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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Planning (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 30 January, 20 and 27 February, and 13 March 2018, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Planning (Scotland) Bill at Stage 1 (“the Bill”).ⁱ
2. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of the Standing Orders.

ⁱ The Planning (Scotland) Bill [as introduced] is available [here](#).

Overview of the Bill

3. This Government Bill was introduced by the Cabinet Secretary for Communities, Social Security and Equalities, Angela Constance MSP, on 4 December 2017. The lead Committee is the Local Government and Communities Committee.
4. The Bill amends the Town and Country (Scotland) Act 1997 (the “1997 Act”) to make changes to planning law in Scotland. The last major amendment to the 1997 Act was by means of the Planning etc. (Scotland) Act 2006. The stated purpose of the Bill is to strengthen and simplify the planning system.
5. The Bill is divided into six Parts. It has 35 sections and two schedules. A short summary of each Part and the schedules is set out below.
 - **Part 1** of the Bill (“Development Planning”) reorganises the system of development plans by removing strategic development plans, amending the procedure for producing local development plans and by introducing “local place plans” prepared by community bodies.
 - **Part 2** establishes Simplified Development Zones (“SDZ”), which will gradually replace Simplified Planning Zones. The new powers for SDZs are similar to Simplified Planning Zones. The differences are frontloading of the scrutiny process, which also becomes simpler, and enabling schemes to be progressed in a wider range of circumstances; i.e. beyond planning permission to include wider consents such as advertising.
 - **Part 3** (“Development management”) makes amendments, some of a technical nature, to provisions relating to planning applications, planning permission and planning obligations.
 - **Part 4** (“Other Matters”) broadens the scope of the Scottish Ministers’ regulation-making powers in relation to planning fees; amends the fines that may be imposed by the courts for various planning offences; and extends liability to a subsequent owner of land for a planning authority’s enforcement costs to remedy a breach of planning control. It also requires members of planning authorities to undertake training before taking part in planning functions, allows the Scottish Ministers to transfer those functions where there is a failure to comply, and introduces measures for the monitoring and assessment of planning authorities’ performance.
 - **Part 5** allows the Scottish Ministers to make regulations introducing an “infrastructure levy” payable to a local authority, in respect of development wholly or partly in the authority’s area, the income from which is used by local authorities to fund, or contribute towards funding, infrastructure projects. It also introduces schedule 1, which elaborates on the power to make infrastructure-levy regulations.
 - **Part 6** contains the “final provisions” of the Bill and follows a similar form to other bills. It includes provision about regulations made under the Bill and commencement. It also introduces schedule 2, which makes minor and consequential amendments and repeals.

Delegated Powers Provisions

6. The Scottish Government has produced a Delegated Powers Memorandum ("DPM")ⁱⁱ on the delegated powers provisions in the Bill. The DPM indicates that the Bill contains a significant number of delegated powers: 46 in total.
7. At its meeting on Tuesday 30 January 2018, the Committee agreed to write to the Scottish Government to raise questions in relation to a number of the delegated powers in the Bill. The Committee's questions, and the response received from the Scottish Government to them, are included in **Annex 1**.
8. At that same meeting, the Committee also agreed to take oral evidence on the Bill from the Minister for Local Government and Housing, Kevin Stewart MSP, at its meeting on 20 February 2018.ⁱⁱⁱ

Recommendations

9. The Committee's recommendations on the delegated powers in the Bill are detailed below. They are divided by analysis of regulation-making powers, direction-making powers, and provision made in a SDZ scheme.

Regulation-making powers

Section 7(2), inserting new section 3CA(3) into the 1997 Act – Amendment of National Planning Framework

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Negative**

Provisions

10. Section 7(2) of the Bill inserts new section 3CA into the 1997 Act. Section 3CA(1) provides the Scottish Ministers with the power to amend the National Planning Framework ("NPF") at any time. This is in the context of section 1 of the Bill, which amends the timescales in the 1997 Act for revising the NPF from within five years to within 10 years.
11. New section 3CA(3) of the 1997 Act allows the Scottish Ministers to make further provision in regulations about amendments to the NPF. Such regulations may in particular make provision about: the procedures to be followed; the consultation to be undertaken on proposed amendments; when the amendments take effect; the publication of the amended framework; and the laying of the amended framework before the Scottish Parliament.

ⁱⁱ The Delegated Powers Memorandum is available [here](#).

ⁱⁱⁱ The *Official Report* of that evidence session is available [here](#).

12. Regulations under new section 3CA(3) are subject to the negative procedure.

Evidence

13. The Committee asked the Scottish Government why it was appropriate to make provision about amendments to the NPF in regulations rather than on the face of the Bill given that it includes setting the procedure for parliamentary scrutiny. In addition, the Committee asked the Scottish Government why the negative procedure was appropriate for such regulations.
14. The Scottish Government explained that such regulations were considered appropriate to provide for the process of making amendments to development plans, as a range of circumstances could arise in the future that may require procedures to be amended, or new procedures developed. At the evidence session the Minister referred to future digital innovations, such as the use of real time data to reflect an ever-changing environment, that could lead to more minor and frequent changes to the NPF without altering the overall policy substantially. He considered that the scrutiny process should be manageable and proportionate. The Minister also recognised that more substantial changes would require greater public and parliamentary consultation.
15. In written correspondence the Government's position on the appropriate parliamentary procedure was that the negative procedure would be sufficient as the regulations relate to practical and administrative detail. When asked about whether it would be more appropriate for the affirmative procedure to apply to the regulations setting the procedure, the Minister committed to looking again at the issue of regulations made by Ministers being used to tell Parliament what scrutiny it should apply.
16. The Minister committed to looking again at whether there should be provision setting out the parameters for when and how amendments can be made to the NPF and the procedure that must be used. However, he stated that such provision does not necessarily need to be set out on the face of the Bill as the Government required to maintain flexibility.

Recommendations

17. The Committee recognises that the procedures applicable to scrutinising amendments to the NPF within the new 10 year cycle should be manageable and proportionate to the amendments being made. However, the Committee considers that significant amendments to the NPF resulting in a change to the overall policy should be subject to specific public and parliamentary consultation requirements set out on the face of the Bill rather than in secondary legislation. This would allow the Parliament to maintain sufficient control over its scrutiny procedures.
18. The Committee considers that the consultation requirements applying to policy amendments to the NPF could be similar to the cyclical review process currently set out in existing sections 3A to 3C of the 1997 Act. They could include a requirement to consult publicly and for the amendments to be laid before the Parliament in draft for a period of 90 days. The Scottish Ministers could also be required to lay a report on the consultation they undertook and provide a statement giving details of any changes which they made in light of the public consultation and any report or resolution made by the Parliament.

19. **The Committee therefore calls on the Government to amend the Bill so that significant amendments to the NPF resulting in a change to the overall policy become subject to specific public and parliamentary consultation requirements set out on the face of the Bill.**
20. **On the basis that these amendments were made, the Committee is content that the negative procedure applies to setting the procedure for minor amendments to the NPF. However, the Committee's preference would be that any provision for periodic parliamentary consideration of such minor issues was set out on the face of the Bill.**
21. **If the Government were not willing to set the threshold on the face of the Bill, the Committee considers that the Government should apply the affirmative procedure to the scrutiny of regulations, made under new section 3CA(3) inserted by section 7(2) of the Bill, setting the scrutiny procedures. However, the Committee considers this secondary option to be unsatisfactory as it should not be for Ministers in regulations to decide the form of parliamentary scrutiny that will apply to the NPF.**

**Section 10(2) and (3), inserting schedule 5A, paragraph 3(1) and (2) into the 1997 Act
– Land that cannot be included in a scheme**

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Affirmative**

Provisions

22. Paragraph 3(1) and (2) of new schedule 5A of the 1997 Act, inserted by section 10(2) of the Bill, provide that the Scottish Ministers can make regulations restricting the type of land that can be included in an SDZ scheme or an SDZ scheme as altered. The restrictions apply to land at the time the scheme is made.
23. Paragraph 3(3) clarifies that if land is included in a zone that an SDZ scheme relates to and that land subsequently becomes land of a description specified in regulations under paragraph 3, that land is not excluded from the zone to which the scheme relates.
24. Regulations made under paragraph 3 of schedule 5A are subject to the affirmative procedure.

Evidence

25. The Committee asked the Scottish Government in written correspondence to consider whether it would improve the transparency of the provisions relating to SDZ schemes if the types of land that may not be included in an SDZ scheme were set out on the face of the primary legislation, as they are currently for simplified planning zones. The Committee suggested that a power could be included to add or remove entries by regulations subject to the affirmative procedure.

26. The Scottish Government responded that the key difficulty that it sought to address is that the types of land that cannot be included in simplified planning zones are set in the primary legislation and cannot easily be amended. The Scottish Government did not wish to replicate this difficulty for SDZ schemes.
27. However, the Scottish Government explained that setting out the types of land that may not be included on the face of the Bill, while allowing for entries to be added or removed by regulations, would equally address its concern. Accordingly, it is content to adopt this approach instead. As a result, the Scottish Government has undertaken to bring forward an amendment to this effect at Stage 2.
28. In a further letter to the Committee dated 2 March 2018, the Scottish Government explained that it intends to remove the blanket restriction on conservation areas in SDZs that currently applies to simplified planning zones.^{iv} The Scottish Government also indicated that the blanket exclusion of areas requiring Environmental Impact Assessment (EIA) that applies to simplified planning zones might be reconsidered for SDZs. The Scottish Government stated that it would hold further discussions with stakeholders, including key agencies, before bringing forward an amendment to set out descriptions of land excluded from SDZ schemes on the face of the Bill.

Recommendation

29. The Committee considers that it would improve the transparency of the legislation if the types of land that may not be included in an SDZ scheme were initially set out on the face of the Bill, with a power included to add or remove entries by regulations subject to the affirmative procedure.

30. **Accordingly, the Committee accepts the Scottish Government's undertaking to amend the Bill at Stage 2 to set out on the face of the Bill the types of land that may not be included in an SDZ scheme, with a power included to add or remove entries by regulations subject to the affirmative procedure.**

Section 21 – Fees for planning applications etc.

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Negative**

Provisions

31. Existing section 252 of the 1997 Act enables the Scottish Ministers to make regulations about the payment of fees or charges to planning authorities for the performance of planning functions. Section 21 of the Bill amends these powers in a number of relatively technical ways, including as follows.

Power for Scottish Ministers to waive/reduce fees

^{iv} See **Annex 2** for the Minister's letter to the Committee dated 2 March 2018.

32. In terms of new section 252(1A)(e) and (ea) of the 1997 Act (inserted by section 21(6) of the Bill), it appears that it is only the planning authority (rather than the Scottish Ministers) that have the power to waive or reduce a fee.

Surcharge

33. Section 21(7) of the Bill, inserting subsection (1D) into section 252 of the 1997 Act, provides that regulations may provide for a surcharge to be imposed on retrospective planning applications.

Evidence

Power for Scottish Ministers to waive/reduce fees

34. The Committee wrote to the Scottish Government asking whether it was intended that the Scottish Ministers should also have the new power to waive or reduce a fee and whether this provision could be clearer.
35. The Scottish Government responded that its view was that the power currently only allows planning authorities to waive or reduce a fee. It undertook to consider further whether it would be helpful for the Scottish Ministers to have the same power.

Surcharge

36. The Committee asked the Scottish Government in writing to explain whether it would be more appropriate for either the Bill to set a cap on the level of surcharge that can be imposed in the regulations or for the affirmative procedure to be applied to those regulations (or some other measure to ensure sufficient oversight).
37. The Scottish Government responded that it does not consider it appropriate to set out the level of surcharge, or any cap, on the face of the Bill. However, it recognised that while regulations setting out levels of fees for any activity are normally subject to the negative procedure, the surcharge is not subject to the usual restriction that any charge does not exceed the cost of the performance of the function.
38. Accordingly, the Scottish Government undertook to consider further whether additional restrictions or greater scrutiny should be applied to the surcharge provisions.

Recommendations

Power for Scottish Ministers to waive/reduce fees

39. **The Committee accepts the Scottish Government's undertaking to consider further whether the Scottish Ministers should also have a power to waive or reduce a fee that they charge.**

Surcharge

40. As the Scottish Government's Delegated Powers Memorandum recognises at paragraph 125, any penalty will need to be set at a reasonable level to comply with the European Convention on Human Rights.

41. **Accordingly, the Committee encourages the Scottish Government's to consider applying additional restrictions and greater scrutiny to the surcharge provisions in section 21 of the Bill.**

Section 26, inserting new section 251B(3) into the 1997 Act – National planning performance co-ordinator

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Negative**

Provisions

42. New section 251B(1) of the 1997 Act inserted by section 26(1) of the Bill provides that the Scottish Ministers may appoint a person to monitor the performance by planning authorities of their functions. The appointed person may also provide advice to planning authorities as to how they may improve the performance of their functions. In terms of new section 251B(2), the appointed person must submit reports to the Scottish Ministers on their activities under subsection (1) and on any recommendations the person has as a result.
43. New section 251B(3) provides, among other things, that the Scottish Ministers may by regulations make further provision about the functions of a person appointed as the National Planning Performance Co-ordinator. No equivalent provision was made in existing Part 12A of the 1997 Act, inserted by section 30 of the Planning etc. (Scotland) Act 2006, which has not been commenced.
44. Regulations made under new section 251B(3) of the 1997 Act are subject to the negative procedure.

Evidence

45. The Committee asked the Scottish Government in written correspondence whether it would be more appropriate for the enhanced oversight afforded by the affirmative procedure to apply to regulations which would make such further provision.
46. The Government argued in written correspondence to the Committee that this power would be used to provide further detail at a technical and administrative level. The response was fairly limited, however, and so the Committee pursued this issue further in oral evidence.
47. The Committee also asked in oral evidence whether, as an alternative to the affirmative procedure, further provision about the functions of the National Planning Performance Co-ordinator should be set out on the face of the Bill.
48. The Minister's position in oral evidence was that the functions of the National Planning Performance Co-ordinator are not particularly wide. He expected that further provision would include details on how performance is to be monitored and how often reports are to be submitted.

49. The Minister also considered that the negative procedure rather than the affirmative procedure was appropriate for such technical details. When pressed on the point further, the Minister indicated that he was not adverse to using the affirmative procedure, but that he did not see the point of it for this provision.

Recommendations

50. The only provision made about the functions of the National Planning Performance Co-ordinator is that made in new section 251B(1) and (2) of the 1997 Act, inserted by section 26(1). This provides generally that those functions are to monitor the performance by planning authorities of their functions, to advise planning authorities on how they may improve their performance, and to report to the Scottish Ministers on these activities and any recommendations stemming from them.
51. The Committee considers that it is unusual for a power to be taken to make further provision about the functions of a person where limited detail is contained on the face of the legislation about the functions of that person.
52. By way of example, the functions of the Scottish Information Commissioner are set out in detail in Part 3 of the Freedom of Information (Scotland) Act 2002. Likewise, the Commissioner for Children and Young People (Scotland) Act 2003 makes detailed provision about the functions of the Commissioner for Children and Young People in Scotland. Similarly, section 7 of the Prisons (Scotland) Act 1989 provides for the functions of Her Majesty's Chief Inspector of Prisons for Scotland in detail. It is not clear why more detailed provision about the functions of the National Planning Performance Co-ordinator could not be set out on the face of section 26(1) of the Bill rather than in regulations.
53. The Committee considers that it is also relevant that section 31 of the Bill already provides a power by regulations to make supplementary provision which the Scottish Ministers consider appropriate for the purposes of, or in connection with, or for giving full effect to the Bill as enacted or any provision made under it. Such regulations could therefore make supplementary provision about the National Planning Performance Coordinator. The power in section 31 would also allow the Scottish Ministers to make supplementary provision about the provision made in the regulations made under new section 251B(3).
54. **The Committee recommends that the Bill is amended at Stage 2 to ensure that the functions of the National Planning Performance Coordinator are set out in full on the face of the Bill.**
55. **If the Scottish Government does not lodge an amendment to the Bill to set out the functions of the National Planning Performance Co-ordinator in full, the Committee considers that the affirmative procedure should be applied to the regulation-making power in new section 251B(3).**

Section 27 – Power to provide for infrastructure levy

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**

- **Parliamentary procedure: Affirmative**

Provisions

56. Section 27(1) of the Bill provides that the Scottish Ministers may by regulations establish, and make provision about, an infrastructure levy. An infrastructure levy is defined as a levy payable to a local authority, in respect of development wholly or partly within the authority's area, the income from which is to be used by local authorities to fund, or contribute towards funding, infrastructure projects. Schedule 1 of the Bill sets out what provision may be made in the "infrastructure-levy regulations".
57. The infrastructure-levy regulations are subject to the affirmative procedure.

Evidence

58. The Committee pursued the following three issues in respect of the power to make infrastructure-levy regulations.

(a) Cap on penalties

59. Paragraph 17 of schedule 1 sets the cap on penalties that can be created under the infrastructure-levy regulations at the maximum permissible amounts; i.e. level 5 on the standard scale for a summary-only offence and the statutory maximum for an either-way offence.^v
60. Furthermore, the Bill sets the maximum term of imprisonment at 12 months on summary conviction and, for an either-way offence, 12 months on summary conviction or two years on conviction on indictment. This is considerably higher than the usual maximum of 3 months established in subordinate legislation for summary-only offences.^{vi}
61. The Committee asked the Scottish Government, in the absence of any explanation in the DPM, to explain why it is appropriate that these limits are set at these high levels.
62. In its written response the Government argued that attempts to evade the infrastructure levy on major developments could deprive the infrastructure fund of significant sums, and therefore substantial penalties may be necessary to reflect the impact of the offence. It explained that the cap on penalties had been set at the maximum amounts in order to provide flexibility and that the appropriate levels would be discussed in the course of consultation on the future regulations. In the oral evidence session, the Minister stated that there would be a "*detailed design phase*" to look at the operation of the levy mechanism, which will include consultation.^{vii}

(b) Provision on how related planning legislation is exercised

^v Level 5 is £5,000 and the statutory maximum is £10,000.

^{vi} Information is available [here](#).

^{vii} *Official Report*, Delegated Powers and Law Reform Committee, 20 February 2018, col. 17.

63. Paragraph 16(1) of schedule 1 provides that infrastructure-levy regulations may make provision about how related planning legislation may or may not be exercised if the Scottish Ministers consider it necessary or appropriate for the following purposes:
- a. *“enhancing the effectiveness of infrastructure levy as a means of raising revenue to fund, or contribute towards funding, infrastructure projects”*; or
 - b. *“preventing or restricting the use of powers, other than the power to charge infrastructure levy, in circumstances in which the Ministers think using the power to charge infrastructure levy would be more appropriate”*.
64. The Committee asked the Minister at the oral evidence session to explain why it is appropriate to take such broad regulation-making powers and whether more could be done to develop the policy to ensure that the power is limited to that which is necessary and proportionate.
65. In relation to the first purpose set out above, the Minister’s position was that the *“Bill specifically links modifications to legislation to the effectiveness of the infrastructure levy, so it would be limited in scope”*.^{viii} As an example of the use of the power, he referred to regulations being made to ensure that the evidence report, which forms part of the local development plan process, provides an appropriate level of information on infrastructure capacity.
66. The second purpose outlined above would allow, among other things, provision to be made regulating when a planning obligation made under section 75 of the 1997 Act could require payment of a sum as a condition of planning permission. The Committee sought to explore whether it would be more appropriate for the Scottish Government to develop its policy first and set out, at least in principle, how related planning provisions should operate on the face of the Bill. It posited that a power could be taken to amend those provisions by regulations in light of experience or changing priorities and practice in due course.
67. The Minister stated that in practice the main consideration would be the relationship with section 75 of the 1997 Act and related legislation through which financial payments could be sought from development. The Scottish Government have committed to reviewing its guidance on section 75 planning obligations.
68. The Minister referred to issues south of the border in relation to the community infrastructure levy and its relationship with section 106 of the Town and Country Planning Act 1990 (the equivalent of section 75 of the 1997 Act). The Minister did not want a situation in which there are unintended consequences. The Chief Planner stated that the power to make infrastructure-levy regulations is expressed widely to enable the Scottish Government to develop, and consult more widely, on the detail of how a levy might operate.

(c) Super-affirmative procedure

^{viii} Official Report, Delegated Powers and Law Reform Committee, 20 February 2018, cols 18-19.

69. In light of the Government's position that the infrastructure-levy would enter a "detailed design phase" requiring further consultation, the Committee asked whether the super-affirmative procedure would therefore be more appropriate.
70. The Minister considered that the affirmative procedure would be appropriate to ensure that the regulations are not introduced without the Parliament's active approval. His view was that this procedure was suitable because of the scrutiny and the extensive consultation that the Scottish Government will undertake.

Recommendations

71. The Committee recognises generally that providing for the infrastructure-levy in regulations would allow flexibility as economic circumstances change, including market conditions affecting land values, investment and development. As noted above, the Scottish Government intends to undertake further consultation to define a practical model.
72. In a number of respects, however, the powers to make infrastructure-levy regulations are drawn very widely to accommodate choices on significant matters. The Committee considers that the following infrastructure-levy powers in schedule 1 of the Bill are particularly wide and inhibit the Parliament from conducting line by line scrutiny of policy as would be the case if such matters were set out on the face of the Bill:
 - (a) Powers to make provision in regulations for criminal penalties are set at the maximum permissible amounts by virtue of paragraph 17 of schedule 1 of the Bill. The Committee recognises that penalties must be an effective deterrent. However, given the significance of penalties to the rights of individuals and companies, the Committee expects to see the levels of the penalties set out on the face of the Bill, as opposed to in a regulation-making power, if powers to set the penalties are not to be meaningfully capped.
 - (b) The linking of powers to modify planning legislation in paragraph 16 of schedule 1 of the Bill to the effectiveness of the infrastructure levy as a means to raise revenue to fund infrastructure projects does not meaningfully limit their scope.
 - (c) The Scottish Government's policy on the relationship between other funding mechanisms such as those under section 75 of the 1997 Act and the infrastructure levy should be developed first and set out on the face of the Bill. A power could be taken in paragraph 16 of schedule 1 of the Bill to amend those provisions in light of experience or changing priorities and practice in due course.
73. Previous powers to provide in regulations for a levy have been subject to a form of super-affirmative procedure. For example, section 14 of the Alcohol etc. (Scotland) Act 2010 contains a power for the Scottish Ministers to make regulations for the imposition on licence-holders of a social responsibility levy. Section 15 of the 2010 Act makes provision to the effect that regulations made under section 14 are subject to a form of super-affirmative procedure. In the Committee's view, this is indicative that an enhanced level of scrutiny beyond the affirmative procedure is appropriate for levy-raising powers.

74. **Accordingly, the Committee recommends that a form of super-affirmative procedure would be appropriate to guarantee a requirement to consult publicly and to ensure that the Parliament can control the exercise of the very wide powers in schedule 1 to make infrastructure-levy regulations.**
75. **In addition, the Committee calls on the Scottish Government to reconsider the powers identified at paragraphs 72 (a) to 72(c) above with a view to ensuring that those powers are framed more clearly and that the powers are no more than are necessary and proportionate.**
76. **The Committee also notes that this is another example of a Bill being introduced with framework powers where significant policy matters have not been developed and further consultation is necessary. In the Committee's view, such an approach undermines the Parliament's ability to scrutinise policy on a line by line basis on the face of the Bill. The application of the affirmative procedure limits the Parliament to accepting or rejecting regulations in their entirety that make provision on substantive policy matters.**

Section 30 – Power to change meaning of “infrastructure”

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Affirmative**

Provisions

77. Section 30 allows the Scottish Ministers by regulations to modify section 29 so as to change or clarify the meaning of "infrastructure" for the purposes of Part 5 (infrastructure levy) of the Bill as enacted and "the schedule".
78. The power is subject to the affirmative procedure.

Evidence

79. As a minor point of technical clarity, the Committee asked the Scottish Government whether reference to "the schedule" in section 30 would be clearer if it referred to "schedule 1" ("infrastructure-levy regulations"). This is because the Bill contains two schedules.
80. The Scottish Government agreed and undertook to bring forward an amendment to this effect at Stage 2.

Recommendation

81. **The Committee accepts the Scottish Government's undertaking to amend section 30 of the Bill at Stage 2 to refer to "schedule 1" rather than "the schedule".**

Direction-making powers

Oversight for significant direction-making powers generally

Provisions

82. In its written and oral questions the Committee asked the Scottish Government about the direction-making powers under sections 7(3) (direction to amend local development plans), 10(2) and (3) (duty to seek to make or alter a SDZ scheme when directed to do so), 25(1) (power to transfer functions where insufficient trained persons) and 26 (directions to planning authority following an assessment of performance).
83. In particular, the Committee asked the Government to give consideration to applying more safeguards to the exercise of these more significant powers. Specifically, the Committee asked the Government whether it would be appropriate to impose a requirement to publish any directions given and the reasons for making those directions (where no such requirements were set out in the Bill), and a requirement to report to the Parliament on the use of these powers.

Evidence

84. The Government stated that directions are already published and that reasons are given with the published directions. At the oral evidence session, the Minister stated that he could not see what adding a publishing requirement on the face of the Bill would achieve. However, he added that he would be content to inform SPICe or some other parliamentary body when a direction was published on the Scottish Government's website.
85. The Minister observed that there are already a number of direction-making powers in the 1997 Act that deal with individual cases. He was not aware of a time when Parliament had called a Minister before a Committee to account for the exercise of a direction-making power.
86. The Minister also considered that a requirement placed on the Scottish Ministers to report on the use of the significant direction-making powers identified by the Committee would not be a good use of parliamentary time. His view was that rather than setting a formal timescale, the Parliament could call on the Minister to account before a Committee on the use of a power on a case by case basis at the relevant time.

Recommendations

87. The Committee welcomes the Minister's commitment to laying directions before SPICe.
88. The Committee notes that section 26 of the Bill, inserting new section 251G into the 1997 Act, already contains a requirement to publish directions requiring a planning authority to take action following an assessment of performance by the National Planning Performance Coordinator. Likewise, section 7(3) of the Bill, inserting new section 20AA(2), specifically requires that a direction requiring an amendment to the local development plan must set out the Scottish Ministers' reasons for doing so.

89. In the Committee's view, a requirement to publish directions that are made, together with an additional duty to provide reasons, on the face of the Bill would aid public transparency and would be preferable to relying on the Government's current practice, which may change in the future. The Committee considers that this view is strengthened by the fact that there are already requirements on the face of the Bill to publish or give reasons for particular directions.
90. The Committee recognises that no special form of scrutiny applies to the current direction-making powers exercised under the 1997 Act. However, the Committee considers that the following direction-making powers contained in the Bill are particularly significant:
- (a) Section 7(3) of the Bill - Direction to planning authority to amend local development plans;
 - (b) Section 10(2) and (3) of the Bill – Duty of planning authority to seek to make or alter a SDZ scheme when directed to do so;
 - (c) Section 25(1) of the Bill - Power of Scottish Ministers to transfer planning functions where insufficient trained persons; and
 - (d) Section 26 of the Bill - Directions to planning authority following an assessment of performance.
91. It is not clear at this stage how often these more significant powers would be exercised. However, the Committee considers that it would be proportionate to apply a periodic requirement to report on the exercise of these powers. This would enable the Parliament to periodically review the Government's actions in these significant areas.

92. **In light of the above, the Committee recommends that there should be a requirement on the face of the Bill to publish all directions made under the provisions in the Bill and to give reasons for making those directions.**
93. **The Committee also calls on the Scottish Government to amend the Bill to include a requirement for it to periodically report to the Parliament on the use of the more significant direction-making powers contained in the Bill identified in paragraphs 90 (a) to 90(d) above.**

Recommendations on particular direction-making powers

Section 25(1) – Power to transfer functions where insufficient trained persons

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Direction**
- **Parliamentary procedure: None**

Provisions

94. Section 24 of the Bill provides that where a member of a planning authority has not fulfilled training requirements specified in regulations made by the Scottish

Ministers, that member is prohibited from exercising any of the authority's functions that are specified in regulations.

95. Section 25(1) confers a direction-making power on the Scottish Ministers where a planning authority are unable to exercise a function because of the prohibition created by section 24. The Scottish Ministers may allow the function to be exercised on the authority's behalf by another planning authority or the Scottish Ministers. This is known as a "transfer of functions direction", which may be modified or revoked and may make different provision for different purposes.

Evidence

96. One element of the Committee's written question on this power was to ask whether it would be appropriate to require the Scottish Ministers to provide an explanation with the published direction setting out the circumstances that had led to a transfer of functions direction being made.
97. The Scottish Government's position in its written response was that it would be for the relevant planning authority and not the Government to explain these circumstances. The Committee's oral questions asked the Minister to justify why this is the Government's position, particularly given that the transfer of functions direction is made by the Scottish Ministers rather than the relevant planning authority. The Minister reiterated in the oral evidence session that it would be for the planning authority to explain the background and how that situation had come about.
98. The Minister expected the power to make a transfer of functions direction where there were an insufficient number of trained members to be used very sparingly. One of the examples he gave was the situation following an election that resulted in a significant change to the membership of the local authority, such that no members had the requisite training, in circumstances where an application had to be dealt with quickly.
99. The Minister also stated that the choice of body to which the functions would be transferred would depend on a range of factors, including the capacity of neighbouring authorities and whether they have experience of similar issues. He insisted that political factors would not influence the choice of body to which the functions were transferred. However, the Minister recognised that it might be helpful to explain the choice and so undertook to consider this point further.

Recommendations

100. The Committee considers that a requirement to give reasons for the choice of body that the functions are transferred to is appropriate to ensure that there is transparency in relation to the reasons for transferring the functions to a particular planning authority over another or to the Scottish Ministers. The Committee welcomes the Minister's undertaking to reconsider this point.
101. In addition, the Committee considers that if the Ministers are to provide reasons with the direction explaining the choice of body the functions are transferred to, it would seem appropriate that they are also required to explain why they consider that it has become necessary to make a transfer of functions direction in the first place. This is particularly the case given that it is the Scottish Ministers, rather than

the planning authority, that exercises the power to make a transfer of functions direction.

102. **Accordingly, the Committee encourages the Minister to include a requirement in the Bill for the Scottish Ministers to give reasons for the choice of body that the functions are transferred to under a "transfer of functions direction" made in terms of section 25(1) of the Bill.**
103. **Further, the Committee recommends that as a matter of transparency there should also be a requirement on the face of the Bill for the Scottish Ministers to publish an explanation setting out the circumstances that have led to the transfer of functions direction being made.**

Provision in SDZ schemes

Section 10(2), inserting section 54C into the 1997 Act – Scheme may also control advertisements

- **Power conferred on: Planning authorities / Scottish Ministers**
- **Power exercisable by: Making or altering an SDZ scheme**
- **Parliamentary procedure: None**

Provisions

104. Section 10 of the Bill inserts new sections 54A to 54F into the 1997 Act. Section 54C(1) provides that a SDZ scheme may disapply any regulations for restricting or regulating the display of advertisements made under section 182 of the 1997 Act and apply instead in that zone any provision included in the scheme that restricts or regulates the display of advertisements.
105. New section 54C(2) states that such provision included in a scheme is to be treated, for the purposes of sections 184, 185, 186 and 187 of the 1997 Act, as though it were provision in regulations made under section 182. However, any such provision must be capable of being included in regulations made under section 182.

Evidence

106. Currently, regulations restricting or regulating the display of advertisements made under section 182 of the 1997 Act are subject to the negative procedure. Likewise, any amendments to those regulations are to be made by regulations subject to the negative procedure.
107. In terms of section 10 of the Bill, however, provision made by a planning authority or the Scottish Ministers in a SDZ scheme either disapplying restrictions contained in the advertising regulations made under section 182 of the 1997 Act or making alternative provision would not be subject to any parliamentary procedure. The Committee therefore asked the Scottish Government in writing to explain why it is appropriate that section 10 of the Bill removes this element of parliamentary oversight. The Scottish Government agreed in writing to re-visit this.

108. At the oral evidence session the Committee asked the Minister how the Government expects to respond to the Committee's concerns about parliamentary oversight.
109. The Minister explained that the intention is that SDZ schemes should be able automatically to grant advertising consent, in the same way that they grant planning consent, for advert types that are set out in the scheme as being acceptable for that scheme area. The Scottish Government's legal advisor added that the drafting approach is a product of the fact that provision governing advertising consent is made in regulations rather than in the primary legislation.
110. The Minister reiterated that the Government would re-examine this issue and would be willing to write to the Committee with any more detail on the matter.

Recommendation

111. The fact that alternative provision on advertising to that made in regulations under section 182 of the 1997 Act can be made either by a planning authority or the Scottish Ministers in a SDZ scheme, rather than in regulations laid before the Parliament under the negative procedure, as is currently the case, means that the Parliament will not be able to conduct oversight of any such alternative provision.
112. No further explanation was forthcoming in the evidence session as to how the Scottish Government intends to address the removal of parliamentary oversight. It is not clear what approach would be taken to this issue given that provision governing advertising consent is made in regulations. The Committee therefore considers that it would be useful to have further clarity on this point.
113. **The Committee therefore calls on the Scottish Government to provide further explanation as to how it intends to address the issue of the removal of parliamentary oversight that would result from an SDZ scheme both disapplying provision contained in the advertising regulations made under section 182 of the 1997 Act and making any alternative provision.**

Annex 1

Written correspondence with the Scottish Government

Thank you for your letter of 30 January, addressed to James Hynd, Head of Cabinet, Parliament and Governance Division, seeking a written explanation of a number of issues in the Delegated Powers Memorandum for the above Bill. This has been passed to me as Bill Manager. I am also grateful to you for highlighting the issues which the Committee may wish to explore with the Minister for Local Government and Housing in the oral evidence session on 20 February. Responses to the Committee's questions are set out below.

Section 1: Issues that the Committee would wish a written response to and may also wish to explore during the evidence session with the Minister

Part 1 – Development planning

Section 7(2), inserting new section 3CA(3) into the 1997 Act – Amendment of National Planning Framework

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Negative**

The Committee therefore asks the Scottish Government to explain why it is appropriate that the Scottish Ministers should have the power in new section 3CA of the 1997 Act, as inserted by section 7(2) of the Bill, to make provision for the laying of the amended framework before the Scottish Parliament, and that such provision is only subject to the negative procedure. As part of this, the Committee also asks the Scottish Government to explain further why provision on process of the sort currently made in existing sections 3A to 3C cannot be made on the face of the Bill.

Throughout the review of the planning system, stakeholders have noted that if development plans, including the National Planning Framework (NPF), move onto a 10 year review cycle, provision needs to be made to update plans between cycles. There is no provision to do this at present; if something changes the plan as a whole has to be reviewed and cannot be updated in part. This lack of flexibility was raised as a key issue by the independent panel, who called for development plans to become more agile and responsive to their wider context. It is therefore considered appropriate to allow for both NPF and local development plans to be updated in part between full review cycles.

Regulation making powers were considered appropriate to provide for the process of making amendments to development plans, as a range of circumstances could arise in the future that may require procedures to be amended, or new procedures developed.

In particular, the Scottish Government has convened a digital task force to advise on scope for technological innovation to support planning reform. The group recently discussed their ideas for the next NPF to be informed by live data, and to be updated more regularly so that it becomes a platform for real time spatial information. We would like to explore the scope for this type of innovation further. If NPF were to develop in this way, amendments may be frequent without changing the overall policy substantially, suggesting

the need for a proportionate and manageable process to handle them. Digital advancements could also significantly improve public engagement and greater flexibility in defining the consultation procedures for amendments would therefore be helpful. As new digital approaches can develop quickly and unpredictably, we do not wish the procedures for amending the NPF to be constrained in future by provisions in primary legislation.

In contrast, other circumstances may arise which require a more substantive change to the NPF. This might include the addition of a national development or the need to reflect a resolution by Parliament on a specific, nationally significant issue. In such cases, we would want the procedure to allow for much greater consultation with the public and with Parliament. We therefore envisage the regulations potentially providing for different procedures for different levels of amendments.

Since these regulations relate to a level of practical and administrative detail we consider that negative procedure is appropriate.

Section 7(3), inserting new section 20AA(2) into the 1997 Act – Direction to amend local development plans

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Direction**
- **Parliamentary procedure: None**

The Committee asks the Scottish Government whether it would be more appropriate that additional safeguards apply to a power of this nature, such as: (a) a requirement to publish any directions given; and (b) a requirement to report to the Parliament on the use of the power.

This new power will support a more flexible and responsive approach to local development plans. Scottish Ministers can at present, via section 16(1)(a)(i), require a planning authority to prepare a new development plan. The Bill enables a planning authority to amend their local development plan, and this power mirrors that by enabling Ministers to intervene where such an amendment is required but not proposed by the planning authority. Examples of circumstances that might trigger Ministerial intervention could be where evidence is showing a clear shortfall in the availability of housing land, or where an economic issue of national significance is considered to require action.

Ministers already have powers to direct planning authorities to consider modifying their local development plans at the Notice of Intention to Adopt stage following Examination. Policy relating to these directions is set out in Circular 6/2013. It notes that “Scottish Ministers have a default power under the Act (section 20) to direct the planning authority to consider modifying a LDP, or for Scottish Ministers to approve the plan themselves. Ministers expect they will rarely use this power.” We would update and publish any such guidance to address the policy on new powers following enactment of the Planning Bill and associated secondary legislation.

With regard to the Committee’s concern about directions being published, we can confirm that all directions made under planning legislation are a matter of public record and are published routinely by Planning and Architecture Division on the Scottish Government’s website. In relation to the question of requiring a report to Parliament, we do not consider it would be an appropriate use of the Scottish Government’s or the Parliament’s time to

require this. However, the Scottish Parliament could ask Ministers to account for their use of these powers at any time.

Part 2 – Simplified Development Zones

Section 10(2) and (3), inserting schedule 5A, paragraph 3(1) and (2) into the 1997 Act – Land that cannot be included in a scheme

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Affirmative**

The Committee asks the Scottish Government to consider whether it would improve the transparency of the provisions relating to SDZ schemes in section 10 of the Bill (as it amends the 1997 Act) if the types of land that may not be included in an SDZ scheme were set out on the face of the primary legislation (as they are currently for simplified planning zones), with a power included to add or remove entries by regulations subject to the affirmative procedure.

We thank the Committee for their consideration of this issue. The key difficulty that we had wanted to address here is that the types of land that cannot be included in simplified planning zones are set in the primary legislation and cannot easily be amended, and we did not wish to replicate this difficulty for simplified development zones. However, setting out the types of land that may not be included on the face of the Bill, while allowing for entries to be added or removed by regulations, would equally address our concern and so we are content to adopt this approach instead. We will bring forward an amendment to this effect at Stage 2.

Section 10(2) and (3), inserting schedule 5A, paragraphs 6 and 19 into the 1997 Act – Duty to seek to make or alter a scheme when directed to do so

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Direction**
- **Parliamentary procedure: None**

The Committee asks the Scottish Government whether it would be more appropriate that additional safeguards apply to the power in paragraph 6(1) of new schedule 5A, such as: (a) a requirement for the Scottish Ministers to provide reasons for giving such a direction; (b) a requirement to publish any directions given; and (c) a requirement to report to the Parliament on the use of the power.

As mentioned in the DPM, we consider that the power for Ministers to direct a local authority to make a SDZ scheme could be used in relation to key sites or projects of national or regional importance to try to drive forward development. It is likely that such projects would have a link to the NPF, which will be subject to Parliamentary consultation. Ministers could also make such a direction where a person has requested that a scheme be made or altered and the case has been referred to them.

With regard to the Committee's concern about directions being published, we can confirm that all directions made under planning legislation are a matter of public record and are

published routinely by Planning and Architecture Division on the Scottish Government's website. They also routinely include the reasons for giving the direction. In relation to the question of requiring a report to Parliament, we do not consider it would be an appropriate use of the Scottish Government's or the Parliament's time to require Ministers to report to the Parliament on the use of direction-making powers. However, the Scottish Parliament could ask Ministers to account for their use of these powers at any time.

Section 10(2), inserting section 54C into the 1997 Act – Scheme may also control advertisements

- **Power conferred on: Planning authorities / the Scottish Ministers**
- **Power exercisable by: Making or altering an SDZ scheme**
- **Parliamentary procedure: None**

The Committee asks the Scottish Government to explain why it considers these provisions to be appropriate in terms of the removal of parliamentary oversight.

It is our intention is that SDZs should be able to grant a range of consents in addition to planning permission, including advertisement consent. This will provide a streamlined approach, avoiding developers having to apply for separate consents, and enhance the attractiveness of the scheme. However, we appreciate the concerns of the Committee that inserted section 54C disapplies the controls on advertisements set out in regulations under section 182 of the 1997 Act. We will re-examine the wording of this section and consider whether any amendments are appropriate.

Part 4 – Other matters

Section 25(1) – Power to transfer functions where insufficient trained persons

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Direction**
- **Parliamentary procedure: None**

A transfer of functions direction relates to functions which are, prior to the direction being made, exercised by members elected for a particular area. In light of this, the Committee asks the Scottish Government whether it would be more appropriate that additional safeguards apply to a power of this nature, such as: (a) a requirement for the Scottish Government to explain the circumstances that have led to the planning authority being unable to exercise a function because of a prohibition created by section 24(1); (b) a requirement to publish any directions given; and (c) a requirement to report to the Parliament on the use of the power.

It is important, to maintain public trust in the planning system, that elected members who will sit on planning committees or on local review bodies will have been sufficiently trained in planning matters to confidently make sound decisions that are rooted firmly in clear planning principles and policies. We do not expect this power to be used frequently, if at all, but it is necessary to have in reserve to relieve pressure on the planning system if the situation arises that a planning authority is unable to carry out its functions due to a lack of members who have met the training requirements. We consider that it would be for the planning authority to explain the circumstances that have led to this situation.

A direction-making power is appropriate because it will be used to address individual circumstances and may be required at short notice. With regard to the Committee's concern about directions being published, we can confirm that all directions made under planning legislation are a matter of public record and are published routinely by Planning and Architecture Division on the Scottish Government's website. They also routinely include the reasons for giving the direction. In relation to the question of requiring a report to Parliament, we do not consider it would be an appropriate use of the Scottish Government's or the Parliament's time to require Ministers to report to the Parliament on the use of direction-making powers. However, the Scottish Parliament could ask Ministers to account for their use of these powers at any time.

Section 25(5) – Power to transfer functions where insufficient trained persons

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Affirmative**

The Committee therefore asks the Scottish Government to consider whether the modifications that can be made should be limited to: (a) enactments that are specified on the face of the Bill; and (b) those that are necessary in connection with a transfer of functions direction (or such a direction as modified or revoked).

When any planning functions of an authority are transferred due to the lack of fully trained members, it is important that the body in receipt of the transfer should not be hindered by the lack of the necessary legislative powers to make that decision and to take other actions such as requiring information or notifying relevant people. These powers may sit in other legislation beyond that of planning, and may be affected by new legislation in the future. Limiting this provision to enactments specified on the face of the Bill could therefore potentially cause difficulties or effectively prevent the functions being transferred.

We do not consider that the modifications of legislation should be limited to those that are "necessary". It is already a clear implication of the terms of section 25(5) that the power to apply enactments with modifications only applies in connection with the transfer of the function, and so any modification would have to be limited to allowing the function to be exercised by another local authority or the Scottish Ministers. The regulations are subject to affirmative procedure, so the Parliament will have ample opportunity to scrutinise the modifications proposed. Necessity is a stringent legal test, and it may be that some modifications are simply desirable in order to make the transfer operate in a transparent and effective way without risk of challenge.

Section 26, inserting new section 251B(3) into the 1997 Act – National planning performance co-ordinator

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Negative**

As the functions of the person appointed are specified broadly in new sections 251(1) and (2), the Committee asks the Scottish Government whether it would be

more appropriate for the enhanced oversight afforded by the affirmative procedure to apply to regulations which would make such further provision.

As the general functions of the national planning performance co-ordinator are set out on the face of the Bill, the regulations made under this section will provide further detail at a technical and administrative level for which we consider the negative procedure to be appropriate.

Section 26 – Directions to planning authority following an assessment of performance

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Direction**
- **Parliamentary procedure: None**

The Committee asks the Scottish Government whether it would be more appropriate that additional safeguards apply to a power of this nature, such as: (a) a requirement to provide reasons explaining why the direction is being issued; (b) clarifying that the steps that may be required are limited to those recommended in the performance assessment report; and (c) a requirement to report to the Parliament on the use of the power.

The review of planning maintains a very clear focus on improving the overall performance of the planning system, addressing concerns about matters such as efficiency and patterns of decision-making in some authorities. Our intention is that the approach should be supportive and collaborative, led by the Planning Performance Co-ordinator whose role is to monitor and advise authorities on improvements. However, in the event that concerns are sufficiently serious to trigger an assessment, and the authority fails to take effective action in response to the recommendations of the performance assessment report, it is appropriate that Ministers should have powers to require the authority to take action.

We consider that the circumstances in which the power to issue a direction under new section 251G could be used also operate to constrain the manner in which the power could be used. It is clear that the intention is that any direction given must be to address an issue raised in paragraphs (1)(a) to (c). However, we do not feel it would be appropriate to limit the steps that may be required to those recommended in the performance report. Ministers may wish to require other steps; for example, the authority might propose an alternative approach in the response report, and Ministers might wish to accept that with further adjustments. We would not want to constrain such flexibility.

With regard to the Committee's concern about directions being published, we can confirm that all directions made under planning legislation are a matter of public record and are published routinely by Planning and Architecture Division on the Scottish Government's website. They also routinely include the reasons for giving the direction. In relation to the question of requiring a report to Parliament, we do not consider it would be an appropriate use of the Scottish Government's or the Parliament's time to require Ministers to report to the Parliament on the use of direction-making powers. However, the Scottish Parliament could ask Ministers to account for their use of these powers at any time.

Part 5: Infrastructure levy

Section 27 – Power to provide for infrastructure levy

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument 7**
- **Parliamentary procedure: Affirmative**

The Committee therefore asks the Scottish Government, in the absence of any explanation in the DPM, to explain why it is appropriate that these limits [on penalties that can be created by the infrastructure levy] are set at these high levels.

The levels have been set at a maximum permissible amount to allow for flexibility at this stage. Further discussion of the appropriate levels of penalties for different offences would take place during future consultation on regulations, and many penalties may be set at lower levels. However, attempts to evade the levy on major developments could deprive the infrastructure fund of significant sums, and therefore substantial penalties may be necessary to reflect the impact of the offence. (For information, Level 5 is £5,000 and the statutory maximum is £10,000.)

The Committee therefore asks the Scottish Government to provide examples of when the Scottish Ministers might consider it expedient to modify legislation to enhance the effectiveness of the infrastructure levy as a means to raise revenues.

The introduction of the infrastructure levy may require adjustments to many aspects of the planning system, for example in relation to information required in applications or the operation of SDZs. Other powers might also potentially be used to require payments from developers or to impose burdens that could conflict with the effective operation of the levy. The power is therefore drawn widely to enable regulations to respond to issues that may arise.

The Committee therefore asks the Scottish Government to consider if it would be appropriate for primary legislation to define, for example, when it would be appropriate for an agreement under section 75 of the 1997 Act (as amended by the Bill) to impose a planning obligation requiring payment of a sum and when the infrastructure levy should be used instead.

Further work to define the regulations for an infrastructure levy will be taken forward and will inform the approach to be taken in regulations. Given that we have not defined and consulted on a detailed methodology for the infrastructure levy it is neither possible nor appropriate to set out its relationship with section 75 planning obligations out in primary legislation. In addition, the regulation making powers aim to allow for the definition of infrastructure to change over time to reflect changes in priorities and practice, potentially requiring associated adjustments in the relationship with section 75 within the same regulations.

The Committee therefore asks the Scottish Government to consider whether a form of super-affirmative procedure would be appropriate for the infrastructure-levy regulations to allow appropriate consultation of those affected and enhanced parliamentary scrutiny of the proposed policy to be adopted.

We recognise that the introduction of an infrastructure levy will be a substantial issue. As with any legislation of this kind, it will be subject to extensive public consultation on the draft regulations, together with a range of impact assessments. We consider that the affirmative procedure is appropriate to ensure that the regulations are not introduced without the active approval of Parliament.

Section 2: Issues of detail on which the Committee is content to receive a written response only

Part 3 – Development Management

Section 16 – Schemes of delegation: Inserted section 43AB(2)(c) – further provision and guidance – directions

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Direction**
- **Parliamentary procedure: None**

The Committee asks the Scottish Government to explain why new section 43AB(2)(b) is expressed as a power in regulations for the Scottish Ministers to specify modifications that a planning authority are required to make to a draft scheme of delegation and why a different approach has been taken to the direction-making power in new section 43AB(2)(c).

There are different circumstances behind the powers introduced in section 43AB(2)(b) and section 43AB(2)(c).

Section 43AB(2)(b) covers the potential for the Scottish Ministers, at the end of the process, to require particular modifications to the detailed substance of a scheme of delegation (i.e. the circumstances in which a local planning application is to be delegated for officer decision, or not), after the scheme has been drafted but before it is adopted. To support greater consistency and appropriate levels of delegation, section 43AB(3) introduces a requirement for planning authorities to have regard to guidance issued by the Scottish Ministers. It is the intention that the guidance will reflect policy support for more substantial delegation of minor local applications, in the interests of both operational efficiency and increased local decision-making. Section 43AB(2)(b) provides a means to add some weight to the policy set out in the guidance, while still allowing for local flexibility as appropriate.

Section 43AB(2)(c) relates more to setting out the parameters for the process to be followed by a planning authority, which could include matters such as the expected style and matters covered by a scheme of delegation, as well as any particular engagement activity. This is essentially an administrative matter for which the Scottish Ministers could, where appropriate, direct specific actions to be carried out in the preparation of a scheme, to reflect the individual circumstances of the planning authority, and would be likely to occur at an early stage in the scheme preparation.

Part 4 – Other matters

Section 21 – Fees for planning applications etc.

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Negative**

The Committee asks the Scottish Government to explain why new section 252(1ZA)(b) is necessary and in what circumstances it is envisaged that it would be used instead of the power in new section 252(1ZA)(a).

We have included the provision in new section 252(1ZA)(b) to allow for Scottish Ministers to charge for a service which they have provided on behalf of Planning Authorities on a national scale, which supports the planning service but is not a planning function required by the legislation. An example of this is the eDevelopment.scot service and its support desk currently operated and resourced by the Scottish Government on behalf of planning and building authorities. The service, comprised of the ePlanning and eBuildingStandards portals, allows users to make planning and building warrant applications online to each authority through a single service. As it continues to evolve, it may become necessary for the Scottish Government to ask authorities to contribute further to the provision of the service. This provision within the Bill provides for those circumstances.

The Committee asks the Scottish Government whether it is intended that the Scottish Ministers should also have the new power to waive or reduce a fee and could this provision be clearer.

We thank the Committee for their consideration of this point. We consider that the power currently only allows planning authorities to waive or reduce a fee. We will consider further whether it would be helpful for the Scottish Ministers to have the same power.

The Committee asks the Scottish Government to explain whether it would be more appropriate for either the Bill to set a cap on the level of surcharge that can be imposed in the regulations or the affirmative procedure to be applied to those regulations (or some other measure to ensure sufficient oversight).

We did not consider it appropriate to set out the level of surcharge in the Planning Bill, or any cap, as we have committed to consulting on the planning fee regime, including any proposals for a surcharge, following the passage of the Planning Bill. While regulations setting out levels of fees for any activity are normally subject to the negative procedure, we recognise that the surcharge presents a slightly different issue, as it is not subject to the restriction set out in section 252(8). As the complete fees package would normally be brought forward in a single instrument, we will consider further whether additional restrictions or greater scrutiny should be applied to the surcharge provisions.

Part 5 – Infrastructure levy

Section 30 – Power to change meaning of “infrastructure”

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Affirmative**

The Committee asks the Scottish Government, as a minor point of technical clarity, whether the reference to the "schedule" in section 30 would be clearer if it referred to schedule 1 ("infrastructure-levy regulations")?

We agree that section 30 should refer to “schedule 1” rather than “the schedule” and we will bring forward an amendment to this effect at Stage 2.

Annex 2

Letter from Kevin Stewart, Minister for Local Government and Housing, 2 March 2018

Dear Graham

At the meeting of the Delegated Powers and Law Reform Committee on 20 February, you asked a question about land that cannot be included in a Simplified Development Zone scheme, and I undertook to write to clarify the answer.

In the current legislation on Simplified Planning Zones (SPZs), section 54(1) of the Town and Country Planning (Scotland) Act 1997 provides that a SPZ may not include the following descriptions of land:

- (a) land in a conservation area;
- (b) land in a National Scenic Area;
- (c) land identified in the development plan for the area as part of a green belt;
- (d) land in a site of special scientific interest;
- (e) land in respect of which a nature conservation order or land management order made under Part 2 of the Nature Conservation (Scotland) Act 2004 (asp 6) has effect.

As introduced, there are no descriptions of land specified on the face of the Bill that cannot be included in a Simplified Development Zone (SDZ), but the Scottish Ministers may specify them in regulations. This power is in paragraph 3(1) of Schedule 5A to the 1997 Act, inserted by section 10(2) and (3) of the Bill. In the letter of 9 February from Andy Kinnaird, we agreed with the Committee's suggestion that types of land that may not be included in a SDZ should be set out on the face of the Bill, with a power to add or remove entries by regulations, and undertook to bring forward an amendment to this effect at Stage 2.

As we had intended to specify exclusions from SDZs in regulations, we have yet to fully consider what those exclusions should be. However, we did state in the "Places, People and Planning" consultation paper that we proposed to remove the blanket restriction on such zones in conservation areas. One of the existing SPZs provides for changes of use and minor physical alterations to support regeneration in Renfrew town centre. However, the ban on SPZs in conservation areas is seen as a barrier to using this approach in many traditional town centres where it could be helpful. The research carried out for the Scottish Government on SPZs and equivalent mechanisms (<https://beta.gov.scot/publications/simplified-planning-zones-equivalent-mechanisms-outwith-scotland-research-report/>) also suggested that the blanket exclusion of areas requiring Environmental Impact Assessment (EIA) might be reconsidered.

It is important to emphasise that a SDZ does not reduce the level of planning control or protection for the environment. They allow the planning authority to consult with the community, agencies and other stakeholders upfront, and bring forward details of the type of development that would be appropriate in that area, rather than just responding to applications. Schemes can include conditions, and detailed design guidance or codes to

ensure that designated assets are preserved or enhanced. Where appropriate, EIA would be carried out as part of the preparation of the scheme and taken into account in the development permitted by it. Ministers also have powers to direct planning authorities to notify them before making or altering schemes, and to call in schemes for their own consideration if necessary.

We will have further discussions with stakeholders, including key agencies, before bringing forward an amendment to set out descriptions of land excluded from SDZs on the face of the Bill.

Kind regards

KEVIN STEWART

