house building? If not, what changes could be made to help further increase house building?

2.1 We represent a significant number of major housebuilders in Scotland. We have seen nothing in the Bill that will result in higher levels of new house building. The Bill does not provide any greater certainty as to how the planning system can deliver more housing in comparison with the current system. The Bill could improve the system by adopting the following measures:-

2.1.1 Placing a statutory duty on the National Planning Framework to set housing targets based on objectively assessed evidence;

2.1.2 Requiring Local Development Plans to be consistent with the National Planning Framework (including its housing targets);

2.1.3 Requiring local authorities to consult on their evidence report and take account of representations before the Report is submitted to Scottish Ministers;

2.1.4 Establishing a procedure for setting developer contributions at a local or regional scale to address the cumulative impact of development within that area on infrastructure within that area;

2.1.5 Amending Section 75 of the 1997 Act to address this point. The current proposals to amend Section 75 are, in our view, open to potential abuse;

2.1.6 Introducing mandatory requirements on key infrastructure providers (e.g. Scottish Water) to engage with the Planning Authority at an appropriate stage in the planning process and to set criteria where the grant of Planning Permission would give deemed consent under other legislation (e.g. for drainage connections or road construction consent).

3. Do the proposals in Bill create a sufficiently robust structure to maintain planning at a regional level following the ending of Strategic Development Plans and, if not, what needs to be done to improve regional planning?

3.1 No. As mentioned above, there is limited information given in the Bill as to what exactly the National Planning Framework will be required to do. Strategic Development Plans currently set a regional framework for planning at a local level. This includes setting housing supply targets and the housing land requirement which Local Development Plans must then deliver. It is unclear the extent to which the National Planning Framework will replicate these requirements. If it does not, then there is a risk that local development planning will descend into chaos.

3.2 By way of example, if the National Planning Framework only sets a national target for house building, what number of houses does the first Local Development Plan produced after the NPF require to allocate? The same point applies if only regional targets are identified. To take south east Scotland as an example, if a target of 20,000 homes is set regionally for the former SESplan area but there is no disaggregation of that to Local Development Plan areas, then there is a risk that the
first Local Development Plan produced will seek to allocate the least number of houses possible in the hope that future Local Development Plans in other Local Authority areas will “pick up the slack” later. Similar difficulties could arise in connection with delivery of renewable (e.g. the allocation in Local Development Plans of sites identified within areas of search in the National Planning Framework).

3.3 The problem is particularly pronounced since the Bill removes the requirement for Local Developments Plans to be consistent with any higher level Plan. The Bill envisages the possibility of Local Development Plans being “incompatible” with National Planning Framework. Local Development Plans are simply required to “take into account” the National Planning Framework and there is no certainty as to what this means or what level of departure from the National Planning Framework would be acceptable or the circumstances for that. In our view there should be a statutory duty for Local Development Plans to be consistent with the National Planning Framework. The National Planning Framework as a policy document can then set out any areas where Local Development Plans could take a different approach and the circumstances where they could do so.

3.4 We are also concerned that the drafting in the Bill (revised Sections 3A(7) – (9)) means that, in effect, there could be a period of 15 years from the initial publication of the National Planning Framework until it is revised. In fact sub-section 9 envisages the possibility of the NPF not being revised after that period of time. In our view, the NPF is to set a regional framework for Local Development Plans, there must be binding dates by which it should be reviewed. If it is not, there will be inadequate guidance for Local Development Plans and local authorities on the Scottish Parliament’s priorities for development. We will ultimately end up in a situation where the Plan-led system ceases to be effective and planning decisions are simply taken on the basis of a series of material considerations rather than in accordance with the Development Plan.

4. Will the changes in the Bill to the content and process for producing Local Development Plans achieve the aims of creating plans that are focussed on delivery, complement other local authority priorities and meet the needs of developers and communities? If not, what other changes would you like to see introduced?

4.1 No. It is unclear how the evidence report phase of LDP preparation is to work in practice. We understand that Scottish Ministers wish to see the LDP elevated in status and importance within local authorities. For that reason, full Council must now approve the proposed Local Development Plan. There is no such requirement for the evidence report, suggesting that it has a lesser status and less importance than the LDP itself. However, some of the policy documentation supporting the Bill suggests that the evidence report might be the place where the housing land requirement, which will fundamentally influence the content of the LDP, will be set. If that is right, then the housing numbers might be published and examined by Scottish Ministers before the full Council had even had an opportunity to say whether it supported the housing numbers. Worse still, the evidence report is simply produced by the Planning Authority and sent straight to Scottish Ministers with no opportunity for comment by any interested party.
If the purpose of the evidence report exercise is to deal with matters as fundamental as setting the housing land requirement, then there are significant flaws in the draft Bill. We would have fewer concerns if the purpose of the evidence report exercise was simply to identify the evidence base on which policy decisions (including setting a housing land requirement) were to be taken in due course by the Local Authority. That is certainly not how the policy documentation that supports the Bill has been drafted. Clarity is required on this point since there may be a need to substantially overhaul the procedures related to the evidence report.

4.2 Clarity is also required from Scottish Government on whether they consider that there is a difference in legal terms between the requirement to “take into account” certain matters when preparing an LDP, and to “have regard to” other matters. The Bill replicates existing wording from the 1997 Act which has never been particularly controversial due to the overarching requirement for Local Development Plans to be “consistent” with Strategic Development Plans. Given the absence of the legal requirement for consistency, the requirements to “take into account” and to “have regard to” take on much greater significance. We have canvassed opinion widely within the legal community and have yet to identify any clear difference between the two terms. If there is no difference between the two terms, then two terms should not be used. However, Parliament should appreciate that if there is no difference then a Local Place Plan would have the same status as the National Planning Framework when it came to a Local Authority preparing its Local Development Plan. We suspect that this was not the intention of Scottish Government but clarification is required on that point.

4.3 Finally, we are unclear why Section 20AA (5) to (7) set out the power for Ministers to make further regulations about the procedures to be followed when amendments to a Local Development Plan take place. The Act already contains procedures for the preparation of the Local Development Plan and we can see no reason why those procedures should not be followed in the context of amendments to LDPs. The Act should be clear on the procedures that should apply at this stage.

5. Would Simplified Development Zones balance the need to enable development with enough safeguards for community and environmental interests?

5.1 No comments.

6. Does the Bill provide more effective avenues for community involvement in the development of plans and decisions that affect their area? Will the proposed Local Place Plans enable communities to influence local development plans and does the Bill ensure adequate financial and technical support for community bodies wishing to develop local place plans? If not, what more needs to be done?

6.1 See our comments above.

7. Will the proposed changes to enforcement (such as increased level of fines and recovery of expenses) promote better compliance with planning control and, if not, how these could provisions be improved?
7.1 No comments.

8. Is the proposed Infrastructure Levy the best way to secure investment in new infrastructure from developers, how might it impact on levels of development? Are there any other ways (to the proposed Levy) that could raise funds for infrastructure provision in order to provide services and amenities to support land development? Are there lessons that can be learned from the Infrastructure Levy as it operates in England?

8.1 The “Infrastructure Levy” as set out in the Bill is radically different to the “Infrastructure Levy” that had been discussed during the planning review process. Our understanding, like most in the development industry, was that Scottish Government intended to introduce a system that would effectively allow the pooling of infrastructure contributions towards necessary infrastructure within the area from which the contributions were taken. The English Community Infrastructure Levy was referred to a number of times during discussions as a potential model and both the Inner House of the Court of Session and the Supreme Court passed comment in the judgements in the Elsick case that whilst such a proposal might be viewed as a sensible idea, there was no legislative basis in Scotland for it at that point in time. We were, therefore, surprised that the Bill did not attempt to address that issue directly.

8.2 Instead, the Bill proposes an ability for Scottish Ministers to introduce regulations at a later stage that would radically alter the taxation system in Scotland. The Bill envisages the possibility of regulations by which a proportion of land value might be paid initially to the Local Authority but taken by Scottish Ministers and redistributed to another part of Scotland to provide for “infrastructure” that had nothing whatsoever to do with the development from which the contribution came. The regulation making power also envisages the possibility that Planning Permission would be withheld until such time as the Infrastructure Levy was paid. This demonstrates a fundamental lack of understanding of how the economics of development work.

8.3 In the vast majority of cases, a developer will not buy land for development until he has secured all necessary consents, including not just planning but road construction consent and any necessary connection agreements from Scottish Water. Until such time as the purchase price is paid for the land, the Landowner will not have the money to pay any Infrastructure Levy. Until such time as the consents are granted, the developer will not pay the Landowner for his site. A suggestion that the Infrastructure Levy might be a pre-requisite of the grant of Planning Permission would prevent the development proceeding. The statement in paragraph 153 of the policy memorandum that an Infrastructure Levy could “incentivise the delivery of development across a wider area and help to unlock sites planned for development” is therefore not accurate in our view.

8.4 The policy memorandum is clear that despite “thorough and informed” research involving external input, further work is required to “define a model which is both practical and meets the objectives of capturing a proportion of land value uplift while taking account of market circumstances and development viability”. Paragraph 159 of the policy memorandum refers to a review of policy on planning obligations to include “clarity about the appropriate use of Section 75 planning obligations and their
relationship to the levy, to allay concerns about potential excessive or double-charging and risks of impact on development viability”.

8.5 In our view, until such time as there has been a thorough debate on the issue involving a properly costed model to demonstrate the potential benefits that could arise from a levy and the disbenefits that could arise from its impact on the development industry, the Infrastructure Levy provisions in the Bill should be deleted.

8.6 It is not, in our view, appropriate to introduce regulation making power without a full and proper debate based on sound evidence so that the implications of this potentially radical policy shift can be properly considered and understood. The introduction of the regulation making power at this stage with such a significant amount of uncertainty as to its ultimate implementation will inevitably have a chilling effect on development in Scotland from external sources. The development industry which supports tens of thousands of people in the Scottish economy requires certainty and the draft provisions in this part of the Bill in particular do not provide that. In the absence of certainty developers and investors will choose to spend their money in other parts of the United Kingdom or further afield.

9. Do you support the requirement for local government councillors to be trained in planning matters prior to becoming involved in planning decision making? If not, why not?

9.1 Yes.

10. Will the proposals in the Bill aimed at monitoring and improving the performance of planning authorities help drive performance improvements?

10.1 We have no comment to make on this.

11. Will the changes in the Bill to enable flexibility in the fees charged by councils and the Scottish Government (such as charging for or waiving fees for some services) provide enough funding for local authority planning departments to deliver the high–performing planning system the Scottish Government wants? If not, what needs to change?

11.1 We have no comment to make on this.

12. Are there any other comments you would like to make about the Bill?

12.1 As mentioned above, there is a proposed change to Section 75 of the 1997 Act. It would allow local authorities to potentially demand financial payments as part of planning obligations, even where there was no link to the development in question. It would potentially also allow developers to offer sums of money in those circumstances. We do not believe that this was Scottish Government’s intention in proposing the amendments to Section 75. We suspect that the change proposed was a reaction to the comments in the Supreme Court judgement in the Elsick case which mean that a planning obligation that simply seeks payment but does not have any element of restriction or regulation of development is not truly a planning obligation.
In practice, however, this issue can be dealt with very simply without the need for any legislative reform. All that is required to address this point in the Supreme Court’s judgement is for the Section 75 Agreement in question to require phased payments and for the Agreement to contain a corresponding provision that means that a failure to make the payment by the relevant date precludes further development from taking place on site. In that way, the relevant payment is linked to the development in question and the development is restricted or regulated if the payment is not made.

12.2 The proposed revisal to Section 75 goes too far and should be removed.

12.3 As mentioned earlier in this submission we were surprised that there is nothing in the Bill that addresses the wider point in the Supreme Court’s judgement: namely the need for legislation to address the ability of local authorities to seek payments towards cumulative infrastructure requirements arising from the cumulation of development within the relevant area. We appreciate that the Scottish Government has not yet been able to identify a satisfactory model to achieve this objective but would suggest that this is a matter that needs to be urgently progressed. The “infrastructure levy” proposed in the Bill does not address the point and is too broad and vague to provide any certainty on how infrastructure will be funded and delivered to support development.

12.4 We would also suggest that it might be beneficial to amend Section 75A to allow for the amendment of a Section 75 obligation by consensus of the Local Authority and the Applicant if that is possible, rather than having to go through a cumbersome procedure which ultimately does not benefit any other party since there is no duty to, for example, neighbour notify the Application. We would also suggest that the Act is amended to set out clearly the criteria that apply when considering whether a Section 75A Application to modify an existing planning obligation should be allowed. The Court of Session has suggested that the relevant criteria are the same as those that apply to Planning Applications, although the Supreme Court appears to take a different approach. The Act itself says nothing about the criteria that would apply and it seems odd to us that Section 75 does not contain the relevant criteria for determination.

12.5 The change to Sections 58 and 59 need to be explained by Scottish Government. We do not understand why the Bill removes a timeframe within which Applications for approval of matters specified in condition must be submitted. The Bill proposes that the system is altered so that there is a fixed point in time after the grant of Planning Permission in Principle by which the development must be implemented. We are unsure what benefit that brings to any party and it may be that it creates problems in the future. For example, if a developer does not have all of his approvals of matter specified in condition before the expiry of the 5 year period, can he implement his Planning Permission? In a large scale phased development, can the developer implement the Planning Permission in Principle and then submit Applications for AMSC after that? If there are no time limits on the submission of AMSC Applications, can they continue to be made in perpetuity?

12.6 Section 17(3) of the Bill amends Section 58 of the 1997 Act so that the duration of the planning permission is to be specified as a condition attached to the planning
permission. Section 17(3) also provides that if planning permission is granted without the condition on duration, the permission is deemed to be subject to the condition that the development to which is relates must be begun not later than the expiration of 3 years beginning with the date on which the permission is granted. Therefore, if the planning authority does not include a condition on duration for whatever reason, the condition will be deemed to have been included.

12.7 Both the Explanatory Notes and the Policy Memorandum that accompanied the Bill confirm that one of the reasons for this change is to allow Section 42 applications to be used to apply for a new permission with a different condition as to duration, provided the original permission had not already expired. Section 42(1) in the 1997 Act confirms that Section 42 “applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.” There is no mention of deemed conditions. Normally in Section 42 applications, the applicant will state in the application the condition which they wish to no longer apply (and will often propose a substitute condition). We consider that the Bill should include express wording to make it clear that where a planning authority has not included a condition on duration in a planning permission and the permission is therefore deemed to be subject to a condition on duration (under what would be the new Section 58(2) of the 1997 Act as amended), then such a deemed condition would still be amenable to a Section 42 application despite it not being expressly included on the face of the permission.