SUBORDINATE LEGISLATION COMMITTEE

Tuesday 14 November 2006

Session 2

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CONTENTS

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SUBORDINATE LEGISLATION COMMITTEE
31st Meeting 2006, Session 2

CONVENER

*Dr Sylvia Jackson (Stirling) (Lab)

DEPUTY CONVENER

Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Mr Adam Ingram (South of Scotland) (SNP)
*Mr Kenneth Macintosh (Eastwood) (Lab)
*Mr Stewart Maxwell (West of Scotland) (SNP)
*Euan Robson (Roxburgh and Berwickshire) (LD)
*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Mr Ted Brocklebank (Mid Scotland and Fife) (Con)
Maureen Macmillan (Highlands and Islands) (Lab)
Ms Maureen Watt (North East Scotland) (SNP)

*attended

CLERK TO THE COMMITTEE

Ruth Cooper

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 5

Scottish Parliament

Subordinate Legislation Committee

Tuesday 14 November 2006

[THE CONVENER *opened the meeting at 10:30*]

Item in Private

The Convener (Dr Sylvia Jackson): I welcome members to the 31st meeting in 2006 of the Subordinate Legislation Committee. Apologies have been received from Gordon Jackson.

Item 1 is to consider whether to take in private item 6, which is a discussion on the committee's draft report on the inquiry into the regulatory framework in Scotland. Item 6 will also involve discussing whether to take further evidence and any potential witnesses. Do members agree to take it in private?

Members *indicated agreement*.

The Convener: Are members content for all future considerations of the draft report to be in private?

Members *indicated agreement*.

Delegated Powers Scrutiny

Planning etc (Scotland) Bill: as amended at Stage 2

10:31

The Convener: Item 2 is consideration of a response from the Executive to points that we raised on the Planning etc (Scotland) Bill, as amended at stage 2. I was unable to attend last week's meeting, but I know that you had great deliberations on the bill, for which I thank you. We have received a response from the Executive.

Members were concerned about the amount of time that the committee has had to consider the bill—and other bills—after amendment at stage 2 and agreed to raise the issue with the Executive. The clerks will progress that.

Obviously, the Executive had to respond promptly to the committee's concerns because stage 3 of the bill will take place on Wednesday and Thursday of this week. If members wish to lodge amendments, they will have to be manuscript amendments. The committee's report on the bill will be produced today and sent for publication tonight. I do not know whether members want to send any part of the report to the Executive—we will discuss that.

Section 2 of the bill will insert new section 12, "Examination of proposed strategic development plan", into the Town and Country Planning (Scotland) Act 1997. We asked whether the Executive had reconsidered the drafting of new section 12(3) and, if it had, whether it had concluded that the provision was sufficiently clear. The Executive has provided clarification and has undertaken to ensure that subsequent secondary legislation is clearly worded to flow from section 12(3). Are members happy with the Executive's explanation? Do members want to make any further points?

Murray Tosh (West of Scotland) (Con): I raised this question and I am happy if our legal advisers' judgment is that the distinctions are clear. I will make the general point—to save my having to make it several more times—that it would have been helpful if we had received this explanation when we first raised the issue. That would also have helped the Executive, which must be frantic with work. Stage 3 of the bill will take place later this week, so the Executive has had to reply to us within a ridiculously compressed period. An earlier reply might have been better.

The Convener: Absolutely. Section 2 also inserts new section 18, "Preparation and publication of proposed local development plan", into the 1997 act. We asked what modifications

are likely to be prescribed under new section 18(3B). The Executive has said that the regulations are likely to centre on circumstances in which new sites or issues emerge at the proposed plan stage. Members have no points to raise further to that explanation.

The points that we made on new section 19, "Examination of proposed local development plan", which is inserted into the 1997 act by section 2, mirror the points that we raised in relation to new section 12(3), and the Executive has offered the same response. Are members happy with what we have received back?

Members *indicated agreement*.

The Convener: New section 19(10)(a)(i) concerns the prescribing of grounds for rejecting the examiner's modifications. We asked what consideration was given to our recommendation that criteria should be specified in the bill as to the grounds for rejecting the examiner's modifications. The Executive has said that it considers it important to set out in secondary legislation the precise circumstances in which departures will be allowed. That will provide scope to extend or reduce the criteria in the light of experience as the new system progresses. It has said that it is consulting on what the criteria should be. Do members have any comments on that? You will remember that this was a big issue for the committee at stage 1.

Murray Tosh: I note that the Executive says that there is general support from consultees, including local authorities. I did not bring it with me because I do not know where it is, but I am sure that a piece of paper crossed my desk last week in which the Convention of Scottish Local Authorities strongly criticised the extension of the reporter's powers over public inquiries. Of course, that is a policy matter for the lead committee.

I agree that the affirmative procedure would be more appropriate, given the lack of specificity about the indicative or theoretical criteria that might be produced. However, we have probably run out of time to promote that, unless the committee feels strongly enough to lodge a manuscript amendment this week.

The Convener: Do members think that we should push for the power to be subject to the affirmative procedure?

Mr Stewart Maxwell (West of Scotland) (SNP): We are left in a difficult position. Because we do not have the information from the Executive, we are in the dark about which procedure should be used. It is disappointing that we have been left in this quandary. Given our previous discussions on the matter and the fact that it is an important aspect of the bill, we should consider lodging a manuscript amendment to make the power subject to the affirmative procedure.

The Convener: We would rather be safe, so that seems to be the best way to proceed. Are other members happy with that?

Euan Robson (Roxburgh and Berwickshire) (LD): If members who considered the matter before I arrived on the committee think that that is appropriate, I do not think that any harm would be done by proposing the use of the affirmative procedure.

Mr Kenneth Macintosh (Eastwood) (Lab): It is a difficult decision. The Executive has not given us the criteria because it does not know what they are. The affirmative procedure is not overly onerous, but the bill already contains a lot of powers that are subject to it. I do not feel strongly about the matter. I would not mind if the committee lodged a manuscript amendment, but I would like to hear the minister's response in the chamber.

The Convener: If we lodge a manuscript amendment, that will at least allow us to hear the minister's response.

Murray Tosh: A further thought is that it is the initial criteria that will be significant. Subsequent changes to the criteria are not likely to be of great moment. It might be reasonable, therefore, to propose the use of the affirmative procedure in only the first use of the power. That might make it more acceptable to ministers. If they are not satisfied with that, there will be the possibility of an explanation in the chamber, which members will listen to and judge on its merits.

The Convener: Are members happy to leave the matter with me and give me the responsibility for lodging a manuscript amendment based on what we have said this morning?

Members *indicated agreement*.

The Convener: Section 2 inserts new section 22, "Supplementary guidance", into the 1997 act. We asked the Executive what it intends to specify as matters to be dealt with in supplementary guidance, what type of guidance is envisaged, and whether the exercise of the power in new section 22(2)(b) will result in the need for wholesale change to development plans.

The Executive says that consultation on the matters to be specified is continuing and that they have not been finalised. However, the Executive has suggested what matters are likely to be included.

Murray Tosh: There is still scope for a degree of difficulty, but the Executive has undertaken to consult. Most of the practical difficulties are likely to be resolved during that process, so we can

accept the position that the Executive set out in its response.

The Convener: Is that agreed?

Members *indicated agreement*.

The Convener: Section 4 inserts new section 26A, "Hierarchy of developments", into the 1997 act. We recommended that the first set of regulations that is made under the power in new section 26A should be subject to the affirmative procedure. Members will be glad to note that the Executive has lodged a stage 3 amendment to provide for that.

Murray Tosh: If we had known that last week, we would not have asked the Executive that question.

The Convener: On section 5, which inserts new section 27A, "Notification of initiation of development", into the 1997 act, we asked the Executive to explain what matters it intends to specify under the power. It has provided an explanation that centres on enforcement monitoring. A draft list of prescribed information will be subject to consultation and is, therefore, not yet finalised. Are members content with that answer?

Members *indicated agreement*.

The Convener: On section 15, "Manner in which applications for planning permission are dealt with etc", which amends section 43 of the 1997 act, we asked why the power to make directions was to be contained in regulations and, therefore, sub-delegated. From the response that we have received, members will see that there is still a dispute about whether that amounts to sub-delegation. However, the legal brief indicates that the points that the Executive makes are okay. The section is consistent with the 1997 act. I refer members to paragraphs 34 to 38 of the legal brief. If we put the issue of sub-delegation to one side, the drafting seems reasonable. Is that agreed?

Members *indicated agreement*.

The Convener: On section 16, which inserts new section 43A, "Local developments: schemes of delegation", into the 1997 act, we asked the Executive why it had provided for the negative procedure in respect of regulations made under section 43A, which deals with reviews of decisions by officials. The Executive argues that the negative procedure is normally used in such circumstances and that procedural rules for inquiries will be subject to full public consultation before they are laid. Are we happy with that response?

Members *indicated agreement*.

The Convener: We have reached another biggie. On section 23A, "Fixed penalty notices", which inserts new sections 136A and 145A into the 1997 act, we asked the Executive to justify the use of the negative procedure and to explain its intentions with regard to setting minimum and maximum amounts. The Executive has explained its intentions and refers to the Transport (Scotland) Act 2005 as setting a precedent for the use of the negative procedure to set the level of penalty. The crux of the matter is that, although there is a precedent, there is no maximum limit on fines in this case. I seek members' views on the matter. Mairi Gibson is happy to provide the committee with further details.

Mr Macintosh: The supplementary legal brief is very helpful. It outlines why in many cases the negative procedure would be sufficient to cover fixed-penalty notices, especially where limits are expressed and changes are limited to a rise in monetary value. Having gone into the matter in detail, we have doubts about the fact that a maximum does not appear to have been set. For that reason, the committee may think that it is desirable for the matter to be subject to the affirmative procedure.

The Convener: The supplementary legal brief seems to indicate that the intention is for the maximum limit to be £5,000, but that is only an intention.

Mr Macintosh: One can read that into the bill, but unfortunately it is not stipulated. In this case, more than in the case of the measure on which we just agreed, there is an argument for the committee to lodge a manuscript amendment that proposes the use of the affirmative procedure. At the very least, we should ask the Executive to give its views on the matter. Given the precedents in other bills, the affirmative procedure may be more appropriate in this case.

Murray Tosh: It is not impossible that in response to argument the Executive will come around to that point of view. We should lodge an amendment to allow a discussion to take place and the Executive to change its mind. That will also allow a vote to take place, if any member feels so strongly about the matter that they push for one.

The Convener: Is that agreed?

Members *indicated agreement*.

The Convener: Are members happy for me to take responsibility for getting the manuscript amendment drafted?

Members *indicated agreement*.

10:45

The Convener: On section 36A, "Entitlement to vote in ballot", we asked the Executive to justify

the need for the power in section 36A(8). The Executive has argued that, as the definition of an eligible person is complex and affected by a number of subsections, a power to alter the definition is necessary. However, it has accepted that that Henry VIII power should be subject to the affirmative procedure and will lodge a stage 3 amendment, which I am sure that we all welcome.

On section 37, "Approval in ballot", we requested an explanation of how the power in section 37(8B) is to be used. The Executive has provided an explanation, and the need for the power appears to be that, when the proposals affect a mix of eligible ratepayers and other eligible tenants or owners, some adjustment will be required. Are members content with the response and the power, which is subject to the negative procedure?

Mr Macintosh: Again, a new system is being introduced. We are talking about the eligibility of local residents, ratepayers and others to vote in such ballots, which is a matter of some sensitivity. As Murray Tosh suggested earlier, we could consider making the power subject to the affirmative procedure the first time that it is used and to the negative procedure thereafter.

The legal brief points out that it is difficult to ascertain whether the proposals are modelled on any previous measures. Without the confidence given by a previous example, it is perhaps more sensible to err on the side of caution.

The Convener: I gather that the legal brief says that the power could have a precedent but that the legal advisers have not been able to find it.

Murray Tosh: I do not think that anything else needs to be said.

The Convener: Are we agreed again that, the first time that it is used, the power should be subject to the affirmative procedure?

Members *indicated agreement*.

The Convener: Okay, a manuscript amendment will be drafted in the same way as we agreed earlier.

On section 39, "Power of veto", we asked why the Henry VIII provision was subject to the negative procedure. The Executive has agreed to lodge a stage 3 amendment to make it subject to the affirmative procedure—the committee did a good job last week.

On section 43, "Regulations about ballots", we asked what interaction, if any, there was between the power in the section and those in sections 36A and 37. The Executive response is that it is proper for the power in section 43(2)(b) to be restricted to renewal ballots because section 36A makes all the provision that is needed in respect of initial ballots. Are members happy with that explanation?

Members *indicated agreement*.

The Convener: That brings us to the end of our consideration of the Planning etc (Scotland) Bill.

Draft Instruments Subject to Approval

Bus User Complaints Tribunal Regulations Revocation Regulations 2006 (draft)

10:48

The Convener: There are two points on the regulations. Are members happy to ask the Executive to confirm that no transitional provisions are required in relation to the staff of the tribunal and to explain the absence of the word "Scotland" from the title of the regulations?

Mr Maxwell: I note that the word "Scotland" was not in the title of the 2002 regulations. I do not know whether it is intentional, but I presume that the draft regulations repeat the same pattern.

The Convener: I think that they do, but we can ask about the previous regulations as well.

Mr Maxwell: It is not absolutely necessary.

The Convener: No. Are those two questions agreed?

Members *indicated agreement*.

Public Appointments and Public Bodies etc (Scotland) Act 2003 (Treatment of Office or Body as Specified Authority) (Scottish Legal Complaints Commission) Order 2006 (draft)

Registration Services (Consequential Provisions) (Scotland) Order 2006 (draft)

The Convener: No points arise on the orders.

Instruments Subject to Annulment

Building (Scotland) Amendment Regulations 2006 (SSI 2006/534)

10:49

The Convener: No points arise on the regulations.

Act of Sederunt (Fees of Sheriff Officers) 2006 (SSI 2006/539)

The Convener: No substantive points arise, but there are some minor points that we can raise in an informal letter.

Waste Management Licensing Amendment (Scotland) Regulations 2006 (SSI 2006/541)

The Convener: Do members want to ask the Executive whether it has any plans to consolidate the regulations?

Members *indicated agreement*.

The Convener: Okay. There are also a few minor points that can be mentioned in an informal letter.

Rice Products (Restriction on First Placing on the Market) (Scotland) Regulations 2006 (SSI 2006/542)

The Convener: It is suggested that we need to ask the Executive to explain the purpose of the definition of regulation 178/2002 in regulation 2(1) as the term does not appear to be used in the regulations, which is a bit unfortunate. It is also suggested that we ask the Executive to explain, in the light of article 4 of the European Commission decision, the absence of a provision to deal with the disposal of material found to be contaminated, given the Executive's practice with other similar emergency instruments such as the Tryptophan in Food (Scotland) Regulations 2005 (SSI 2005/479). That point is about consistency. Are those questions agreed?

Members *indicated agreement*.

Instruments Not Laid Before the Parliament

North Lanarkshire (Electoral Arrangements) Order 2006 (SSI 2006/532)

Scottish Borders (Electoral Arrangements) Order 2006 (SSI 2006/533)

West Lothian (Electoral Arrangements) Order 2006 (SSI 2006/535)

City of Edinburgh (Electoral Arrangements) Order 2006 (SSI 2006/537)

10:50

The Convener: No points arise on the orders.

Act of Sederunt (Fees of Messengers-at-Arms) 2006 (SSI 2006/540)

The Convener: No substantive points arise, but there is a minor point for an informal letter.

We will now move into private session.

10:51

Meeting continued in private until 11:17.

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