COMMUNITIES COMMITTEE

Wednesday 1 February 2006

Session 2

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COMMUNITIES COMMITTEE
4th Meeting 2006, Session 2

CONVENER
*Karen Whitefield (Airdrie and Shotts) (Lab)

DEPUTY CONVENER
*Euan Robson (Roxburgh and Berwickshire) (LD)

COMMITTEE MEMBERS
Scott Barrie (Dunfermline West) (Lab)
Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Christine Grahame (South of Scotland) (SNP)
*Patrick Harvie (Glasgow) (Green)
*Mr John Home Robertson (East Lothian) (Lab)
Tricia Marwick (Mid Scotland and Fife) (SNP)
*Mary Scanlon (Highlands and Islands) (Con)

COMMITTEE SUBSTITUTES
Shiona Baird (North East Scotland) (Green)
Alex Johnstone (North East Scotland) (Con)
Christine May (Central Fife) (Lab)
Mike Rumbles (West Aberdeenshire and Kincardine) (LD)
*Ms Sandra White (Glasgow) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:
Cheryl Black (Scottish Water)
Neil Deasley (Scottish Environment Protection Agency)
Paul Lewis (Scottish Enterprise)
Roy Martin QC (Faculty of Advocates)
Frances McChlery (Law Society of Scotland)
Allan Rae (Scottish Enterprise Grampian)
John Thomson (Scottish Natural Heritage)
John Watchman (Law Society of Scotland)
Ailsa Wilson (Faculty of Advocates)
Mark Wrightham (Scottish Natural Heritage)

CLERK TO THE COMMITTEE
Steve Farrell

SENIOR ASSISTANT CLERK
Katy Orr

ASSISTANT CLERK
Jenny Goldsmith

LOCATION
Committee Room 4

Scottish Parliament

Communities Committee

Wednesday 1 February 2006

[THE CONVENER *opened the meeting at 09:33*]

Planning etc (Scotland) Bill: Stage 1

The Convener (Karen Whitefield): I open the fourth meeting of the Communities Committee in 2006. I remind everyone present that mobile phones should be turned off.

I have received a number of apologies today. Tricia Marwick is unable to attend, so Sandra White is attending the committee as her substitute. Scott Barrie is also unable to attend, as is Cathie Craigie.

The only item on our agenda is stage 1 of the Planning etc (Scotland) Bill. The committee will hear evidence on the bill from three panels of witnesses. I welcome the first witnesses, who represent the planning law sub-committee of the Law Society of Scotland. They are Frances McChlery, who is the sub-committee's convener, and John Watchman, who is a sub-committee member. I thank them for attending today.

Is the Law Society of Scotland content with the Scottish Executive's consultation on the bill? Were you afforded an appropriate opportunity to engage in that consultation and have your concerns been reflected in the bill?

Frances McChlery (Law Society of Scotland): Yes. In fact, the Law Society has written to the Executive to congratulate it on how effective its engagement with all stakeholders and other parties had been. At the white paper stage at least, there were good opportunities to get into the issues and discuss them. We hope that such opportunities will continue.

The Convener: I am sure that, during the questioning today, we will touch repeatedly on the European convention on human rights, if for no other reason than that it features heavily in the written submission that you gave to committee members in advance of the meeting. It appears to me that you do not believe that the Executive's proposals are ECHR compliant, but the Executive appears to be confident that they are. Will you elaborate a little on why you believe that there may be ECHR deficiencies?

John Watchman (Law Society of Scotland): It is true that the planning law sub-committee considers that some of the bill's provisions might not be ECHR compliant, and I understand that the Faculty of Advocates, from which you will hear later this morning, shares that view. The sub-committee has also intimated its wish to work with the Scottish Executive's advisers because it is clearly undesirable that the bill be struck down for being outwith Parliament's powers.

ECHR compliance is a difficult area of law. In the Alconbury case, a decision of the House of Lords reversed the first-instance decision. It was the same in the County Properties v the Scottish ministers case: the decision was reversed on appeal. We must consider all the circumstances of the cases that are involved. In particular, we have to consider the content of the matter that is in dispute and the manner in which a decision is arrived at. Some of that detail will be filled in by subordinate legislation.

The policy memorandum contains no detailed analysis of why the Executive believes that the bill's provisions are ECHR compliant—it might be that the Executive is relying unduly on the general right of access to the courts. Our general concerns relate to articles 6 and 1 of protocol 1 of the ECHR. Our concerns under article 6 come under three broad headings: the review by a council of a decision and—in relation to sifting of appeals—early determination and the repeal of the right to a hearing. Our concerns under article 1 of protocol 1 are to do with the compensation provisions for temporary stop notices.

The Convener: We will return to those issues with some detailed questions. Will you, through dialogue with the Executive, be able to some extent to resolve your concerns and to allay the fears of the Law Society and the Faculty of Advocates?

John Watchman: Yes—we hope to be in a position to resolve difficulties. It is clearly much better to have dialogue between the Law Society and the office of the solicitor to the Scottish Executive or whoever is advising on the bill.

Christine Grahame (South of Scotland) (SNP): Threaded throughout your submission is the point that most of the material that might resolve the ECHR issues that you raise will be in secondary legislation. What would our position be if we were to pass the primary legislation before we had seen the secondary legislation? Is it necessary for that secondary legislation to be before us so that we can confirm that it is ECHR compliant before we pass the bill, or are we going to pass a bill that will cause all kinds of troubles, as you appear to predict?

John Watchman: Strictly speaking, the law refers to the legislation being ECHR compliant. One could say that the bill is potentially ECHR compliant, but without the underpinning detail of,

for example, what will be in the council reviews, it is difficult to say whether the process will be ECHR compliant. Therefore, from a practical viewpoint, it is essential that we know more of the detail about the processes that will be used in council reviews.

Christine Grahame: Do we need to know that before stage 3?

John Watchman: We must, as a matter of policy and good governance, know more about the detail of the processes. It might be that, technically speaking, one could be content that the bill is ECHR compliant now, but it makes little practical sense to pass the problem down to someone attacking the process because of the nature of the subordinate legislation.

Mary Scanlon (Highlands and Islands) (Con): One of the bill's main objectives is to increase public involvement at the early stages of the planning process in order to avoid lengthy and costly disputes later. Will the Executive's proposals achieve the balance of making the system more efficient and more inclusive?

Frances McChlery: From reading the motivating factors behind the bill, one objective is to provide real engagement with communities that may be affected by a planning process. That is not a new objective; it has been around for some time. We agree with the "Modernising the Planning System" white paper that success in engagement will be crucial. How does one draw a complex matter such as planning into a dialogue process? How is recognition given to everyone in a community, from the young to the elderly, so that the process is directly relevant to how they live their lives? That cannot be achieved through black letter law. The legislation reinforces the commanding nature of the planning process. If that is successfully delivered, not just in thought but in deed, some progress will have been made.

One concern is that a new commitment to consultation is being introduced after several other ways of consulting communities have been introduced. As the committee will be aware, a community can suffer consultation fatigue, although that is much more to do with how the consultation is managed than it is about the law.

Mary Scanlon: I note from the submission that you agree with the Executive that we should not introduce third-party right of appeal. Are you saying that although local government operates well and is given the resources to conduct the consultations, it will still be difficult to engage the public in the process because of the complexity of the planning system?

Frances McChlery: Such engagement is achievable. In the history of co-working, many communities in Scotland have successfully engaged with the planning process. We take it for granted that as reforms kick in, best practice will be absorbed into the process.

Some people believe that the third-party right of appeal is unhelpful to the objectives of the planning process—they have several reasons for believing that. One concern is that the third-party right of appeal may distort the collective dialogue that consultation at its best can produce. The third-party right of appeal might also mean an individual person challenging the process. If all the quality requirements are implemented through the process, planning decisions will be good. Against that background, it is our considered view that challenges by individuals are not justified.

Mr John Home Robertson (East Lothian) (Lab): The submission states:

> "It is not particularly satisfactory that the Bill amends the principal Act, [the 1997 Act] … so that anyone wishing to establish the law, in particular lay persons, will require to look at both the new and the 1997 Act."

The committee has already raised this with the Executive. What else can be done in this regard?

09:45

Frances McChlery: The bill suffers a little from the pedigree of the legislation that it will amend because the Town and Country Planning (Scotland) Act 1997, with which we work now, codified long-established principles. We have a settled system that is well understood and relatively easy even for a layperson—a non-lawyer—to navigate. Amendment of such legislation and the introduction of new sections is by no means a new technique—it happens all the time. Lawyers will be all right, because we are used to that, but in today's world accessibility is a significant factor of citizenship and it will be tricky for a layperson to see in an integrated form what the legislation contains.

A related point is that we are working with the committee on the bill without the benefit of seeing the regulations and the guidance. The system will obviously be multilayered and complex. We are moving away from a settled and consolidated code to something that is located in many more places. We would have liked a bill that would have maintained codification in a more integrated way.

Mr Home Robertson: Mary Scanlon will return to the point about regulations; I will focus on the bill. We raised that issue with the Executive: its reply was:

> "Once the Bill has been passed, consolidated versions of the legislation will be produced by several legal publishers, and these will be used by practitioners in implementing the revised provisions."

The problem is that that does not much help us now. I am looking for a remedy. We all want

proper public consultation and understanding, and we would like to understand what is going on ourselves. Is there a way to improve the situation? Are you suggesting that, at this stage, the Executive could publish an illustrative consolidated bill so that we could understand where we are going?

Frances McChlery: Such action has precedents. Legal publishers sometimes generate consolidated versions and the first thing that all us lawyers will do is make up our own versions. Anything that would get rid of cross-referencing would be beneficial. One would like a new consolidated act that would re-enact the themes that will be maintained, but the draftsman has not gone that way. I hesitate to second-guess such an important technical exercise.

John Watchman: On a practical note, I am aware that the Executive publishes consolidated versions of European Community directives on its website. A consolidated document might be at least an interim position.

Mr Home Robertson: We will reflect on that when we write our report.

Mary Scanlon: On page 2 of your submission, you say that you are

"not able to provide … detailed evidence on the effect of the Bill on the planning system"

because of the absence of regulations. We all know that the devil is in the detail. Can we as legislators exercise good judgment in the absence of regulations?

Frances McChlery: Of course you could. How could I say otherwise? Your task is difficult, though. We are saying that it would be easier for all of us if we knew more about the detail. That would make it easier for us to understand more fully how the system will hang together. That is most vividly understood if one reflects on what will be the impact of the national planning framework and its cascade effect down the new layers. Our clients—whether public sector organisations, businesses or individuals—will not know what the effects are likely to be on their businesses and their administration until they know what is to be decided at Parliament level or through the NPF, and what will be at strategic and local plan levels. In effect, that information will be in guidance. Our point is that until we have that guidance, it is difficult to proceed.

John Watchman: I will add a small example. It occurs to me that there is no detail in the bill about the proposed fee regime. There is one reference in the policy memorandum to a current application fee rising from £13,000 to about £39,000. At a lower level, there is a possibility that a local development application might cost significantly more than it does at present. If there were to be such a significant increase in fees, one might say, "Yes, we like the proposed system, but the cost of the system is too much—we cannot double or triple the fee." Such an increase might affect how one views the system that is ultimately put in place.

Patrick Harvie (Glasgow) (Green): My questions are about the national planning framework. You express concern in your written submission about the transition period—I think that you used the word "hiatus" on a couple of occasions. Will you expand on what the consequences would be of a difficult transition and how it could be prevented? Specifically, will you explain why the suspension of strategic environmental assessment would be helpful?

Frances McChlery: One hesitates to say that the suspension of strategic environmental assessment would be required, but it is a European requirement that must be complied with. I will need to look at what we said in the submission because I do not think that we meant to say quite that.

Patrick Harvie: Perhaps it was not about suspension but about exemption from the need to comply with an SEA.

Frances McChlery: Occasionally, such a suspension would be helpful in the transition period for smaller cases.

The thrust of the question is about the hiatus problem. Local authorities, and the Scottish Executive in its new role as a more involved planning authority, will have to have a major rethink at a time when resources are straitened. Decisions will have to be made about what is worth the investment in officers' time.

Our concerns about a hiatus are that until the NPF is available, many authorities will have severe doubts about what constitutes their meaningful agenda. The development of plans is expensive, engaging with the strategic environmental assessment process is expensive and both require meaningful consultation. It would be reasonable—the law aside—for the directing officers of a local authority to decide to delay work on the plan-making process until they knew what they could meaningfully address.

England has just gone through a similar transition, although in a more diverse way. There have been one or two cases in which local authorities have said, "We know that under the law we should be proceeding with this, but we would like to defer our law-making process until we know what we are doing." The courts have endorsed that as being a reasonable approach.

There are transitional arrangements in the legislation; there always have been. They usually

provide that plans that have been put in place continue in place until they are replaced. On paper, that will be all right, but if we are trying to reinvigorate the system and take leadership of the system from the NPF down, the sooner we know what will be in the NPF, both generally and specifically, the easier it will be for everybody to get going. Until that happens, there will be a hiatus during which nobody will be quite sure; developers and local authorities will not be sure and communities will be in limbo, which be undesirable. We are keen that the boundaries or landmarks of the new system should be available firmly, as soon as that can be achieved.

Patrick Harvie: I do not want to step on the toes of anyone who will ask questions about resources later, but can calculations be made about the level of resources that will have to be allocated to new work by local authorities before the Executive gives commitments about the NPF?

Frances McChlery: I will answer that question from the point of view of my local authority background. Appropriate allocation of resources in such circumstances would be very difficult for planning officers.

Patrick Harvie: On the national planning framework, your submission states that it is important that the decision-making processes be

"open, participative, transparent and sufficiently rigorous."

Can such objectives be achieved with a parliamentary scrutiny period of only a matter of weeks?

Frances McChlery: The more time there is for scrutiny, the better. I have seen what the Executive has said about the length of time for which the NPF is to be before Parliament. That document is crucial to the future of spatial planning in Scotland, but there are also other pressing issues before Parliament. It is obvious that a balance must be struck in dealing with parliamentary business.

Patrick Harvie: Should the prior part of the process—the public engagement with the NPF—take place purely through an Executive consultation or would there be space for, and value in, a more formal examination in public, given that spatial strategies elsewhere in the United Kingdom are subjected to such examination?

Frances McChlery: I think that the lawyers who will address the committee will, from their experience, speak well about the outcomes of examinations in public. There are few better places to get into the meat of an issue than in front of an impartial quasi-judicial person. Such an examination is a good way of doing the job—that remains our position. Again, a balance must be struck so that resources are used effectively. It appears that the public aspect of the proceedings has been criticised for some reason. We acknowledge that criticism, of course, but such an approach is a good way of getting to the heart of issues.

Patrick Harvie: I have one more question about the NPF before I move on to different issues. You mentioned the difficulty of dealing with reserved issues and Westminster's strategies on reserved matters—you gave the example of nuclear energy. We all accept that such difficulties must be addressed, but will you expand a little on what the difficulties are in ensuring that the NPF takes into account reserved matters?

Frances McChlery: There will be difficulties. From a legal point of view, it is important that one can look at the NPF and see where it links with other public forward-planning matters. A number of legal work streams give rise to infrastructure decisions, of which the Electricity Act 1989 accounts for only one. There are different ways of planning roads, for example. The NPF is probably an opportunity to make clear to all of us the framework in which the various permission processes will be deployed.

Patrick Harvie: So, there is a lack of clarity from the Executive about that at the moment.

Frances McChlery: When we advise our clients, from the biggest to the smallest, it would help us if we could tell them where they can expect the decision-making processes to arise.

Patrick Harvie: Okay. I want to move on to development—

The Convener: I must stop you before you move on to development plans, Patrick. Christine Grahame has a supplementary question.

Christine Grahame: I seek your legal guidance on the NPF. How would proposed new section 3B of the Town and Country Planning (Scotland) Act 1997, as would be inserted by section 1 of the bill, operate? It states that the Scottish ministers

"are to lay the proposed National Planning Framework … before the Scottish Parliament".

I understand that the clock would not be ticking then, and I take it that there could be months of consultation. Is that correct? I am simply trying to understand how the timescales would work.

Frances McChlery: You have me at something of a disadvantage—I have not taken a considered view on that matter.

10:00

Christine Grahame: Proposed new section 3B(1)(b) of the 1997 act, as inserted by section 1 of the bill, says that Scottish ministers

"are not to complete their preparation or revision of the framework until the period for Parliamentary consideration has expired."

Does that period begin when the proposed national planning framework is laid, or after that has happened?

Frances McChlery: Forgive me if I am wrong, but a quick look at the bill suggests that it contains some provision for delay. Certain minimum procedures are to happen and there will be time to carry out other work. However, I should say that that observation is very much off the cuff.

Christine Grahame: The Parliamentary Bureau will have to allocate the framework to a committee, and some time will be involved in that. I am concerned about the time that we would have to examine the framework, even if that time were additional to the 40 days' consideration period. I realise that one of my colleagues asked that question earlier. Do you intend to suggest to committee members an amendment on that matter?

Frances McChlery: I have to say that we feel that we have had only a relatively short time to examine the bill. In our discussions, we have quite often picked up important details and we will provide the committee with slightly more detailed written evidence on how we envisage the bill's development. I imagine that we will raise some points about the parliamentary process, which is an important but technical issue.

Christine Grahame: Thank you.

Patrick Harvie: My question, which concerns the sustainable development duty imposed by the bill, applies not only to development plans but to the NPF. I have previously wondered why such a duty is to be imposed on development plans but not on the framework itself. However, will you expand on the comment in your submission that if the bill does not impose the duty on both matters it will be less enforceable or useful?

Frances McChlery: If sustainable development—the definition of which we can return to—represents a central standard for an integrated forward planning system, the immediate question is why it should apply at one level but not at the highest, framework level. After all, reasonableness is the most basic legal measure for the validity of an administrative act and it is not inconceivable that questions of reasonableness might arise if the same standard is not applied to both levels. One legal difficulty that could strike at the validity of a particular, important development plan document is that a contention might be seen as reasonable when measured against different standards but might well render actions elsewhere unreasonable. Our general feeling is that such a key theme should run through the whole system.

Patrick Harvie: So your concern about a mismatch between two levels of the system is separate from your concern about the difficulty of defining sustainable development.

Frances McChlery: One theme common to both concerns is that if, to be valid, a development plan document has to achieve sustainable development and someone thinks that there is a legal case that it has not done so, the document could be struck down by a judicial challenge. Exactly the same challenge could be mounted in both contexts. The NPF itself could be challenged. However, it is slightly more likely that non-compliant acts further down the system could be more vulnerable to challenge because of unreasonableness.

Patrick Harvie: The submission also states that it is "regrettable" that criteria for situations in which there is a

"departure from any reporter's recommendation are not to be included in primary legislation".

Will you expand on that?

Frances McChlery: I cannot at this stage. That comes into the category that we have already touched on. We will probably consider it more carefully as we work with the committee on how the bill will proceed. It is a controversial issue at the coalface. Developers make considerable investment in seeking to persuade planning authorities that their sites should be zoned appropriately. It is, therefore, meaningful to know how the information will be handled. We want a clearer understanding as to how the Executive envisages that aspect of the legislation working in practice.

There is also the tricky aspect of what happens at the local level. Is one to put sanctions in place against a planning authority when, for what it considers good reasons, it cannot accept what it is advised to do? In relation to the mechanisms, that is a matter for Parliament to resolve. However, we want to know more about how the system will be developed.

Patrick Harvie: Will including the criteria on the face of the bill be straightforward and achievable?

Frances McChlery: Yes, we suspect that including this important point in primary legislation is the best solution—after a debate in Parliament, of course.

Euan Robson (Roxburgh and Berwickshire) (LD): ECHR compliance was referred to earlier. On local developments, local council officers will take decisions on certain defined developments; the definition will have been drawn up by their local authority. I noted the point in the submission on the reference of cases to the proposed local review panels. Has the society a difficulty with the

general concept of an unelected council official making a decision in this area?

John Watchman: I do not have a difficulty with that. As a matter of practice, council officers commonly exercise delegated powers. They are seen to be answerable through their directors to politicians, particularly when they make decisions on behalf of politicians.

Euan Robson: Is the society, therefore, more concerned with ECHR compliance in the circumstances in which, in effect, a body will hear appeals against its own decisions?

John Watchman: Yes, the concern is that the matter will be reviewed by the same body that made the decision. There are various practical difficulties, about which the committee may have heard evidence, with the day-to-day relationship between council officers and members and with their discussing matters that may ultimately come before them. The concern is with the general process of how the review system is envisaged to work.

Euan Robson: Do you believe that it is possible to construct a Chinese wall that will be sufficiently impenetrable to allow compliance? If that is not possible, do you believe that there will be non-compliance?

John Watchman: Theoretically, it is possible to take that approach. There are examples of Chinese walls throughout private practice in large law firms. However, I must caution that the courts are no longer overly well-disposed towards Chinese walls. From having worked in local authorities, I know that, in their practical day-to-day workings, it is difficult for councillors not to approach council officers to discuss certain cases with which they are engaged.

Euan Robson: Let us suppose that a council is organised on a geographical basis, with area committees. If an area committee that did not cover the geographical area of an application reviewed the planning officer's decision on it, would that suffice? Would there still be a concern about the same organisation being involved in the review?

John Watchman: Instinctively, I think that there would still be a concern. For example, Fife, where I practise, is divided into three parts, and a committee of councillors from Kirkcaldy could make a determination in connection with a proposed development in St Andrews. On one level, that could perhaps work. However, from my experience in St Andrews, I know that there is a degree of hostility there to decisions being taken in mid-Fife rather than in north-east Fife. There are political tensions in such situations.

Euan Robson: Coming from the Borders, I am well used to that.

In the absence of proposals on how the system might work, which will be in secondary legislation, the society's position is that the system will be very difficult to achieve. I refer not so much to the public part of it, but to the matter of independence and a sense of freedom from the suspicion that the same organisation could be acting as judge and jury.

John Watchman: There is not only the issue of independence, but issues about how the council might go about determining disputes of fact, for example, and about the extent to which that information would be on the record. After a council review, the right of recourse would be to the Court of Session, as I understand it. One of the concerns around the compatibility of the whole system is to do with the nature of a dispute. Are we trying to resolve a dispute about facts? Are the likely consequences that flow from those facts to be considered? Is the significance attached to those consequences to be considered?

The situation with regard to ECHR compliance is quite complex. My current concern is that the bill seems to take a broad-brush approach to a number of the processes and is relying predominantly on the right of access to a court so that it can be determined that the system is ECHR compliant.

Euan Robson: Thank you—that was helpful. The committee will have to pay considerable attention to that issue.

I turn now to ministers' powers to designate in secondary legislation different types of development as coming under particular categories in the hierarchical framework. What are your general views on the thresholds for developments in the proposed three-tier hierarchy?

John Watchman: One of our current problems is that we do not have an idea of what the various thresholds are. We understand that minor developments are likely to involve permitted development rights, but we do not know what the thresholds are. As I understand it, the Scottish Executive is carrying out work to sort out the delineation between local developments and major developments. I recollect reading in the submission from the Scottish Environment Protection Agency that it would not favour the approach that has been foreshadowed by the Scottish Executive of simply taking into account the number of housing units in or the square meterage of a particular development. SEPA would want other matters to be reflected, rather than just size criteria.

Euan Robson: So you feel that there ought to be appeal mechanisms in situations in which a particular application is deemed to be in one

category whereas the applicant feels that it ought to be in a different category.

John Watchman: That question has been posed before, and evidence was given about a 300-unit threshold. Somebody might have a 298-house development. Which category would that person like to go into? Unfortunately, people might be driven to consider the scope of a development with an eye on their ultimate right of recourse.

To put it simply, a developer might decide to make a proposal for 305 houses because that would be a major development, which would give them a right of appeal to the Scottish ministers, in preference to a 298-house development, which would give them a right of review by the council. I do not envisage that councillors will reverse many decisions. That is one of the dangers, which I am sure that you will consider. Common experience is that it is more the exception than the rule that decisions are made contrary to recommendation, so we might introduce a system in which there is no change in the decision that was made at officer level in—to pluck a figure out of the air—90 per cent of reviewed applications.

10:15

The Convener: I notice that, in its written submission to the committee, the society welcomes the fact that development plans will have to be reviewed within a fixed timescale. However, the society also expresses some concern that planning authorities might not be able to comply with that five-year timescale. Will you elaborate on the society's concerns and on anything that the Executive could do to address them?

Frances McChlery: That point has been discussed over an extended period. The society considered it on previous occasions before the bill's introduction and recognised the problems that would arise if a plan continued to be deferred.

We should bear in mind two lessons from history. The first is that there was originally a stipulated timetable for development plans, which was not really adhered to. The second is that, under the 1997 act and its predecessors, powers have always been available to the Secretary of State for Scotland and then to the Scottish ministers to instruct a local authority to make its plan, but those powers have never been exercised. Therefore, there must be something about planning work that means that it keeps getting pushed down the agenda, with resources diverted from it into matters that are considered to be—and might well be—more commanding priorities. If a regular, five-year cycle is to be a key component of the new system, we must make it possible for councils to do their spatial planning within that timescale without unnecessary default and to commit willingly and enthusiastically to that.

One of our concerns was about identifying a sanction for a council that is in default. The issue is the same as for any local authority function: what is the point in punishing a local authority financially when financial resources might be part of the problem? It is not for lawyers but for the committee to answer that long-standing question.

The five-year timescale is a key component of the new system and councils' ability to create their plans in that timescale is a key issue. Let us learn from history and ensure that we get it right this time round.

The Convener: Will the fact that local authorities' planning services will be audited in future be an incentive for them to want to adhere to the five-year timescale? It is not a financial sanction, but perhaps the audit will make them want to comply and be seen to do their job effectively. Having taken evidence from the Scottish Society of Directors of Planning, I have the sense that the directors of planning are up for the change. They accept that they might have difficulties delivering on the timescale, but doing well in any audit will be an incentive for them and will be good for their morale and for staff morale.

Frances McChlery: As a former local government officer and as a participant in the system, I believe that a real commitment to good management practice in an organisation solves many problems. Auditing can be an affirmation of good performance, but it can be much more negative. The white paper, "Modernising the Planning System", acknowledges that a key success factor will be a real engagement with the idea of doing planning well everywhere it is done. Checks and balances, and checks on performance, are important and should be implemented, but auditing is not the whole story. The main objective should be to ensure that local authorities are enabled to meet the standards that have been set for them, as well as to check that they are delivering.

The Convener: My final question is about the involvement of key agencies in producing development plans. Does the Law Society have concerns or reservations about the involvement of key agencies such as Scottish Water and SEPA in the process of producing development plans and about ensuring that everybody is effectively engaged in that process?

Frances McChlery: We understand that the plan is that the key agencies will be the national agencies of state, such as SEPA, Scottish Natural Heritage and Historic Scotland, which is not technically an agency, and the local enterprise companies, which are obviously important. One

major problem in delivering some of our key developments has been infrastructure. All the infrastructure agencies are co-ordinating agencies, and Scottish Water is obviously a factor in that.

In our clients' interests, we attach great importance to a co-working, collaborative process. Previous commitments have been made to such an approach under the heading of community planning, which involves health boards and other service providers. We would like a conjoined approach, so that, in the spatial planning exercise, the key agencies are involved when we need them to be involved and are asked to continue to deliver on the expectations that they have raised in the plan. That is important.

The proposal would restrict key agency involvement merely to the national agencies. In a new regime, we would expect nothing less than a quality contribution from the national agencies, but we would like a really inclusive approach to be taken to the essential co-ordinating providers, so that the exercise is collaborative.

The Convener: Does the right culture exist for all the agencies not just to say that they want to be part of the process, but to be tied in, to ensure that they are part of it? Do you have concerns about that?

Frances McChlery: Such a culture has not always existed. A recommitment to re-engaging, particularly on the part of the national agencies, is perceptible. I have seen that in strategic environmental assessment and the SEA gateway, for example. That is a good idea that I would like to be developed.

The issue is much more to do with infrastructure providers' difficulties with investment programmes and investment gaps. In the past, dialogue has continued, but only up to a point, beyond which difficulties arise with commitment. We know that, if we want to move forward, we must pass that impasse, begin to commit resources and draw matters together such that infrastructure can meet the needs of development.

Ms Sandra White (Glasgow) (SNP): Good morning. I note from your submission that the society's planning law sub-committee has concerns about appeals—particularly about the right to be heard in some cases—and that you think that the proposals are not ECHR-compliant. Will you elaborate on that?

John Watchman: We are concerned about the proposals to repeal the right to be heard in several instances. One issue is that the proposals are tucked away in the schedule, which is on repeals, and are not obvious at the outset.

The ECHR gives certain guarantees and we are concerned about how one approaches ECHR compliance, to which I understand that the proposals relate. One guarantee under article 6 of the ECHR is of a fair and public hearing, but the balance is being moved away from an applicant or appellant having the right to choose a hearing. Currently, there is certain encouragement in a practical sense not to go for a public inquiry, but that will be replaced by a civil servant choosing, in effect, the type of process for an applicant or an appellant. In general, the issue is not only developers' rights, as the rights of third parties will also be determined. The change is significant, and there is certainly tension with respect to the guarantees under article 6 of the European convention on human rights.

Ms White: I would like to explore that issue a little more. You are basically saying that there could be a challenge in court under article 6 of the ECHR because it is stated that people have a right to choose the type of hearing that there should be, such as an investigative hearing.

John Watchman: There could be such a challenge, depending on the particular circumstances. That is why the matter is so complex. Things could be decided on a case-by-case basis. If the proposed route is followed, my general concern would be that there would be tension around whether there was EHCR compliance in respect of dealing with disputes.

In general, we support a presumption in favour of the applicant's or appellant's choice of process. No one, from individuals to those in corporations, makes the choice of having a public inquiry lightly because of the costs that are involved—which is the starting point—the length of time during which people must engage in the process and the time that it takes to get a determination. Everyone has not defaulted to the position of seeking a public inquiry. There is much more mature reflection about which process an applicant or appellant should choose. It is wrong to say, "Oh, well, they simply want to have the Rolls-Royce all the time," and that there is an automatic default to that position. A lot of consideration is given by applicants and appellants to choosing the form of the process and whether it should involve written submissions, a hearing or an inquiry. Furthermore, the pool of cases that become appeals before Scottish ministers should be smaller as a result of the proposal that a number of inquiries should be transferred to be decided by councillors. Therefore, I do not quite follow why there is such a rush to move the balance towards, in effect, the state determining the type of dispute resolution process with which people will be engaged.

Ms White: I have been involved in two public inquiries in my political life. People do not engage in such inquiries lightly.

Basically, although the hearing system would still exist, a challenge would perhaps come from the legislation giving power to Scottish ministers rather than giving everyone a choice. The issue is not the determination of what type of hearing appeal system there should be, but that power will be shifted.

John Watchman: The issue is the power of choice. Our recommendation is that the applicant or appellant should be left to choose the procedure. Such an approach would have significant benefits, one of which would be that if a person elects to have a written submissions procedure for their appeal, they will clearly have waived their right to have a hearing. There are advantages in leaving matters in the hands of the applicant or appellant.

As I said, most applicants and appellants take the choice that they are faced with seriously. They take a considered view—it is not simply a case of deciding which box to tick. There are financial consequences. Nowadays, most inquiries last for a minimum of two days. The outlay is significant if the costs of legal representation, planning consultants and other technical witnesses are factored in.

Ms White: The Executive has mentioned the introduction of a screening procedure to eliminate poorly founded appeals, which I think you said is basically a sifting matter. You also said that the procedure might not be ECHR compliant. Will you elaborate on what you said?

10:30

John Watchman: Under the proposals, an appeal can be submitted to the Scottish Executive planning division for it to undertake a preliminary examination as to whether the appeal should be passed to the Scottish Executive inquiry reporters unit for further action. The criteria for rejecting an appeal at a preliminary stage have not been set out, although the white paper referred to certain criteria for rejecting an appeal early and gave two examples. The first example is proposals that

"clearly depart from an up-to-date development plan."

Although that is easy to say, when broken down it is not such an easy call to make. What is an up-to-date development plan and what is a clear departure from such a plan? It must also be recognised that there is an inherent tension within development plans. Some 20 years ago, one of my first inquiries related to an opencast development. It struck me then that the developer's evidence was focused on the economic policies in the structure plan, which clearly supported the proposal. Representing the local authority, I cited the local planning policies that were protective of the environment. To assess whether a proposal conforms to the provisions of a development plan is very difficult. It is not a simple judgment to make.

The second example that is given is appeals that

"do not properly address the reasons for refusal".

An issue that will arise is whether an appeal is considered to have addressed the reasons "properly". There can be practical difficulties at the coalface in cases where, for example, the decision is taken contrary to recommendations of local authority planning officers. It is exceptionally difficult to get a statement from a council as to why its councillors have gone against the professional advice of their officers. Although in some cases reasons will be given, one might not understand what underpins them. That can be important. If one has a refusal that conforms to the local authority officers' recommendations, one can find the reasons underpinning the decision within the committee report.

Ms White: To follow on from that, the submission referred to the legislation coming into force in 2008. It could be tricky if development plans are not up to date as there could be challenges under the ECHR. Objectors could claim that they did not have a proper hearing because the Executive claimed that the matter was not worth looking at properly. Can a challenge be made under the ECHR if a development plan is not up to date? It will not be until 2008 before this is fed into the development plans.

John Watchman: The concern with the ECHR, particularly article 6, is not whether a development plan is up to date. There can be an out-of-date plan and that can have certain consequences. One can claim that the direction of a development plan adopted 10 years ago has changed due to changes in Government guidance and that the development plan has not caught up with current planning guidelines. In that situation, it is a case of weighing up what the provisions of the development are against material considerations that would include the new Government guidance. Our ECHR concern relates not so much to the possibility that development plans may be out of date as to the processes for determining applications that are assessed against development plans.

Ms White: Although the bill proposes not to allow developers to submit up-to-date plans when they are making an appeal, you are in favour of allowing them to do that. Why would that be better?

John Watchman: Regarding the appeals process, current powers will be extended to enable a council to refuse to determine an application if it was subject to a recent refusal.

Again, from experience, I know that the changes that are made are not as significant as those that the people who drafted the legislation had in mind. It is not the case that a totally revamped application is introduced at an inquiry. In the majority of cases, new proposals will fine-tune applications. Our concern is that if one excludes that fine-tuning, the applicant will be put back to square one. The council might then say to them, "You have been refused before, so we will not entertain your application." It might also mean that there will be a significant delay for what, in practical terms, is a minor change to a development proposal.

Although it is another issue, perhaps I can broaden my answer to include what might happen when planning authorities agree to a substantial change. The best way to illustrate that is to say that the reported cases all concern reductions in the scale of development. I can think of two such cases. The first relates to a housing development site whose size was reduced from 35 acres to 25 acres and from 420 houses to 250 houses. In the other case, the area of the floor space of the development dropped from 85,000m^2 to 15,000m^2. Cases tend to be like that.

However, it may be that relatively small changes in a development proposal, such as moving the footprint of a building by 3ft or 4ft, will have such an impact in terms of overshadowing or causing loss of privacy that a significant planning judgment has to be made about whether to allow the development. It is not that a completely new proposal has been submitted, and it is not usually the case that someone produces a development that is more significant in terms of scale or numbers. It is normally the reverse; it is a reduction in scale and size. Sometimes changes that appear to be de minimis—as in the example of a 4ft change to the location of a footprint of a building—have planning impacts that are so significant that they might make one change from accepting a proposal to refusing it.

Patrick Harvie: You may not be able to answer this straight away, but one minor detail of appeals is that an existing third-party right of appeal operates in Shetland. It has been put to the minister that the bill will abolish that. Last week in the chamber, he seemed to accept that that would happen. If that existing appeals right is abolished as a result of the bill, will there be any ECHR concerns?

John Watchman: I cannot answer your question immediately. I am aware that a third-party right of appeal operates on works proposals in Orkney and Shetland. That relates mainly to things such as harbours and fish farming. As I said at the outset, one has to look at the whole framework of the particular piece of legislation. As I understand it, the pieces of legislation concerned are local acts, with which I am unfamiliar in practice. I am aware that there are third-party rights of appeal under those local acts, but I cannot answer your question about whether repealing a third-party right of appeal in local acts would be ECHR compliant. However, I can certainly come back to you with information on that.

Patrick Harvie: That would be helpful.

Christine Grahame: Will you clarify that the 40-day period for parliamentary consideration of the national planning framework starts on the day on which the framework is laid? My colleague pointed that out to me, because I missed that from when I read the bill.

I want to return to third-party right of appeal. The bill founds itself, so far as communities are concerned, on upfront, rigorous and meaningful consultation. I do not know whether you would accept that, regardless of how well meaning local or national politicians are, many people will not get engaged in the local development plan process until there is a proposal to do something on their doorstep—it might be to open an opencast quarry, to take shale out of the river, to dump waste or to put a big housing development on the edge of their little village, for example. That is life.

I note that you reject third-party right of appeal, which you refer to as an individual's right of appeal. Given that you have many ECHR concerns, which mostly relate to the applicant, but which could also apply to communities, would there be any merit in supporting such a right of appeal for communities in certain limited circumstances—for example, when the vast majority of a community are opposed to a development for which planning permission has been granted? If there were enormous local hostility to a proposal, would it not be appropriate for the community to have a right to appeal the planning decision—even though the local development plan might say that the area in question was scheduled for housing or whatever?

Frances McChlery: Those are some of the most difficult questions with which one has to struggle. One's instinct is to respond favourably when a community has mobilised because that is a collective act. It is tempting to consider that a community in action could have the rights of the local authority to participate in the process and to initiate an appeal. However, there are issues, of which I am sure that members will be aware, about how representative community bodies are of local views.

Christine Grahame: May I stop you there? I did not mention community bodies. I am not talking about community councils and so on; I am talking about a community, not a body that has been set

up under the aegis of the community council. I am suggesting that communities could have a right of appeal in extremely limited circumstances. I have said that I wished that people got more involved in the local development plan process. I once got scolded for saying that I had no idea what was in the local development plan for my area, but that is true of most people who are not planners or developers—they simply do not engage in the local planning process.

Notwithstanding what you say in your submission, against the background of your concerns about the ECHR compliance of the bill at large, is there room for a third-party right of appeal for communities in limited circumstances?

Frances McChlery: Cases in which a community has a community council are slightly easier because in such cases the community council will have been developed through a community council scheme and it is possible that the members of the community council will at least have stood for office. Cases involving community councils are easier because community councils are recognisable, working community bodies.

The difficulty lies in identifying how representative of the wider community an active community group is. Such activism gives rise to all sorts of issues about diversity, constitution and accountability, which both have a legal impact and affect such bodies' rights to speak for the wider community. Some of our communities can be deeply divided on certain issues. How does one reconcile, rationalise and predict the effect of the views of the different groups involved? That process is fraught with problems.

Christine Grahame: I accept that. As I understand it, there will be no more local public inquiries. Is that correct?

Frances McChlery: I do not know.

Christine Grahame: Under the process that the bill proposes, apart from being able to object to the local development plan and to particular applications, what other rights will members of a community have?

Frances McChlery: There will be losses in the sense that opportunities are present in the current system that will not be available to communities, either as individual citizens or as groups, to prompt examinations in public of aspects of the local plan.

Christine Grahame: What will the losses be?

Frances McChlery: I do not have a list to hand. We could point out where communities' rights will be diminished, which will be in the plan-making process. As John Watchman has explained, there will be a loss of quality in the plan-making process. As I have said, examinations in public through public inquiries have stood the test of time on getting to the core of issues.

One must reconcile maintaining quality with ensuring participation. To enable that through a right of appeal is perhaps not the way to go. It should be remembered that rights of appeal or review regarding process exist at present and communities can and do exercise challenges on points of law when things have gone off the rails. That can happen and their right of audience is well recognised in the courts.

10:45

Christine Grahame: But they have to go to court.

Frances McChlery: The difficulty of doing that at a lower level on, for example, the quality of development and zoning, involves finding a truly representative voice. One constantly comes up against entrenched views in members of the public and their representatives, whereby people are clear either about why something is unacceptable or about why they support it. However, people tend to feel insufficiently empowered to engage in dialogue about what would happen if a development were given permission—that is regarded as conceding a point. Professionals are accustomed to living with that, but it is much harder for members of the public or their representatives to work that into their contribution. Therefore, we envisage many difficulties in bringing that aspect forward effectively. Giving community groups a right of appeal on the substance of a planning debate—on the merits of an application—would not resolve the problems that we envisage in a more general right of third-party appeal.

John Watchman: I will add a couple of points. First, it is clear to me that having a third-party right of appeal—limited or otherwise—is a political choice and is not a matter of ECHR compliance or anything like that. The focus of the Executive's legislative package is—quite rightly, in my view—on a system that is led by development plans. The philosophy is to encourage participation throughout the various elements of the system because the development plan sets the framework for any subsequent decision that somebody is likely to complain about. To me, the issue is not only about giving individuals opportunities to engage with the system but about giving them adequate resources to allow them to engage properly.

You also touched on what types of tools are available to members of the community. In practice, there are a number of tools, other than simply objecting to a local plan and following the objection through. For example, it is common for

community groups to write to Scottish ministers to seek to have a planning application called in for one reason or another, perhaps because the application is for a local authority site or because they think that the council is not handling a matter particularly well. People can take actions that are not prescribed in legislation that allow them to draw ministers' attention to cases about which they have particular concerns.

The focus of the legislation package that is before members is on achieving a balance. It is better to encourage engagement with the development plan, which we want to put at the heart of the planning system, than it is to have people sit on their hands, perhaps not even engage with the planning application process, and then find out later that there is a development that they are not happy with. People will then say that they did not realise that was happening or that they knew something was happening but did not realise what its full impact would be and, suddenly, they will be asking for a judicial review. That does not seem to me to be the correct way to go.

The Royal Town Planning Institute has highlighted a number of ways in which people can engage with development plans—I think that it gave 14 ways—and the bill will provide additional opportunities. However, we should make engagement meaningful. We cannot expect individuals or community groups to be unresourced and to be able to participate only on the proceeds of a coffee morning, for example.

Euan Robson: A right of appeal would obviously attach to individuals rather than to property. How could we restrict a right of appeal to community bodies, which are collections of individuals, but then exclude individuals? Would it be possible to frame a right of appeal that excluded individuals but included collections of individuals?

Frances McChlery: That is an immediate difficulty. Article 6 of the ECHR is about the rights of individuals, not of collective groups, although individuals obviously feed in through community groups. All I can say is that the issue is a difficult one to resolve. In my experience, community groups can be fragile organisations. As well as the difficulties of funding to which John Watchman alluded, which would have to be addressed, such groups would be subject to a lot of change in the course of a long process. As well as difficulties about qualification, difficulties arise about how the process would be sustained.

Euan Robson: What I was trying to get at was that if we allow community bodies, which are collections of individuals, a right of appeal, how could we exclude single individuals from that right? On top of the issues to do with the definition of the term "community body", I do not see how such a measure would not risk immediate challenge from an individual in the first circumstance that arose in which they had a different opinion from a community body.

Frances McChlery: Indeed. I cannot say much more than that you are right that there is a problem.

The Convener: Your written submission expresses concerns about good neighbour agreements. Will you put those concerns on the record?

John Watchman: At the outset, I should say that the Law Society of Scotland supports community liaison. Our concern about good neighbour agreements is that the measure was presented as a fait accompli in the white paper and was then progressed into the bill without the same significant public consultation that has taken place on other matters. We have had lively debates about how good neighbour agreements would operate in practice. We are concerned that the idea has been accepted without drilling down into the detail and considering the practicalities.

To pick up on one of Mr Robson's points, good neighbour agreements will, on the face of it, be restricted to agreements with community bodies such as community councils and trusts, but how would we exclude a Mr Watchman coming along and saying, "I want a good neighbour agreement, but I am not part of a community group"? One difficulty is about the parties to the agreement, but there are other philosophical difficulties about how the agreements would operate in practice and whether the proposal has a rigorous underpinning in the Scottish planning system.

The Convener: My understanding is that the Executive did not just come up with the idea. It considered the experience in North America, where good neighbour agreements have been used successfully. My experience of community groups is slightly different from Frances McChlery's—the groups that I represent in North Lanarkshire are far from fragile, fortunately. They are rightly vociferous in raising their concerns, because, unfortunately, they have had negative experiences of bad developers. I realise that not all developers are bad, but some parts of my constituency have unfortunately had to bear the brunt of bad developers.

The people living in areas such as mine believe that good neighbour agreements could work; that such agreements could give a community some comfort when it is faced with a development about which it has reservations, but which it accepts must go ahead; that such agreements could provide some degree of certainty and surety about what a community can expect from the developer; and that such agreements could provide a

safeguard to which it could refer the local authority should it have concerns about the proposed operation. Would you accept that if there is a dialogue to establish some of the contents of good neighbour agreements, they might be of benefit to some communities?

Frances McChlery: It is of course the exception that proves the rule. I am aware of the communities that you represent and I am definitely aware of the history of the area. The fact that there has been a sustained period of co-existence between those communities and developments that are quite difficult in an environmental sense has presumably fed into a considerable degree of stability and a high level of local knowledge in those communities about how one engages with the system. That is almost the ideal—if one can call it that, given the background to the situation.

Over the years, I have seen many examples of communities taking up a new issue that has taken everybody by surprise. The community in question might not be very large and it might not be very cohesive. There can be a lot of different views. It would be invidious to give examples, but there can be a lot of different views in a rural community. There will be those who present arguments and there will be those who have views but who do not express them. That can be unfortunate—indeed, it offers material for lots of good social science PhDs.

The society is fundamentally supportive of the idea of a regime being put together whereby everybody collaborates and the developer, manager or operator of a development commits to certain codes of behaviour. That is excellent. There are precedents for that in North America and there are similar models here, including green transport plans. However, nobody has any illusions about such codes of behaviour being enforceable, which is where the difficulty arises. Who has the right to take the operator to court over a perceived or actual departure from a good neighbour agreement? How would one ensure that that person had a mandate? From the developer's point of view, what would be the incentive to proceed under such arrangements?

Community liaison, as John Watchman said at the outset, can only be beneficial. It is a question of good management on the part of operators and of good community relations. We applaud the aspiration to enshrine that in some way. However, there are various difficulties, one of which concerns representation. Another difficulty, for the operator, is the potential for duplication between the obligations of the local planning authority to secure enforcement and another, amorphous, set of rights. We envisage difficulties there.

The Convener: Would a good neighbour agreement not form part of one of the obligations that were imposed when planning consent was granted? That way, there would not be duplication of any of the obligations placed on developers—instead, the agreement would be something in addition that they would have to abide by. I do not think that communities expect good neighbour agreements to duplicate the conditions that are attached to planning consent. They want local authorities to enforce the conditions that are attached to planning consent. Sadly, that does not always happen.

Communities want to have a good relationship with developers and to have a genuine dialogue, during which they can voice their concern about, for example, the wheels of lorries that drive through their villages not being washed properly or the fact that some drivers go a bit fast. If they can have such a dialogue, they will be reassured. Local authorities should, however, always enforce the conditions that are attached to planning applications. The good neighbour agreement is about having an additional right, but it should not attempt to achieve the same thing as a planning obligation.

11:00

John Watchman: One of the difficulties that you have highlighted is who should do what, and what a good neighbour agreement would add. The report that I understand underpins the Executive's views on good neighbour agreements did not highlight any criticism of local authorities, in the sense of failure to take enforcement action. The agreement was viewed as an additional mechanism to secure enforcement. We must recognise that the report refers to other jurisdictions, especially the USA. However, the regulatory context for planning in the USA is completely different from that in Britain. There is concern about the context in which good neighbour agreements will be introduced.

Frances McChlery touched on what can be achieved through existing planning mechanisms. We have community liaison groups; community trust funds; conditions relating to hours of operation, noise pollution, odour pollution and lorry routes; and provisions and agreements on independent compliance monitoring. It is difficult for me to see precisely what the scope of a good neighbour agreement would be. I am aware of the context in which you view matters, convener, as I come from North Lanarkshire originally, but there is a problem of duplication. What exactly would be involved? Who would the parties be? What sort of obligations should the community take on? Presumably, no agreement would be one sided.

Even if a good neighbour agreement is thought to be a good idea conceptually and practically, there must be resourcing for representation of the

community when it enters into the agreement, and to allow it to monitor whether the agreement has been complied with. I recollect that Mr Hartland has given you evidence to the effect that, generally, communities are not very good at monitoring. Clearly, there must also be resources to enforce the good neighbour agreement if it is breached.

If the problem that you have identified is reluctance on the part of local authorities to take what is considered to be appropriate enforcement action, it must be addressed. It is not clear to me what added value or additional control good neighbour agreements would provide, other than to allow certain specified groups in a community to enter into, monitor and enforce an agreement. Significant issues have not been fully thought through.

I will make a final point about practicalities. You talked about good neighbour agreements being introduced either by making resolutions to grant planning permission subject to there being such agreements, or by using suspensive planning conditions that prevent developments starting until good neighbour agreements have been put in place. That would be a pretty powerful tool in the hands of the community.

Frances McChlery: It is proposed that enforcement policies should be reinforced. Local authorities should get to grips with enforcement, which should be put back on to their planning agenda through the preparation of enforcement charges. That would be one way of getting local authorities to look at their areas and deciding in a transparent way what needs to be done by way of enforcement. In the case of major developments, such as those that we have in mind, the issue will be high on the agenda. I suggest that it should be a little higher up the list than good neighbour agreements.

There is an equally important principle, which is that the citizen is entitled to the protection of their country's environmental laws. It is part of their human rights to have recourse to the courts if the authorities do not enforce those laws for their protection. An individual who found themselves harmed by a failure to enforce the law could take their local authority to court to require it to take enforcement action. There would be consequences from that.

The Convener: The theory is all very nice, but I am not sure that the resource implications allow some communities to take their local authority to court. I agree that enforcement is the key and that we have to get it right. I will allow Sandra White in very briefly.

Ms White: I will be as brief as possible. By your own admission, John, you said that if the white paper is to work, it has to be based on development plans and people being involved from the beginning. Should a good neighbour agreement be reached at the beginning? Would it be duplication? For a good neighbour agreement to work and be trusted by the people, it would have to embody some kind of legal contract. If it contained such a contract, communities and individuals—Euan Robson's point in that respect was important—could have a right of appeal.

John Watchman: You make an important point about looking at such agreements in the context of development plans. Currently, development plans are required to flag up where planning agreements might be required and the nature of the contributions that can be expected. If the legislation is to include good neighbour agreements, I would expect development plans to refer to a requirement for the agreements in certain circumstances and to the types of issues that they would cover.

You are right to say that we have reached the stage where planning agreements in draft development plans foreshadow what will be required of developers. Similarly, I anticipate that good neighbour agreements would have to be flagged up in that way and be subject to examination as to their scope and so on. The point is that we should not look to the end of the system all the time; the agreements have to be brought into the development plan system.

Ms White: I do not think that we need good neighbour agreements, because checks and balances already exist, but if we have to have them, they should be legally enforceable by communities. If that were the case, would communities have the right to appeal, like a third-party right of appeal?

John Watchman: I think that you are thinking of when someone applies to vary a good neighbour agreement.

Ms White: We do not yet know what is in the legislation, although that could be it.

John Watchman: I will take one step back. There should be reference in the development plan to both planning agreements and good neighbour agreements. As I explained to the convener, if good neighbour agreements were required, they could be introduced either by making resolutions to grant planning permission subject to the conclusion of good neighbour agreements or by using suspensive planning conditions. If agreements are put in place, monitoring and enforcement will have to be addressed.

Subsequently, it is proposed that there might be provision to vary or amend good neighbour agreements, among other things, by application to the local authority. In that case, anyone could

apply to vary a good neighbour agreement—the community that is party to the agreement or the developer. As I understand it, whoever applies to the local authority to vary or amend the good neighbour agreement would be able to appeal against the local authority's decision. It is not just a developer-led matter; there might be a right of appeal for the community as well.

Ms White: Thank you for that clarification.

The Convener: I think that you will find that when that question was put to the Scottish Executive it said that it would consider it but that, currently, only the developer would have the right to apply to vary an agreement and to appeal a decision; the community would have no right of appeal and variation.

Ms White: We are asking about the law. John Watchman is telling us that, by law, communities would have the right to appeal.

The Convener: No, that was not my understanding of what he said.

Ms White: I am not a lawyer, but I accept the evidence from the Law Society and the Faculty of Advocates. Perhaps they would answer that question.

The Convener: I was clarifying what the Scottish Executive said—

Ms White: Yes, but you also stated that the Scottish Executive said that there would be no right of appeal for communities. However, from the evidence that John Watchman has given—I am sorry to put him on the spot like this—if good neighbour agreements are accepted and are legally enforceable, communities and individuals will have a right to appeal. The representatives of the Royal Town Planning Institute in Scotland also said that last week.

John Watchman: My comments are based on a quick reading. Proposed new section 75F of the 1997 act says that an applicant may appeal to the Scottish ministers against a local authority's decision. As far as I can see, there is no restriction on who can apply to a local authority to have an agreement discharged or varied so, in theory, a community body—a community party to a good neighbour agreement—could suggest varying an agreement. If the application had a negative outcome, the applicant would have the right of recourse to the Scottish ministers. I do not know whether that was intended, but that is my quick reading of the new section.

The Convener: I am grateful for the Law Society's interpretation, which is slightly different from the Scottish Executive's—that was the point that I tried to make. As Ms White did not attend the meeting when the issue was previously discussed, perhaps she will reflect on that.

The Law Society has expressed concerns about the potential for legal problems as a result of using temporary stop notices. Will you elaborate?

John Watchman: I make the general comment that I agree with Alan Prior's evidence, which was that an appropriate enforcement toolbox is available and that the matter is more a case of priorities and resourcing than powers. I understand that the power to issue temporary stop notices can be exercised if a council wishes to serve a notice to protect its position for 28 days, after which it can decide whether to take the matter further.

Our concern is about the compensation provision, which appears to apply when planning permission has been granted for the activity that has been stopped for 28 days, but not when someone is acting under permitted development rights. Such a person would be required, under the temporary stop notice, to cease undertaking that activity—which may well be an economic activity—for 28 days. At the end of that period, he could pursue compensation only if he obtained a certificate of lawfulness. It seems a bit artificial that, on the face of it, the bill excludes compensation for someone who operates under permitted development rights.

The Convener: I understand your point, but my concern about temporary stop notices is that local authorities are sometimes reluctant to use them, because they fear the cost of compensation that they might have to pay and because they would have difficulties in demonstrating that other activities on a site were not related to the activity that they wanted to stop because they thought that it breached the planning consent. That can sometimes create great frustrations—perhaps not for the developer, which is trying to do what it wants to do, but for the community, which faces the difficulties and the impact of what the developer does.

John Watchman: It is envisaged that some compensation will be given for temporary stop notices—although the system is not perfect—in recognition of people's rights under the European convention on human rights.

Your general point is that the potential need to pay compensation impacts on an authority's decision to take enforcement action. I am sure that that happens. However, if need be, I can give the committee a useful reference to an RTPI publication on enforcement by three enforcement officers, who I think were from Glasgow, Edinburgh and Aberdeen. They commented in that text that in their experience they have never known of a claim for compensation. They are senior officers, so presumably they are also experienced officers in that field. If that evidence would be helpful for the committee I would be happy to dig it out for you.

11:15

The Convener: That would be helpful.

Christine Grahame: You will be glad to know that we are nearing the end. On page 15 of your submission, you state that your sub-committee

"is concerned about the lack of any effective sanction for inadequate service provision and the lack of any 'incentive' for high quality service provision"

by the planning authority. What would you see as appropriate sanctions and incentives?

Frances McChlery: We were uncertain about what would come under either category. I mentioned the difficulties of financial sanction. If a council is not doing its job properly, subordinate legislation powers exist to enable the ministers to examine the affairs of a local authority, and to hold a local inquiry into how things have been going or to direct that local authority to take certain action. There are a lot of policing powers; the point is that they have not really been used in all the years that they have been there. It would appear that the availability of powers is not the problem.

Christine Grahame: In which legislation do those powers lurk?

Frances McChlery: They are throughout the 1997 act. They were in the Town and Country Planning (Scotland) Act 1972 and there are also general powers in local authority legislation to enable ministers to go into the affairs of a local authority and to deal with them. However, those powers have not been used. It would appear that that is not really the issue. Rather than penalise or sanction local authorities, perhaps the first action taken should be remedial, or inquisitional—I am sure that that is not the word. It should be to find out what is wrong and to come to terms with it through the existing mechanisms rather than to speak in terms of removing resources from an errant authority.

Christine Grahame: So you come to the point at which one of the sanctions under consideration is the removal of resources.

Frances McChlery: Yes.

Christine Grahame: What would be an incentive? In your submission you talk about the need for assessment and

"the lack of any external assessment of the Scottish Executive Planning Division and the Scottish Executive Inquiry Reporters Unit."

We would need some kind of audit, monitoring or report.

John Watchman: To pick up on your point about rewarding good performance, there have always been powers to investigate an authority or to consider sanctions against an authority that is failing to perform to an acceptable standard. In the last planning audit report, West Lothian Council was one of the best performing authorities. If we are going to have a culture change, perhaps we should be recognising good practice or good quality in the development plan and in development management, so that authorities such as West Lothian, in addition to the kudos of being recognised for their performance, are given more substantial recognition. It is difficult for lawyers to suggest what those rewards might be.

To pick up on your second point, which is really about the assessment of the Scottish Executive itself as a planning authority—

Christine Grahame: Heaven forfend that I should say that, but yes.

John Watchman: No doubt it was in the spirit of fairness. While the Executive may wish to monitor the local authorities, who is monitoring the supreme planning authority, which is the Scottish Executive? Reports are published about the performance of the planning division and the inquiry reporters unit, so, to a degree, there is some indication of how those bodies are performing. I was involved, for the Government, in County Properties Ltd v the Scottish Ministers. One of the issues that came out of that case related to the monitoring of the performance of the reporters unit and whether undue pressure might be placed on reporters to take a certain view, given matters such as performance-related pay and promotion. That was flagged up clearly in that litigation.

South of the border, section 55 of the Planning and Compulsory Purchase Act 2004 relates to the UK ministers publishing timetables for their deliberations in relation to applications. The ministers publish a timetable for their determination of a called-in case, for example, and a report is laid before the Parliament so that it can review the performance of the ministers in the discharge of their functions and allow them to explain any issues regarding their not performing as per the timetable. If we are looking for an open and transparent system in which there is accountability, there is some merit in assessing not only the local planning authorities, but the supreme planning authority—the Scottish ministers.

Christine Grahame: How often would you foresee such a report coming before the Parliament or one of its committees, such as the Audit Committee or the Communities Committee?

John Watchman: Currently, the planning division of the Scottish Executive reports on a yearly basis.

Christine Grahame: So, it would be an annual report to Parliament.

John Watchman: I think that it would be an annual report.

There is concern in the system about the time that it takes for Scottish ministers to approve a development plan once it has gone through the process. I think that the ministers took 51 weeks to approve the submitted Edinburgh and Lothians structure plan—that is not widely known. There may be issues, especially as the Edinburgh and Lothians structure plan is one of the more slimmed-down documents because of the 40 pages, 40 policies rule. The introduction of an annual report would allow Parliament to assess the ministers' performance in the approval of development plans and in dealing with called-in cases. It would make them more accountable to the Parliament.

The Convener: Thank you for your attendance and for your helpful evidence. We will consider that evidence and pursue those points with the Scottish Executive, especially where there might be some divergence of views regarding your interpretation of what is proposed and what the Executive is proposing. We will pursue those matters with the ministers when they come before us.

I suspend the meeting to allow for the changeover of witnesses.

11:23

Meeting suspended.

11:27

On resuming—

The Convener: I reconvene the meeting and welcome our second panel of the morning. We are joined by representatives of the Faculty of Advocates. Roy Martin QC is the dean of the faculty and Ailsa Wilson is an advocate. Thank you for attending the committee and waiting patiently in the public gallery during our first panel session.

I will start by asking a general question about consultation. Do you believe that the Scottish Executive consulted effectively on its proposals for the Planning etc (Scotland) Bill? Were you able to engage in that process and express your views?

Roy Martin QC (Faculty of Advocates): Yes. I am quite satisfied that the consultation exercise was adequate and allowed us to say what we had to say. I thank the committee for allowing the faculty to appear at this stage of the process also.

Mary Scanlon: Your written submission begins:

"The bill is extremely complex. Drafting appears over elaborate in comparison with existing legislation."

If it is complex and over-elaborate to you, spare a thought for the rest of the people in Scotland who have to make sense of it. What are the implications of the bill's complexity and over-elaborate drafting for its passage and implementation?

Roy Martin: The over-elaboration arises in two ways. First, there is over-elaboration of the legislation, which, as you rightly say, poses a difficulty not only to you, but to all of us who have to deal with legislation of this sort. I was interested to hear the earlier discussion with representatives of the Law Society about the possibility of a consolidated version of the legislation as it would be if the bill were enacted. There is no reason why somebody could not go through the 1997 act, having regard to the bill, and rewrite it as it would read if amended by the bill. That would make dealing with the legislation easier, but that process is of course beyond the normal legislative steps. The legislation and the detail of the bill's provisions make a complicated situation.

Secondly, the bill increases the bureaucratic—I do not mean that pejoratively—steps that must be taken. For example, it introduces many more notification procedures whereby people who intend to start a development have to notify the planning authority and there are consequences if they do not. The faculty is anxious that more and more is being imposed not only on individual members of the public but on planning authorities. In many of those circumstances, one might well stand back and ask whether that extra burden is really necessary and in the public interest.

11:30

Mary Scanlon: One of the bill's main objectives is to make the planning system more inclusive, but the primary objective is really to make it more efficient and to enable planning applications to be processed more timeously. Will that be achievable under the bill?

Roy Martin: The processing of a planning application will probably not be much different from now, but many of the additional steps that will have to be taken before processing and might be taken after it give rise to our anxiety that what planning authorities and individuals will have to do will be much more intricate. In so far as the bill addresses the simple determination of a planning application—although it is not a simple act—it does not make a material difference to how determination operates at the moment. All sorts of things will happen differently beforehand, and all sorts of things might happen differently afterwards, but the core determination of a planning application will not be materially affected.

Mary Scanlon: Like other witnesses, you have mentioned that the devil is in the detail of the regulations. You also say:

"We have not seen evidence that these issues have been fully thought through."

I suppose that we do not have all the evidence yet. I note that paragraph 221 of the financial memorandum says:

"We … anticipate a modest saving for the Scottish Executive Planning Division".

Given that, as you state, there might be many opportunities for legal challenges, is the Executive's modest saving likely to be offset by huge increases in lawyers' fees as a result of legal challenges?

Roy Martin: The heart of several of our concerns is the manner in which the bill would take away the right to determine disputes by way of a public inquiry with cross-examination—I will not go into the detail of that now, but we would be happy to assist in that regard. If that is the bill's effect and if it were to create a regime that did not comply with article 6 of the European convention on human rights, those who had an interest in the outcome of the procedures that had been affected might well make legal challenges. I cannot say that such challenges would be inevitable, because regulations that we have not yet seen might address the concerns that the committee and those of us who operate in planning law will have to consider, but if we create a legislative regime that gives rise to a greater likelihood of such challenges, it is logical that that might have cost implications.

Mary Scanlon: That is the problem. We are working with the bill but we do not have the regulations in front of us, so we have to take steps forward in blind faith. On the evidence that is in front of you, what would you say needs to be corrected or addressed in draft regulations to reduce the possibility of legal challenges that would hold up the process, be more costly and result in the opposite of the bill's objective?

Roy Martin: There are several critical issues that could be addressed in regulations. The right of all parties—including individual objectors and communities—to a public inquiry on objections to a local plan has been taken away. On the face of it, that is a little illogical if the bill's purpose is to engage with communities at an earlier stage and to greater effect, which is a reasonable purpose. Other issues include the right of the applicant, when there is an appeal against refusal of planning permission, to require a hearing before an appointed person—which is normally a public inquiry, with evidence being tested—and the arrangements for review by members of the planning committee, without some form of hearing, of the decisions of planning officers on local developments. Those are the obvious things that could be addressed in regulations because it could be said that there will be an inquiry in circumstances where there are any fears to be allayed.

I have identified the most obvious difficulties with the bill. Ailsa Wilson may want to make some additional points.

Mary Scanlon: Do you not have faith and confidence in the new emphasis on upfront confrontation? I meant to say consultation—that was a Freudian slip.

Christine Grahame: You were close there.

Mary Scanlon: Are you not confident that upfront consultation will alleviate the need for public inquiries?

Roy Martin: It does not matter whether I have confidence in the process. If it is right to have confidence in it—it is certainly right to engage the community as early as possible—there will be fewer inquiries. All that we say is that, inevitably, like it or not, there will be situations in which contested points of view have to be resolved. If we do not provide a mechanism that is sufficient to do that, we run the risk that there will be challenges to the lawfulness of the bill at that stage. If there is a mechanism that enables people to be engaged as fully and as early as possible, it is likely that difficulties will be resolved and there will not need to be appeals.

Christine Grahame: In your written submission on both the bill and the white paper, you touch on a number of areas that would be open to challenge under the European convention on human rights. Draft regulations are a huge problem for the committee. I think that their substance should be included in bills, but everything happens in regulations. Do you support the position of the Law Society that the committee needs to see the regulations prior to stage 3? You say that substantial issues will be remedied in regulations that tweak primary legislation quite substantially.

Roy Martin: It is not for me to presume to speak for the committee.

Christine Grahame: I am not asking you to do that. What is your advice to us?

Roy Martin: My advice, if I may give it, is that at the moment there is sufficient uncertainty, in the absence of the draft regulations, to give rise to the view that there is a potential risk of challenges to the bill.

Christine Grahame: That was very careful, but I understood your answer to be yes.

I want to ask you about upfront consultation. It is supposed to be more inclusive and efficient, but there are a few barbed comments about it in your submission, which is fine by me. You say:

"The pre proposal appears to be resource driven".

I take it that you are referring to the early consultation. Given all the other things that you say about the bill, do you believe that the reasons for the pre-proposal are resource driven, rather than part of the general sweep of the bill, which is to make the process more democratic?

Roy Martin: I ask Ailsa Wilson to answer that question. She is a member of the Scottish planning, local government and environmental law bar group, which was responsible for preparing the submission.

Christine Grahame: I know Ailsa from many years ago.

Roy Martin: She may have a better idea of the answer to your question. However, you are right to identify what has been said.

Ailsa Wilson (Faculty of Advocates): There is a feeling in the bar group that much of the process is driven by the wish to save resources associated with the cost of running public inquiries. To an extent, that is reflected in the policy memorandum, which makes it clear that cost savings are a consideration in the new legislation. Although the Faculty of Advocates accepts that that is an important consideration for Government, it is essential that it is not the driver and does not result in important rights and decisions being compromised.

Christine Grahame: We are told that public inquiries use up a lot of money and time. Sometimes they rule against projects that go ahead anyway, so they can be pointless. As the bill stands, without any regulations, in which direction has the balance between making the system more efficient and making it more inclusive been tipped?

Roy Martin: If I may pick up on what Ailsa Wilson said, the resource-driven point is made in support of the view that there is not a sufficient justification for the restriction or removal of the right to a public inquiry. The encouragement of consultation at an earlier stage might be complementary to having fewer inquiries later, but I do not think that it is necessarily resource driven in the same way. Encouraging consultation at an early stage, and indeed the way in which the bill goes about doing that, is generally a good thing. There is no suggestion that we should not have consultation and do everything that we can to resolve issues as early as possible. The resource-driven issue is concerned with the restriction on the right to public inquiries at the end of the process.

Mr Home Robertson: Mr Martin referred to the Faculty of Advocates' anxiety about the loss of scope for inquiries, hearings and appeals. The faculty's submission states:

"The loss of certain parties' rights to insist on a public inquiry or hearing … risks the loss of effective scrutiny for many proposals."

Later in the submission, concern is expressed about a new presumption against public inquiries. Perish the thought that the faculty might be representing the interests of its members in that respect. Would you like to take this opportunity to defend those concerns about the loss of that right?

Roy Martin: I echo what I have already said. However much one encourages agreement at the beginning and throughout the process, there will be competing points of view in some situations and those positions have to be resolved in a way that is satisfactory both to the people who are involved and to the members of the public who are looking on. Of course, the matter must also be resolved in a way that complies with the European convention on human rights. To assist the committee, we provided a copy of the House of Lords' decision on the Alconbury case. Paragraph 46 of their lordships' speeches makes it clear that the opportunity to test evidence by cross-examination, which is also mentioned in the Executive's code of practice for inquiries, is an important element of the system's compliance with article 6 of the ECHR.

It looks as if the planning system is very much an administrative process. Many parts of it are truly administrative and many parts can be dealt with in an administrative fashion. However, when there is a difficult and contested case, the positions of parties with competing civil rights have to be resolved. Our position is that that can be done only through a public inquiry. If everyone participates in a public inquiry, there is the best hope that everyone will accept the result, even those who do not get the result that they wanted. As we highlight in our paper, when a public inquiry is held, the reporter is obliged to record all the evidence and to explain why he or she reached their decision or recommendation. In that way, the reasons for the decision are exposed to public scrutiny. That explains the danger that we foresee if the Parliament limits the right to public inquiries.

Mr Home Robertson: That is helpful. I am sure that we are grateful for your warning about the line that was taken by their lordships. You used the phrase "if everyone participates". That is the key. The Executive and the committee are anxious to get the public engaged in the matter. Concern has been expressed to us by various people—not least, the Scottish Society of Directors of Planning, which gave evidence last week—that the legal, confrontational and sometimes rather obscure

approach can be exclusive and can frighten off public participation. Do you take that point?

11:45

Roy Martin: I can see that there might be a perception to that effect, although my experience as a planning advocate, having appeared for all aspects of issues at a large number of public inquiries, is that one does everything that one can not to bring about that result.

It is a matter for the committee to consider, but the difficulty is that, if it is accepted ultimately that the only way to resolve disputes is through a sort of adversarial process, the consequence might be that some feel that that is too confrontational. That is not to say that we do not do everything that we can procedurally to minimise both the perception and the actuality. However, I regret to say that the faculty envisages competing points of view being resolved through an adversarial process. Ailsa Wilson might like to add something about trying to minimise the risk of confrontation.

Ailsa Wilson: In the years in which I have been involved in planning inquiries, both as a solicitor and as a member of the faculty, I have acted not only for developers but, on many occasions, for planning authorities and third-party groups that were objecting to proposed developments. The third-party groups for which I acted were as anxious as other parties to be represented in an inquiry forum and to have other parties forensically cross-examined. It was important for their ultimate acceptance of any decision that they were able to participate in that process.

Mr Home Robertson: Obviously, I must defer to our witnesses' experience on this issue. However, having sat in on various inquiries on my own patch, my view is that the process can seem obscure and exclusive to ordinary punters. We heard from the Law Society of Scotland that an inquiry is a good way of getting to the heart of an issue, but it can also be a good way of obscuring an issue if a clever lawyer who has been well briefed goes all round the issue in a way that frightens off ordinary members of the public who do not have access to the support that the lawyer has. Those who can afford to brief first-class advocates can be in an overwhelmingly powerful position in an inquiry forum.

Ailsa Wilson: The Executive might also consider resourcing third-party groups—I think that Frances McChlery touched on this in one of her responses earlier—so that they are well informed and able to get proper representation to participate in inquiries in the way that they would prefer. Occasionally, a group wants its own day in court and to be the one asking the questions. However, in the main, third parties who are opposed to a development want to participate effectively in an inquiry process.

On the point about the obscure nature of discussions in inquiries, because of environmental legislation and other regulatory areas, the discussion in planning inquiries and the decision-making regime in planning is often about very technical matters. Detailed lines of cross-examination will be followed by the reporter who, at the end of the day, must either make a recommendation to Scottish ministers or make his or her own decision. That might not be understood by members of the public who have not seen all the papers that relate to the detailed line of cross-examination.

There might be obscurity because lawyers are just indulging in games—that might be what Mr Home Robertson was suggesting—but my experience is that reporters these days are clear that that is not a permissible approach by those engaging in inquiries. There have been dramatic changes in inquiry procedure rules and the approach of reporters over the past five years. I think that Mr Home Robertson would gain a different impression from a modern-day inquiry compared with one of five years ago.

Mr Home Robertson: My final question on this area is why the faculty considers that a local public inquiry is more appropriate than a less formal hearing that might be more user-friendly and inclusive.

Roy Martin: Again, that view is based on experience of judicial authorities, which is that if somebody must take hard decisions, a public inquiry and an adversarial approach in which each party can put up its case and examine and cross-examine witnesses is ultimately the only way to safeguard the result in terms of the treatment of the parties' civil rights. One of the papers that we provided to the committee refers to the English Court of Appeal case of Dyason, in which that point was made. There was a challenge to a decision made in a hearing that was conducted informally. I emphasise that that does not mean that a hearing is in principle inappropriate or that it should not happen in as many cases as possible. I suspect that this is based on many years of legal experience, but we have to provide for the hard cases in which such arrangements will simply not satisfy people's needs for a robust result in cases that everyone wants to challenge or in which everyone wants to have their point of view heard before the decision is taken.

Patrick Harvie: Do you agree that the aspirations for a less formal consultation and engagement process, in which the potential for conflict is minimised and which, perhaps, might involve even fewer inquiries, will not be best achieved by removing people's rights? That will

simply increase feelings of frustration with and alienation from the system. Achieving the type of engagement with the entire planning process that the Executive wants is entirely compatible with retaining people's rights, if they feel that they need them, at the other end of the system.

Roy Martin: Absolutely.

Patrick Harvie: Thank you.

Ms White: I do not think that I will be too long. John Home Robertson has asked some of the questions that I wanted to ask, and the Law Society has already answered some of them. I am interested in the ECHR implications of the appeals process. I am also interested in what is known as the sifting process, which we call the screening process—both have the same meaning.

My experience of public inquiries has been different from John Home Robertson's. I found the reporter very helpful, and people were most impressed by the process—they got more information from an inquiry than they would have got from a hearing. That is what it is all about—fairness and transparency for everyone.

Perhaps you already said this to John Home Robertson, but I want you to elaborate on why public inquiries are essential. There are not as many public inquiries as there are hearings. Am I right in saying that the basic idea is that the bill must enshrine public inquiries, perhaps as a last chance for people? Patrick Harvie talked about the risk of rights being taken away. Why do you feel that ECHR compliance is so important in connection with sifting and people's right to a public inquiry?

Roy Martin: In the context of the ECHR, the point is that people have a right to a public inquiry—they do not have to ask for it. The right to a public inquiry is important because it has been said that it forms an essential part of the chain of legal steps that satisfy article 6 of the convention. A reporter is essentially—if not technically—independent of ministers and exercises functions impartially. If you take away the right of access to a reporter, the opportunity for parties to test each other's evidence in public and the need for the reporter to issue a reasoned decision, you run the risk of leaving a system that would not comply with article 6—at least on the face of the law as it exists.

In the context of the inquiry into the strategic development plan or the local development plan, it is particularly surprising to find that the reporter, or the person appointed, is free to make his or her own decision about the procedure to be adopted. Under current legislation, any objector has the right to require an inquiry into a local plan—that applies even to an individual who objects on a very straightforward basis. No formality is required. That local interest can bring about a local inquiry into an objection. If one is trying to encourage earlier participation and earlier resolution of issues, it seems a little odd that that procedure is being taken away.

Euan Robson: Can we discuss the scheme of delegation? I believe that you heard the earlier exchanges. Is the difficulty caused by the fact that the officer is employed in an organisation led by councillors to whom that officer is therefore accountable? Those councillors will make a decision on any case that is referred to them. Is that the main concern?

Roy Martin: I do not think that that is the main concern, but it is certainly a significant concern. The planning authority is and will remain a single statutory body consisting of members and planning officers. Therefore, people would seek a review of a decision by the body that made the decision in the first place. At a legal level, that causes anxiety, because the officer is simply an employee of the planning authority. At a more functional level, the relationship between planning officers and members often makes it difficult for members to be able to review the decision of an officer without, quite reasonably, being influenced by what they already know about what has occurred in the authority. I have never had any direct relationship with planning authorities, but I have heard about that at inquiries.

One is familiar with planning officers presenting a report to committee and making a recommendation to grant or refuse planning permission. The members act on that recommendation: they either accept it or they reject it. That is the end of the planning authority's role—the work is done through a combination of the efforts of the officer and the members. The mechanism in the bill would bring about a different relationship. I am perhaps not the person to ask, as I do not have direct knowledge of a planning authority, but I can see that that would be difficult.

Euan Robson: You say that the bill would bring about a different relationship, but in effect the relationship will be fairly similar. Officers will explain to members why they have come to a particular conclusion and the members will sit in judgment on that. That happens all the time. I do not see any difference in the process. There might be some difference in members' relationship with officers, but surely not in the process.

Roy Martin: Characterised in that way, you are quite right—the relationship will be very similar. The problem is that the mechanism in the bill would be used to take away the right of appeal to the Scottish ministers. That is the critical problem. The creation of a two-stage process within the authority would not give rise to a difficulty if there was then a right of appeal. Whether that would be

administratively efficient is a separate matter. Ultimately, it is the absence of the right of appeal to the Scottish ministers that is the critical difficulty.

Euan Robson: The employment aspect and the relationship between the officer and the members are, in your view, subsidiary to the main point, which is the repeal of the right to be heard in certain cases. You mention that 30 per cent of decisions taken to appeal are overturned. There is no intuitive reason why 30 per cent of decisions might not continue to be overturned.

Roy Martin: That may well be the case. However, that is not the point. The issue is the process by which the decision might be overturned and the ability of all to participate in that process in the way that we have been discussing.

Euan Robson: Clearly, we do not have the regulations yet. The main point is well made and quite appreciated. In the arrangements under which councils currently operate, is there any way of satisfying ECHR considerations? Can you envisage a way in which Chinese walls—or any other edifice, for that matter—could be constructed that would satisfy those considerations?

Roy Martin: If we are talking about the satisfaction of ECHR principles, let us consider the decision of the House of Lords in Alconbury. The mechanism was as follows. A decision, which is essentially administrative, is made by the secretary of state—it being an English case. A reporter—or an inspector in England—who is an independent person who hears and sifts the evidence and produces a report, is introduced. A decision is then made, either by the reporter or by the minister, and there is then a right of review in the courts. It is possible to imagine a model in which a local authority could review its own decision by appointing an independent reporter to do that—that would be similar to the existing mechanism for planning appeals. That approach has not been as thoroughly researched as it might have been, but such a mechanism could be ECHR compliant, even if there was no appeal to the Scottish ministers.

Euan Robson: Let us say that the parties consented to a process and in effect agreed that there would be no appeal beyond it. That would be one mechanism. However, some local authorities operate what is called a scrutiny committee, where decisions that are taken are subject to scrutiny. Might a development in that area suffice?

12:00

Roy Martin: Again, I hesitate to give definitive advice, but I think not, if the process did not have the equivalent of an inquiry in which the issues could be tested if somebody were to demand that. We are talking simply about the right to that scrutiny; if parties agree to a different procedure—which they are perfectly free to do—these issues do not arise.

Euan Robson: You have expressed concern about large developments becoming local developments—in other words, developments that dodge the inspection process by being redefined. Other than a contention, is there any evidence that leads you to suspect that that behaviour would occasionally be seen or even become the norm among local authorities?

Roy Martin: Are you asking whether, if some sort of numerical threshold is provided for the difference between a local and a major development, the individual in question will, at the point of the threshold, and whichever way happens to suit him—

Euan Robson: Yes. Is your view theoretical or based on evidence of past behaviour?

Roy Martin: It is theoretical, in the sense that we have not had a mechanism such as this; therefore, I do not have empirical evidence. My view is, however, based on my experience of human nature over the years. I speak as a lawyer. I regret to say that, if a potential barrier is created—not only in planning, but in income tax or whatever else—those who are at the margin will tend to act in their own interests rather than in the spirit of what was intended. I feel that such action would be likely in planning, and I support what the Law Society said. That is why the thresholds and regulations will be difficult to devise and important for the committee to scrutinise. A simple numerical threshold may not be the way to go, as it is easy to envisage people manipulating the process. There may be other ways of doing it that achieve the objective in a far better way.

The Convener: In your written evidence, you express concern that enforcement notices will result in the potential for duplication in the decision-making process. Can you expand a little on what you mean by that?

Roy Martin: Ailsa Wilson will deal with that point.

Ailsa Wilson: Under the existing legislation, one of the grounds for appeal against enforcement proceedings is that planning permission should be granted for the unauthorised development. The proposal is that that right of appeal be removed. Consequently, although the enforcement notice might be appealed against, if planning permission was being sought to legitimise the operations on the ground, an application would have to be made for planning permission. There would then be two separate processes running at the same time: the enforcement notice process and the new planning application, seeking retrospective planning

permission. In the faculty's view, that goes against the desire to introduce efficiency and seems to take away quite an efficient mechanism that works at the moment.

The Convener: It perhaps works for the developer, but it is questionable whether it works for the community. Is this not an opportunity for us to encourage developers to be up front? Sometimes, especially in relation to a development that a developer is aware that a community might not want near it, such as an opencast mine or a landfill site, the developer will apply for planning consent for much less than they actually want. The developer will then say, "We had to do this work in this area anyway," and will apply for retrospective planning permission. Communities then feel alienated, angry and abused. Perhaps telling developers to be up front, to engage with communities and to be honest about their needs will lead to a much more transparent system that everyone can have confidence in.

Ailsa Wilson: You said that communities felt let down when a developer applied for permission retrospectively and sought to authorise a development. That will still happen. The suggested procedure retains the possibility of applying for permission and having an authorised development. The difference is that that involves a separate process from the enforcement notice process. Third parties can participate in enforcement appeals; they are not excluded from that. If a planning authority refused an application for retrospective planning permission, the developer would end up at an appeal in any event, depending on how a development were categorised.

We would end up with two inquiries: one on enforcement and one on an application. Those of us who work with the public, third parties and planning authorities regularly are well aware that the more the public must attend different hearings and inquiries, the more confused and frustrated they become.

The Convener: Surely developers would not end up in this bureaucratic mire if they applied for retrospective planning consent only in exceptional cases. Unfortunately, my experience is that they do not apply for such consent only in such cases and that the practice is more common. Perhaps the proposals will create a disincentive to abuse the system in that way.

Roy Martin: You have identified a perfectly reasonable concern. Our point is that what we are discussing does not address that concern; it simply introduces two processes to deal with the problem, instead of having a single combined process. Imposing a further limitation on the right to apply for retrospective planning permission when an enforcement notice had been served would be a separate issue. Our point is that no such limitation appears to be proposed. The change is simply procedural and will in substance make no difference, other than to duplicate applications. I do not want you to think that the faculty is not sympathetic to your point, but the fact is that what the bill seeks to do does not address it.

The Convener: You suggest that, if what was described is the intention behind the Executive's proposal, the bill will not achieve it.

Roy Martin: That is right—if that is the objective.

The Convener: If that is the objective, what should the Executive do to prevent that abuse and to achieve more transparency when decisions are made about developments?

Roy Martin: That is a significant question that raises political issues on which the faculty would not want to comment. However, I suggest that, procedurally, a prohibition is conceivable on applying for planning permission for a period if an enforcement notice has been served. The issue is political and I do not want to express a view on it. All that I can say is that there might be ways to achieve that objective procedurally.

Ms White: I have a brief question on public inquiries. Most of the objections that we hear about—for example, constituents may approach us—arise because local authorities have proposed development plans for their own land. That is a major concern—the issue is not just about developers. Would removing the right to a public inquiry when a local authority is involved be much more detrimental to people's involvement in the planning system that we are trying to create? Is that a major area in which the right must stay?

Roy Martin: The faculty has been open about that and the point has been acknowledged elsewhere. Local authorities as local planning authorities have given planning permission for developments on land that they own or have some other interest in, which we must accept has given rise to concern, particularly when local objections have been expressed. One general point that we made in initial discussions and in our response to the white paper was that something should be done to address that, perhaps by means of a more easily triggered call-in of such applications when—and only when—objections were expressed.

As you suggested, the removal of the right to appeal will only increase concerns. That is not an exclusive category in which there is any difference to the principle of whether or not the right to an inquiry should be available. However, if we are trying—as we all should—to address public concern or a lack of public confidence, we must

acknowledge that planning authorities authorising development in which they have an interest is a concern. The bill certainly ought not to do something that is likely to increase that concern.

The Convener: The committee has concluded its questions, which were based on your written evidence. However, we might not have raised issues that you wanted to put on the record, so I give you the opportunity to make further comments.

Roy Martin: I will make one point about third-party rights of appeal, which have been discussed. I will not take up much time. The issue is contentious. There are various ways to give third-party rights of appeal when a planning authority has granted planning permission and an objector wishes to appeal against that. Rights could be given generally to any individual who has objected or to community groups, as was discussed, such as community councils or groups that have been established in ways that are similar to those in the legislation that provides the community right to buy. Alternatively, rights could be given in specified circumstances, which might be when permission for a development had been granted against a development plan as acknowledged or when a planning authority has granted permission for a development on its own land.

All those alternative mechanisms raise political issues that I do not want to go into. However, as the faculty responded earlier, ultimately, the political issues will take account of economic consequences. It is clear that a third-party right would be of great advantage to individuals and community groups and it is normally discussed in such terms. However, it must be remembered that, if such a right were available to individuals, commercial competitors of the party that obtained planning permission might well exercise the right—that would depend on its limitations. The risk of that would be that the right would not benefit those whom it was truly intended to benefit and that it would create an economic consequence and more, rather than less, contention in the planning system.

The Convener: Thank you for attending the meeting.

I suspend the meeting briefly to allow the witnesses to change over.

12:12

Meeting suspended.

12:15

On resuming—

The Convener: I welcome the final panel, which represents several bodies: John Thomson, director of strategy and operations west, and Mark Wrightham, national strategy officer, Scottish Natural Heritage; Cheryl Black, customer service director, Scottish Water; Neil Deasley, principal policy officer, planning and environmental assessment, Scottish Environment Protection Agency; Paul Lewis, director of competitive place, Scottish Enterprise; and Allan Rae, manager of competitive place, Scottish Enterprise Grampian.

I thank the witnesses for attending the committee. Do you believe that your organisations were effectively consulted and that your views were taken into account during the Executive's consultation on the bill?

John Thomson (Scottish Natural Heritage): Yes.

The Convener: All the witnesses seem to be indicating that they are happy with the process.

Paul Lewis (Scottish Enterprise): Yes: with the bill, with the white paper and with previous consultations on modernising the planning system over the past several years.

The Convener: Thank you.

Patrick Harvie: We started with some nice quick questions with nice quick answers. What work are you doing to anticipate the next NPF process? How do you see your priorities aligning with the next and future framework processes?

John Thomson: With the next NPF, the answer is not a lot, because its preparation is some way away. We put much thought into the content of the framework when the first one was prepared, but not all that we would have liked to be in it appeared in the final version. We have a certain amount of capital from that exercise to utilise in the future. One area we have considered is the role that the framework might play in future energy development—there are many strategic development issues in Scotland. We believe that the NPF will play a part in guiding that process and in identifying some key infrastructural requirements for future energy policy.

Cheryl Black (Scottish Water): From Scottish Water's point of view, we are keen to be involved in the national planning framework so as to avoid certain development constraint issues that we have experienced over the past four years. One of our concerns about being effectively engaged centres on the misalignment between the timing of our regulatory investment periods and the NPF. Our investment cycles run for four years. It is not possible for us to commit to funding beyond that time. We are anxious to understand how our investment cycle can be properly aligned with the NPF cycle.

Neil Deasley (Scottish Environment Protection Agency): From SEPA's perspective, our work to date is similar to that of Scottish Natural Heritage: it is still early doors.

We worked closely with the Executive on parts of NPF 1, particularly on strategic waste management priorities, to try to align the national waste plan with some kind of spatial dimension through the national planning framework. Those are the sorts of matters on which we envisage there being some close working and our having some influence.

You asked about aligning our priorities with the NPF. I guess that we would like that to happen with the national waste plan and the targets that it sets. Also, as I mentioned in our written submission, we wish the national planning framework to become a driver for sustainable development and to align with the actions, recommendations and policies that are set out in the sustainable development strategy. Moreover, we need to gear Scotland up to deal with climate change and take forward the planning-related elements of the future Scottish climate change programme.

Paul Lewis: Like SEPA, Scottish Enterprise was involved in NPF 1 and has aligned its development priorities with the main economic development zones that were identified in it.

On planning for NPF 2, Scottish Enterprise's strategy "A Smart, Successful Scotland" and the "Framework for Economic Development in Scotland" have recently been updated. Both place a much greater emphasis on the spatial aspects of economic development and on the key dependencies that deliver economic change, particularly transportation and other infrastructure. We are examining our investments in light of the updated strategies. In particular, we have already established a drive to have a greater national impact and to plan our activities to reflect more on the metropolitan opportunities in Scotland.

Patrick Harvie: How do the witnesses envisage that their agencies will influence decisions about the developments that should be included in the national planning framework? If, for example, there was a need for a nuclear waste facility, what influence would their agencies have, or hope to have, in determining whether that proposal would be in the national planning framework?

John Thomson: Scottish Natural Heritage would certainly hope to be consulted on the future NPF. One concern that we have is that the bill does not formally require that we be consulted as part of that preparation. We have already talked about the consultation on the bill. We have been involved in the past, but we would like that involvement to be formalised in statute.

Cheryl Black: Scottish Water would like to be engaged in the process early to ensure that we understand how the requirements of the national planning framework mesh with any other European or local environmental legislative requirements that have been placed on us, so that we do not end up trying to balance conflicting needs and so that we ensure that those matters are considered much earlier in the process.

Neil Deasley: SEPA has a similar desire to be engaged in the process early. As we have said in our written submission, the consultation arrangements on the national planning framework should be enshrined in legislation to make them clearer and more specific. Providing the Executive with information about Scotland's environment that can go into the national planning framework is one of our big areas of work. It was part and parcel of our engagement with NPF 1, particularly on waste, as I explained. We consider ourselves to have an informing as well as an influencing role, in that we provide the right level of information to inform decisions on the national planning framework.

Allan Rae (Scottish Enterprise Grampian): Scottish Enterprise welcomes the enhanced role that is envisaged for the national planning framework, and would like to be a statutory consultee. We would welcome the opportunity to feed into the process our view of what is important for future economic development in Scotland. I am thinking of the major infrastructure requirements that we want to see moving forward, for example in transport. We would welcome the opportunity to become more involved.

Patrick Harvie: I have a question on the NPF approval process. There will be consultation in which your agencies will be involved—one way or another. The Executive will then lay the NPF before the Parliament, after which there will be a 40-day period when we can make a response, which the Executive will have to take into account.

What is the right balance between the need for us to get the thing done—to get the framework in place so that people know what is what—and the need to have enough time to take evidence from your and other organisations as part of our detailed scrutiny? Is 40 days long enough to do that effectively, or is the need for speed the more important consideration?

Cheryl Black: As Scottish Water is usually busy dealing with many important issues, more time would be beneficial for us. It would ensure that we could consider the framework properly and contribute fully to the scrutiny process. If sufficient time is not allowed, the NPF will not be as workable as would otherwise be the case. The balance ought to be in favour of a little more time.

Neil Deasley: Invariably, an informed decision is better than one that is arrived at speedily. However, we have to balance the need to get the right level of information to inform the decision with the need to make decisions quickly on the

development that Scotland needs to take place. Different views will be expressed on how we can do that. We heard the lawyers talking about some sort of examination process, which they think would help to tease out the issues. I think that it was the RTPIS submission that included a proposal for a type of commission. There are different ways in which we could achieve that type of engagement. Although whether 40 days is enough may not be for us to determine, the principle of having an informed debate on the NPF will be a crucial element of its success.

Paul Lewis: I agree. I am not competent to comment on whether 40 days is long enough. However, I hope that the process prior to the NPF being submitted to the committee will be robust. That would allow the full and robust debate that is needed before the framework is agreed to. The need for speed, which is also important, can be taken into account in the process. In that way, we will have a framework that we can start to align our investments around. We achieve impact only by investing.

Mark Wrightham (Scottish Natural Heritage): We would probably agree with that. The critical point for us is that adequate consultation must be built into the process, one way or another. Certainly, we are most concerned to see that element being carried through.

Patrick Harvie: I have one last question for SEPA. You have given us your view that the NPF should be subject to the same sustainable development duty that applies to other bill provisions, such as development plans. I have made it clear that I am sympathetic to that view. What would your response be to people who say that "sustainable development" is a vague and woolly term that is difficult to define and hard to enforce? What is the real value of including that term in the bill?

Neil Deasley: I think that SEPA has made it clear that we think it is more difficult to impose a duty to contribute to sustainable development at the very detailed level of individual planning applications, but we see no reason why such a duty should not be applied at the level of the national planning framework, for example.

I have two points to make on the subject. First, proposed new section 25 states that decisions will be made in accordance with the development plan or, if they are national developments, in accordance with the national planning framework. Given that all the decisions that will be taken will be based on those two strategic documents, it does not make much sense for the higher level document not to include the duty to work towards sustainable development that is included in the lower level document.

Secondly, planning has a significant role to play in the delivery of sustainable development. It can bring together many strategic-level policy priorities, particularly the climate change programme and the sustainable development strategy. It is important that they have a spatial element to them. We can try to ensure that by ensuring that the national planning framework also has a duty to contribute to sustainable development.

Christine Grahame: I have a brief point on statutory consultees. I take it that we would have to consider amending new section 3A(8) of the Town and Country Planning (Scotland) Act 1997. As it stands, that sub-section states:

"The Scottish Ministers are to consult such persons or bodies as they consider appropriate".

However, I think that we ought to include a list of named statutory consultees and then add a reference to "such other persons or bodies" at the end. That would be much clearer all round.

12:30

Mary Scanlon: I thank Neil Deasley from SEPA for sending us his helpful written submission.

Some of my questions on development planning, which is covered by part 2 of the bill, may already have been answered, but I would like to talk about the new duty to co-operate.

Proposed new section 9(5) of the 1997 act states:

"It is the duty of a key agency to co-operate with the strategic development planning authority in the compilation of the authority's main issues report."

Proposed new section 10(9) states:

"It is the duty of a key agency to co-operate with the strategic development planning authority in the preparation of the authority's proposed strategic development plan."

The committee has taken a considerable amount of oral and written evidence at the pre-legislative stage and at stage 1 and, although I am trying to be polite, I am afraid that when it comes to co-operation, Scottish Water has not ranked very highly. Will Cheryl Black tell the committee whether in relation to the development planning process and the national planning framework, Scottish Water will be more co-operative in future than it has been in the past? Will the bill change your stance? Will you take a more co-operative, or perhaps I should say a co-operative, stance?

Cheryl Black: First of all, we certainly have not intended to be unco-operative. If that is the impression that people have got, I suspect that it is more because of a failure of process than because of a stance that we have taken. We certainly wish to be co-operative, and we understand the key

role that we play in planning. We have created a new department specifically to deal with such issues, and we are keen to understand what part we have to play in the process. Other than assuring you of our commitment, I am not sure what more I can say. There are dedicated resources to deal with planning and, as we understand more about our obligations, we will refine the group involved to ensure that the skills and resources are there. The will to co-operate is certainly there, because we understand that if we do not co-operate it will be much more difficult for us to get what we need out of the planning system at the other end—planning permission for the developments that we are involved in.

Mary Scanlon: I do not wish to labour the point, but community councils, developers, planners and academics have asked various questions about Scottish Water, and in Parliament there have been oral and written questions and debates about Scottish Water's lack of co-operation in affordable housing initiatives. You are now putting more resources into that area. Do you recognise that you have not co-operated fully in the past and that there must be a greater will to do so, given the duty in the bill?

Cheryl Black: I accept what you say. From 1 April, we will be obliged to produce a report that shows the capacity for connection to our network around the country. That will be a great step forward in providing information to individuals and local authorities about the issues that they might face in connecting to the network. A number of issues are involved. However, to be fair to Scottish Water, if we have appeared to be unco-operative, it is simply because our legislative environment has not allowed us to give customers what they require. We simply have not had the funding to provide capacity for individuals or developers who want to connect to our network, not through any desire on our part to be unhelpful but because of the framework within which we work. From April 2006, funding has been made available to relieve some of the constraints that have led to the frustration, or the perception of non-co-operation, that you have described, and there will be a way through that.

Mary Scanlon: It is certainly not a perception; it is the reality. We have heard about it too often.

In response to Patrick Harvie, you mentioned your four-year funding and investment plans. I open up this question to all panel members. In the light of the bill, will you align your investment plans with local development plans to ensure that there are no development constraints such as those that we have seen with Scottish Water? Perhaps you are doing that already.

Cheryl Black: It is not within Scottish Water's gift to change the four-year cycle. That would need to be done through discussion between the Executive and the economic regulator. We can be involved in the planning process to ensure that we understand and plan for future needs, but we cannot promise investment outwith the four-year period.

Mary Scanlon: Given that you have a four-year funding cycle and local authorities have five-year development plans, surely there must be considerably more co-operation to allow the authorities to implement their development plans. The four-year cycle cannot be an obstacle for local authorities in implementing their plans. There must be some alignment—if only 80 per cent.

Cheryl Black: We will try to align our planning as much as we can. I just want to be clear that the mismatch exists. Our investment is for the four-year period. We can plan ahead, but we cannot commit funding outwith the period. It is important to point out that connection to the Scottish Water network relies on investment not only from Scottish Water but from developers, subject to the arrangements for making a reasonable cost contribution. Of course we will work with local authorities, but the mismatch exists.

Mary Scanlon: I do not want to labour the point but, given that local authorities have a five-year plan, which is set out in legislation, surely it would not be beyond Scottish Water to align its spending and to change to a five-year cycle in order to be co-operative—and to be seen to be co-operative.

Cheryl Black: It is not within our gift to change the four-year cycle. We can raise the matter with our regulator and the Scottish Executive—indeed we have already done so.

Mary Scanlon: This question is for all panel members. Various people have told us that there should be some form of sanction or remedy against key agencies that fail to meet the commitments that are made during the drafting of the development plan. Is that reasonable?

Paul Lewis: It is difficult to know what form of sanction you have in mind. It is in the interests of every agency represented on the panel to participate fully and actively in the creation of the national planning framework, strategic development plans and local development plans. Agencies such as Scottish Enterprise already participate in community planning through local economic forums. I cannot see why an agency would wish not to participate. I do not know what would be an appropriate form of sanction.

John Thomson: In practice, this is not a big issue for SNH, in that we do not fund infrastructure investment in the way that Scottish Water or Scottish Enterprise might do. I am sure that we would wish to be actively engaged in promoting proposals in development plans that reflected our

interests anyway. The dilemma for a national body such as ours—and perhaps for others represented here—is that our priorities are set by the Executive to a large extent. Therefore, our capacity to engage in the implementation of local development plans might be constrained by the fact that ministers have set other priorities for us, which, inevitably, would have first call on our resources. What is available to do other things to reflect local priorities would depend on the overall scale of resources.

Neil Deasley: SEPA is in a similar situation to SNH, in that it is not an investment agency as such. The committee has referred to a culture change in the planning process. SEPA is embracing that culture change in how it deals with the process. We recognise the value that influencing the planning system can have in achieving our environmental outcomes. To that effect, over the past several years we have begun to put resources into the engagement process. Resources have been increased and certain parts of the planning process have been prioritised within the agency in a way that local authorities will find useful. SEPA's investment role may not be the same as, say, Scottish Water's, but it is investing in the future and improving its engagement with the planning process. I admit that there is a way to go, but we are actively pursuing change.

Mary Scanlon: Apart from the external influences mentioned by John Thomson, do SNH and Scottish Enterprise have in place internal procedures to enable them to co-operate effectively with the development plan process?

John Thomson: SNH actively engages in the development plan process, which has been a priority since SNH's establishment. The changes are not a major challenge for us, other than in the broad sense that our resources are under increasing pressure from several different directions. Therefore, although we welcome the strategic environmental assessment process very much, it makes another call on resources, and there is always competition for resources within the organisation. Nevertheless, we are pretty well geared up to make the inputs to the planning process that are sought.

Allan Rae: Scottish Enterprise has procedures in place. We already engage in the development planning process across Scotland. For example, our local office was involved in the Clyde Valley structural plan and in Grampian and Aberdeen we have focused on positively influencing the structural and local planning processes to ensure that our objectives are delivered locally. We have the processes in place to cope with the bill's proposals.

Mr Home Robertson: I want to move on from development planning to development management. We have established that there is a powerful case for the key agencies to be actively involved in the preparation of plans, which we would like to assume carries with it an obligation to assist in the implementation of those plans—both for national and local developments. We must then hope that, having signed up to a plan, the regulatory key bodies will resist the temptation to have several bites at the cherry by objecting again at that stage. More important, if the investment bodies sign up to a plan, they must play their part in delivering the infrastructure to ensure that the plan can be implemented. Have the witnesses any thoughts on that?

Cheryl Black: As one of the main investors, Scottish Water welcomes the prioritisation of strategic investment in the national plan. However, one of the main challenges arises with implementation at the local level, where there is often less acceptance of the need for strategic planning. For example, if Scottish Water must invest in a new sewage treatment plant in a particular area, there can be less acceptance that it is a good development at local level. Other provisions in the legislation, such as those on bad neighbours, allow people to prevent implementation.

We hope that greater understanding at local level of the national and strategic need for investment is one thing that will emerge from the bill. That should smooth the way, because we often find that local dissatisfaction with our plans for investment prevents us from going ahead with plans, or at least can delay them for a substantial time, thus delaying the benefit to the greater community. We hope that there will be clearer understanding at local level of why something is prioritised at national level.

12:45

Mr Home Robertson: I want to come back to Scottish Water, but perhaps representatives of some of the other agencies would like to pick up on that point too.

Paul Lewis: Mine is another agency that invests in development. For the committee's benefit, I think that it is important to distinguish between the type of investment that Scottish Enterprise will make and that of an agency such as Scottish Water. We are not a statutory infrastructure investment agency; we invest in discrete economic development projects that will make an impact in Scotland. However, as I said in response to Patrick Harvie's first question, on aligning our investment, we have already established our investment priorities in line with the national planning framework, as we do with the strategic development plans that exist in Glasgow, in Clyde Valley and elsewhere. We expect to do the same

with the new strategic development plans and national planning framework and to see those priorities reflected in local plans.

As far as development management is concerned, our main contribution is often as a promoter or developer of individual schemes. We have much greater exposure to the planning and development management process as a participant in that process than as an adviser to it.

Euan Robson: You mentioned aligning your plans with the national planning framework and strategic development plans, but what about areas that lie outwith strategic development plans? You did not mention that you might align your priorities with those areas as well.

Paul Lewis: I thought that I had mentioned local development plans as well. Clearly, one would hope that there would be a flow from national priorities through into a strategic, city region approach, which would in turn be reflected in local development plans.

Euan Robson: Thank you. It is useful to emphasise that point. I am sorry if I misunderstood you.

John Thomson: Perhaps I could respond to the challenge that Mr Home Robertson posed to the regulatory authorities. One of the reasons why we have always emphasised the importance of contributing to development planning at an early stage is that we hope that if we can flag up significant natural heritage interests at that stage, the plans will take those interests into account and accommodate them. If the plans are right, we hope that there will not be too many occasions when we become objectors to individual proposals, as long as they conform to the plan.

There could be a slightly bigger problem at the level of the national planning framework, because that will inevitably be rather a broad-brush exercise. We have certain statutory obligations, some of which reflect the Government's obligations under European directives, that we have to discharge. Although it may be possible to identify a certain piece of infrastructure as being necessary in the national interest, from a natural heritage standpoint there may be real issues about exactly how that translates into a specific project. For example, it might be necessary to improve a road along one stretch of the network, but the exact alignment and construction of that road might be a significant factor in determining whether the project is acceptable from a natural heritage point of view.

Although we hope that, through engagement upstream in the national planning framework and the development planning system, we can minimise the occasions when there are conflicts between those development objectives and environmental objectives, we cannot guarantee that that will always be the case. However, we will always do our best to find a way around any problem.

Mr Home Robertson: I was afraid that somebody might say that. We may need to reflect on that further.

I return to Scottish Water. I do not want to be too hard on Cheryl Black, because we have all had experience of excellent help from her on constituency casework and customer relations, and it is a bit unfair that she must face the music on an issue on which Scottish Water is in a rather controversial position.

Christine Grahame: He is building up to a question.

Mr Home Robertson: I am sorry, but from time to time it has been put to individual members that Scottish Water has not engaged with planners at local or national level on important developments. If there is an empty chair at meetings, it is difficult to take forward plans. Do you recognise that scenario?

Cheryl Black: No. I am disappointed to hear that; it is certainly not our intention to operate in that way. If that is the case, perhaps we have more work to do than I thought to change the situation. As I said, we have created a dedicated department to fulfil that role. Over the past couple of years, we have dealt with 16,000 development applications. We are involved in the details of the process. Perhaps there is a resource issue, but if there is clarity about where we need to be involved—at structure plan or local plan level—we can commit to such involvement. However, we obviously do not have the resources to be engaged in every community plan—that is not possible.

Mr Home Robertson: I am talking about higher up the pecking order than that.

Cheryl Black: In that case, there is no reason why we cannot be involved and we intend to be involved.

Mr Home Robertson: Okay.

I apologise to my colleagues on the committee for boring them again on the theme of affordable rented housing. However, towns and villages throughout Scotland urgently need housing to meet social needs and the needs of families who want to live in those areas, and again and again we hear about Scottish Water's inability to provide the sewerage connection and water. There can be universal agreement at both national level and local level on the need to provide something, but it puts everybody in a difficult position if Scottish Water is the abominable no-man, saying "No. It is not going to happen."

Cheryl Black: The situation will be improved substantially from 1 April when we go into our investment period from 2006 to 2010. Money has been provided to allow us to relieve the constraints that you describe, when even one or two connections have not been possible at new works. Money has been provided and we will have a plan to do the work, but the issue is prioritisation. Money has been provided to relieve constraints in relation to 120,000 homes and 4,000 hectares of commercial land over eight years, but the nature of the beast is that one project will be first and another will be last. We are engaged in the task of working with local authorities to prioritise their needs and align those with our normal investment plan to achieve quality improvements. There is still an issue about timing.

Mr Home Robertson: What I am on about is the need to synchronise the local planning priorities that will be taken forward under the bill and Scottish Water's planning priorities. We keep hearing that Scottish Water is detached from the process—the evidence is not all anecdotal. We are looking for a way of making the process work better.

Cheryl Black: I do not think that we are detached—we are just not always able to give the preferred answer.

Mr Home Robertson: We will probably return to the issue.

The Convener: Is there an opportunity in the bill for key agencies such as Scottish Water to work with local authorities to offer their planning departments assistance in their development management work? Could your agencies assist them with the assessment of development proposals? Do you have a role in that?

John Thomson: We are certainly being encouraged to engage in the pre-application process for certain categories of large development. We are happy to do that and we already do it in many cases. We have a lot of contact with developers and planning authorities before many projects get to application stage. There is quite a lot of scope for such involvement.

In general, we already make a substantial input to development management. We are often under pressure to contribute even more than we do and again resource constraints become an issue. I highlight the need to increase the capacity of local authorities to handle many of the environmental issues—I realise that they have financial constraints. I suspect that in many cases the process would be smoother if there was greater expertise within the local authorities, so that they did not always have to come to us. That might be true of SEPA too.

Neil Deasley: The issues for us are similar. We already comment and provide views on more than 8,000 planning applications per annum. We engage closely in the process partly by prioritising the applications that we consider to pose the highest environmental risk and trying to devote more time and resources to them. We have to decide how to do that. Increasingly, we are issuing standing guidance for smaller developments with lower environmental risk, so that planning authorities know our view on certain types of development and their likely impact.

We are involved in development management, as well as the development plan. It is a two-pronged attack—if I can use that word—because we need to work in both those areas.

It might be worth mentioning what is called a processing agreement for certain types of development. A pilot project is under way for an application in Highland Council. We are interested to see how well a more formalised process for development management and processing applications might work. SEPA is engaged in that process with the developer, the planning authority and one or two other key agencies.

Paul Lewis: Scottish Enterprise's prime engagement with our local authority colleagues is in relation to development planning as opposed to development management. Often we are a promoter or part-funder of some of the schemes that are being considered. We have had good experiences of and would recommend some of the proposals on development management, such as the pre-application hearings.

The Convener: It is certainly encouraging to hear that the Scottish Environment Protection Agency is interested in and—indeed—is already participating in a processing agreement. It would be useful to hear how that works and how effective it proves to be over time. We will take further evidence on that and will raise the matter with the ministers when they come before us. Sandra—did you have a question?

Ms White: Yes. I hear what some of the agencies are saying about consultees, but none of them is a statutory consultee. What would be SEPA and Scottish Water's opinion of the bill making them, and perhaps other agencies, statutory consultees?

The Convener: Christine Grahame has asked that question. Perhaps you could reflect on the answers that our witnesses gave her, Ms White.

I want to move on to good neighbour agreements. We have heard from previous witnesses this morning that they have reservations about the purpose and effectiveness of good neighbour agreements. What is your view?

John Thomson: The underlying principle seems to be sound, but I guess that a lot of the

issues that would be dealt with would not necessarily be of direct concern to us. It is not an area in which we can claim any real expertise.

The Convener: SEPA might be able to.

Neil Deasley: "Expertise" is probably the wrong word: we have an interest in the area. Our view is that good neighbour agreements are in principle a good addition to the planning process, although there are issues that need to be addressed, many of which were raised earlier, in relation to how the process will work. I do not want to go over those issues again, but a specific issue for SEPA is that good neighbour agreements should address the operation of facilities, which might include their operating hours. That begins to drift into the way in which SEPA might regulate some facilities' activities, such as those that fall under waste management licensing or pollution prevention and control legislation.

We need to engage in the process relating to good neighbour agreements and to develop an overview of what is going on in them because they might impact on, or influence, how we regulate. Without going into any great detail, I would say that it is important to recognise that we need to be aware of the process when good neighbour agreements are being used.

13:00

The Convener: Might there be a benefit for organisations such as SEPA? Let us take landfill as an example—I know that one landfill site in particular generates a lot of work for SEPA. If recapping work needed to be undertaken on a landfill site over a period and a good neighbour agreement was in place that obliged the developer to explain in a newsletter to the community that, while the recapping work was going on, the smell from the landfill site was going to be a much greater than normal nuisance, that might result in a reduction in calls to SEPA. Often, as well as contacting their MSP and their councillor to complain about an unexplained awful smell, people call SEPA. However, if there were a good chain of communication, there would be a benefit for the community, the developer and organisations such as SEPA.

Neil Deasley: Broadly, I agree with you. There are key benefits in good neighbour agreements in respect of information, communication and awareness. Such agreements are about a relationship between two sets of people. Part of making the process work is ensuring that information flows, so that people are aware of what is going on and why.

The other element of the process relates to enforcement. There is a kind of boundary or line between what is required in terms of the enforcement of planning conditions—or the conditions of a waste management license, to use the landfill example—and what is required in terms of an agreement between the parties about matters such as communication. The agencies that regulate the site, such as the planners and SEPA, will need to work in a way that enforces the conditions that have been set. That will go a long way towards taking account of people's views about the sort of sites that we are discussing. That is an important part of what the bill is trying to achieve in relation to its emphasis on more robust enforcement through the planning process.

Euan Robson: Could you each say something about the bill's staff and financial implications for your organisations?

Paul Lewis: I can foresee no staffing or financial implications for Scottish Enterprise.

Neil Deasley: The devil will be in the detail of the secondary legislation; for example, on what would be expected of the key agencies in relation to duties in the bill. Pre-application consultation and discussions involve SEPA—we welcome that and believe that it is an important part of what we will do. Subject to the devil that will be in the detail of the subordinate legislation, SEPA is confident that we have put in place the resources that will allow us to take account of the challenges that the bill sets for us.

Cheryl Black: Without knowledge of the detail, it is difficult to answer the question. Scottish Water is investing more resources, although I think—from our discussion this morning—that we may need to invest even more.

Mary Scanlon: Definitely.

Cheryl Black: I would not like to put a figure on it. There is no doubt that there will, for agencies such as ours, be an impact in manpower terms that will be similar to the impact on planning departments and other parts of local government. The bill will work only if there are enough people to carry it through.

John Thomson: As I said, SNH is already pretty heavily engaged in the development plan process. I am reasonably optimistic that we will therefore cope with the challenges that the bill presents. Indeed, I hope that any extra work that we may have to put into the upstream processes in terms of the development plans and national planning framework will result in savings in the long term because our role in development management should reduce. The call is a hard one to make at this stage, however. I echo what other panel members said; the outcome depends on the detail.

Christine Grahame: The panel will be glad to hear that my question is the final sweep-up

question. If we have not covered anything that is a burning issue for you, there is now an opportunity for you to tell us about it. Please do not feel obliged to respond, though.

John Thomson: I am afraid that I have not one but two issues—hopefully, I can be brief.

First, I echo the point that was made earlier—by a Law Society of Scotland representative, I think—on the link between the planning processes that the bill sets out and the wider community planning process. Scottish Natural Heritage has always seen that link as being important. We feel that the land-use planning process is a spatial expression of a wider community planning process, but we are not convinced that that connection has been made fully in the bill.

In addition to that contextual point, we have a more specific issue to raise. On Monday, the Executive issued the consultation paper, "Enhancing Our Care of Scotland's Landscapes"—I am sure that the committee is aware of it. The paper makes proposals for future use of national scenic area designation and suggests that, if agreement is reached on the provisions that need to be made to refresh NSA designation, they should be included in the Planning etc (Scotland) Bill by way of amendments at stage 2. I do not want to miss the opportunity to say that SNH would welcome such amendments and that we hope that the proposal finds favour with the committee and Parliament.

Christine Grahame: I am glad that I asked the question. I am not sure that I was supposed to ask it, but there it is.

Neil Deasley: Earlier this morning, we touched on thresholds. SEPA's view is that if applications are to be prioritised in a hierarchy, and planning authorities and key agencies are asked to prioritise their resources towards the higher-priority applications, our decision making needs to be informed not only about size. Even developments that are on the smaller side—let us say 300 units—can raise complicated planning and environmental issues. The decision-making process for determining such developments could benefit from a requirement to consider factors other than size. SNH is concerned that if such developments—which have their own complexity—are classified in the lower tiers of development, they may be given slightly less attention than they deserve.

Christine Grahame: How would you resolve that? Should guidance or criteria be issued to local authorities?

Neil Deasley: Obviously, size is one of the key determinants—

Christine Grahame: I was taking up your point on smaller complex developments. What guidance should be given to local authorities so that the public also knows what should happen?

Neil Deasley: We are talking about environmental risk. The question needs to be asked whether the development is proximal to a protected site, on contaminated land or close to a site that SEPA licenses or regulates, such as a waste management site or a pollution prevention and control site. Applications in such areas can raise complicated issues. There would be benefit in taking a more structured approach.

We are concerned that such a complex development could fall into the lower tiers in the hierarchy and therefore may be given less attention than developments that fit into the higher end of the scale—although I have no evidence that that will happen. Planning authorities and key agencies are being asked to prioritise their resources on developments that are at the higher end of the scale. Essentially, some sort of qualitative description should be required; decisions should not be based on size alone.

Paul Lewis: You will be very glad that you asked the question. I have a question, rather than a point to raise. The bill aims to reduce the timeframe for a planning appeal by six months and the duration of planning consents from five to three years. Is that a sensible rule to apply to major developments? By their very nature, such developments are complex and difficult issues must be resolved. Slightly longer timeframes may therefore be appropriate for major developments.

The Convener: I thank the witnesses for their attendance at committee this morning. We will reflect on their evidence in our consideration of the bill.

Meeting closed at 13:11.

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