Law Society of Scotland

Consultation Response

Places, people and planning: a consultation on the future of the Scottish planning system

April 2017

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Planning Law Sub-committee welcomes the opportunity to consider and respond to the Scottish Governments consultation on the future of the Scottish Planning System.[1] The Sub-committee has the following comments to put forward for consideration.

Chapter 1: Making Plans for the future

Do you agree that our proposed package of reforms will improve development planning?

We welcome the fact that the Scottish Government agrees with the findings of the independent panel and supports the continuation of a plan-led system. We believe many of the reforms, if undertaken correctly and in a timely fashion, do have the potential to improve development planning.

PROPOSAL 1: ALIGNING COMMUNITY PLANNING AND SPATIAL PLANNING

Q1. Do you agree that local development plans should be required to take account of community planning?

Yes. The alignment of community planning with development plans, is to be welcomed and will ensure that the interests of statutory consultees (police, fire, health and social care) are fully taken into account through

[1] https://consult.scotland.gov.uk/planning-architecture/a-consultation-on-the-future-of-planning/

a statutory link between development plans and community planning. We anticipate a duty on planning authorities to consult and have regard to the responses they receive.

We welcome a review of the development plan process to simplify it and introduce greater flexibility. We agree that the current process is technical in respect of the input required by planning professionals and can be lengthy, expensive and cumbersome in respect of the statutory steps to be followed. We agree with the general statement at Paragraph 1.4 that, in order to be relevant to a thriving economy, focus should be on outcome rather than process and procedure.

PROPOSAL 2: REGIONAL PARTNERSHIP WORKING

Q2. Do you agree that strategic development plans should be replaced by improved regional partnership working?

Yes, if the regional partnerships are formally constituted bodies and steps are taken to ensure that these partnerships are properly focused, co-ordinated and have the power to deliver in a timely fashion.

We accept the evidenced-based findings of the independent panel that the strata of plans and the NPF cause difficulties in aligning competing or conflicting policies and outcomes. The proposal to remove the SDP and focus on the NFP and regional partnership working between planning authorities would be a possible solution. We would caution, however, that an informal or non-statutorily defined partnership might not achieve this aim. We note that the SG is reluctant to create new formal partnerships and would suggest that consideration is given to imposing (for example through secondary legislation) a framework for partnership working to minimise potential conflict of outcomes and priorities. We do not consider that community planning partnerships are the appropriate model as they are local authority based; whilst they are a good model for joint working across local service delivery, they do not have power outwith their respective local authority areas. We are of the view that the joint integrated approach in health and social care could provide a useful model for the planning system.

We note the numerous joint working partnerships already in place and proposed across Scotland. We welcome collaborative efforts to address planning issues, however, we are concerned that in some instances there may be duplication of effort in relation to some topics. We think that there is scope for regional spatial planning to benefit from the work carried out by these groups. However, with regard to scale and coverage of regional partnerships, the NFP should or could define the regions in order to avoid conflict or overlap in outcomes. The regions need not be fixed so, for example, in respect of housing need, the region could be one or two neighbouring authorities with similar social or demographic profiles and, in respect of infrastructure and industrial, it could be a different group of authorities. CPP plans could inform the most appropriate groupings in this respect.

2(a) How can planning add greatest value at a regional scale?

See our answer to question 2 above.

2(b) Which activities should be carried out at the national and regional levels?

We believe that activities such as strategic infrastructure, major retail and major industrial development should be carried out at the national and regional levels.

2(c) Should regional activities take the form of duties or discretionary powers?

We consider that regional activities would need to be set out in terms of duties if they were to have any force. See further our answer to question 2 above.

2(d) What is your view on the scale and geography of regional partnerships?

We consider that regional partnerships should be broadly in line with old regional councils or perhaps similar to NHS boards in terms of scale and geography.

2(e) What role and responsibilities should Scottish Government, agencies, partners and stakeholders have within regional partnership working?

They should be properly represented within the regional partnerships.

PROPOSAL 3: IMPROVING NATIONAL SPATIAL PLANNING AND POLICY

Q3. Should the National Planning Framework (NPF), Scottish Planning Policy (SPP) or both be given more weight in decision making?

In circumstances where the SDPs are to be abolished then we support that greater weight should be given to the NPF and SPP in decision making.

3(a) Do you agree with our proposals to update the way in which the National Planning Framework (NPF) is prepared?

If going down the regional planning authority route, yes.

Q4. Do you agree with our proposals to simplify the preparation of development plans?

Yes.

4(a) Should the plan review cycle be lengthened to 10 years?

No. We note the independent panel's recommendation that spatial development plans are reviewed on a 10 year cycle. We are concerned that this time scale is too lengthy as spatial development plans are likely to be outmoded by the time the review is due. This timeframe would only succeed if power to modify spatial

development plans in whole or in part were to be granted. We address this more fully in the following paragraphs.

4(b) Should there be scope to review the plan between review cycles?

Yes, particularly in regard to topic specific matters such as housing land supply.

4(c) Should we remove supplementary guidance?

Although not subject to full scrutiny and that is a concern, supplementary guidance plays a relevant role in addressing and supporting local needs at present. However, if the NPF and SPP are to be more detailed and have a stronger statutory status with input from regional partnerships and if an ability to modify local developments plans is allowed, there is considerably less need for SPGs and perhaps these can largely be dispensed with.

PROPOSAL 4: STRONGER LOCAL DEVELOPMENT PLANS

Q5. Do you agree that local development plan examinations should be retained?

Yes: this is an essential step in ensuring transparency, a degree of independent checking and providing an opportunity for those making representation to the plan to have their say. We have concerns that the current arrangements and infrequent use of hearings does not provide an adequate system for those making representations to challenge the plan.

We note the proposal in respect of gatechecking. This appears to us to be broadly similar to the outline and full business case approval process used to assess public funding bids but gatechecking may be limited mostly to checking the effectiveness of the housing land supply. We have concerns, however, that without a clear framework for assessment - including a strict timetable for gatechecker input - the desired outcome of speeding up the process will not be achieved.

We accept the trend towards greater community empowerment and involvement and recognise that the development plan process is a public one. We are concerned, however, that the notion of professional mediation is mentioned at the gatecheck stage. If we are to understand the proposal correctly, the gatecheck is carried out at an early stage and before the plan is drafted with a view to assessing the broad proposal. It will, therefore, lack specific detail. We are of the view that the examination of particular issues and dispute resolution is more appropriate at a later stage after the broad principles have been agreed.

In order to respond fully to this proposal the status of the gatecheck and the gatecheck decision need to be clarified It is not clear if it is proposed that the gatecheck is a single, informal approval which predates the preparation of the plan or if it is a fluid process which continues through the preparation process. It is also not clear if it is proposed that the decision of the gatechecker is binding on the planning authority, and, if so, is reviewable. We cannot, therefore, comment on whether timescales and costs would be reduced.

We appreciate the logic that spatial development plans of extended duration give better certainty and stability for developers but consider that any benefit would be outweighed by the spatial development plan being wholly out of date before the end of its life. We agree that, if, as found by the independent panel, the main issues report does not serve its purpose and its removal from the process will reduce the preparation time, it should be dispensed with.

We do not agree that the 10 year cycle will make spatial development plans more responsive to change, particularly if SPGs are removed. We appreciate that the spatial development plan should be a "one-stop-shop" for people to find out everything they need to know, but consider that often SPGs play a useful role in adapting to local needs which arise from time to time but should be limited in their coverage in order to avoid the situation whereby an LDP is not much more than an index for a plethora of SPGs. We consider that web-based technology and the use of planning portal, could provide better links between the relevant parts of spatial development plans and SPGs. We submit that, if scrutiny is the issue with SPGs, a better solution would be to make the consultation process for SPGs more robust.

We note the proposal to have the local development plan reviewable every 10 years and the proposal to provide for plans to be updated within the 10 year cycle. We note also broad concern in respect of the lack of scrutiny, transparency and consultation in respect of SPGs. We consider that, if the interim updates during the 10 year cycle are not subject to a process of public scrutiny and examination with the right of interested parties to have their say, these criticisms will be levelled at it.

We agree that planning guidance could be streamlined and updated. We have concerns, however, that the local development plan becomes "local" only in so far as it deals with minor matters and the benefit of local connection and local knowledge of planning authorities is lost, to the detriment of local investment. We do not think that this proposal sits well with the localism proposed in other parts of the consultation.

We agree that the simplified planning zones serve the purpose of being, in effect, PIP for certain development plan sites.

5(a) Should an early gatecheck be added to the process?

Yes, but we would need to understand more about what is envisaged. There is merit in ensuring that the development plan which is to be examined has an adequate supply of effective housing land as this is often the issue that arises at the later examination stage causing difficulties.

5(b) Who should be involved?

A reporter, the planning authority, regional partnership, stakeholders and interested parties should be involved.

5(c) What matters should the gatecheck look at?

We consider that the gatecheck should assess the effectiveness of the housing land supply and the broad policies; it is not necessary to look at the detail at this stage.

5(d) What matters should be the final examination look at?

The final examination would be the appropriate point to look at the detail of the planning proposal and of course cross-check this against the gatecheck with adequate rights of interested parties to have their say.

5(e) Could professional mediation support the process of allocating land?

We do not think that professional mediation would be helpful in the process of allocating land and would be inconclusive and result in delays.

Q6. Do you agree that an allocated site in a local development plan should not be afforded planning permission in principle?

Yes, as there are a range of difficulties including compliance with notification and taking into account parties' interests at this stage; compliance with EIA and the use of Planning Obligations. Compliance would lead to considerable delays in the plan.

Q7. Do you agree that plans could be strengthened by the following measures:

7(a) setting out the information required to accompany proposed allocations

Yes, provided this was reasonable and proportionate.

7(b) requiring information on the feasibility of the site to be provided

Yes, provided this was reasonable and proportionate.

7(c) increasing requirements for consultation for applications relating to non-allocated sites

There may be a case for this, particularly if allocated where sites were to be given some enhanced status but the requirement should be reasonable and proportionate.

7(d) working with the key agencies so that where they agree to a site being included in the plan, they do not object to the principle of an application

This is important, provided these agencies are prepared to properly engage in the process.

PROPOSAL 5: MAKING PLANS THAT DELIVER

8. Do you agree that stronger delivery programmes could be used to drive delivery of development?

There is a case for this if it were to be implemented along the lines described.

8(a) What should they include?

It is important that these delivery programmes pay close attention to the delivery of infrastructure that may be required for significant development to proceed.

Chapter 2: People making the system work

PROPOSAL 6: GIVING PEOPLE AN OPPORTUNITY TO PLAN THEIR OWN PLACE

Q.9 Should communities be given an opportunity to prepare their own local plans?

Our members have mixed views as to whether communities should be given these powers. If such opportunity is granted these local place plans would need to conform generally to the development plan and in the event of a conflict the local development plan should prevail. We consider this in more detail in our answer to Q9(a). There is also the issue that the existence of local place plans may shift the communities focus from engagement in the local development plan.

9(a) Should these plans inform, or be informed by, the development requirements specified in the statutory development plan?

We refer to our answer to question 9 above.

There have been significant difficulties with the implementation of neighbourhood plans in England under the Localism Act 2011. In particular, the issue of whether a neighbourhood plan is in "generally in line" with local and national policies has led to considerable litigation. One of the main issues with neighbourhood plans, at least from a developer perspective, is how they can be used to frustrate development allocations on a local development plan by adding additional restrictions on allocated sites or unallocated sites which may be brought forward for development. Local place plans have, if not used properly, the potential to undermine the Scottish Government's aim of delivering sufficient housing land.

The English system has an examination process for neighbourhood plans. Although not free of difficulty, this process does mean that there is a degree of independent examination of the plan. We note that the Scottish Government's proposals do not have any requirement for independent examination of a local place plan. The planning authority is under a duty to adopt the local place plan as part of the local development plan unless they think the plan opposes the wider aims of the local development plan. As such, the local place plan will require to inform the development requirements specified in the statutory development plan. Although there is reference to "the issues" being assessed as part of the proposed development plan gatecheck, it is not clear how that would work. It is further noted that the Scottish Government’s proposal provides that in preparing the local place plan the community body must make sure that the plan is generally in line with local and national planning policies. As such local place plans will require to be informed by the development requirements specified in the statutory development plan. We consider that the timing of the preparation of local place plans and their ‘signing off’ in relation to the preparation and adoption of the local development plan will be critical to ensure that local place plans do

not undermine the development plan process. It appears to us that there is potential in the proposed new Scottish system for local place plans to be in conflict with emerging local development plans with the potential for confusion, delay and litigation. It is important that local place plans should conform generally to the development plan and in the event of a conflict the local development plan should prevail.

We agree with the aim of giving communities more ownership of the development plan. However, it is suggested that greater effort should be focused on how the community involvement can be integrated into the local development plan making process. Providing for a separate plan-making process for communities has already been shown in England to create conflict and undermine the development plan process. A further issue arises regarding access to resources – both in terms of technical expertise and funding – which community bodies and the planning authorities would require if this change were to be introduced.

Q9(b) Does Figure 1 cover all of the relevant considerations?

We note that the Scottish Government's proposals provide that community bodies should be able to register their interest with a local authority if they want to prepare a local place plan and that a duty will be placed upon local authorities to consider applications from community bodies to prepare a local place plan. Figure 1 does not consider the criteria that the local authority should take into account in considering and determining such applications and endorsing a community body. It appears to us that the proposed application process may create potential for conflict amongst both competing community bodies and community bodies and local authorities. Furthermore there is no provision for "deregistration" of community bodies or criteria as to when this might occur: such dissolution provision is necessary to avoid defunct bodies continuing to have a role in the process when they had ceased to be relevant.

Q10. Should local authorities be given a new duty to consult community councils on preparing the statutory development plan?

Yes and that may foster greater community involvement.

10(a) Should local authorities be required to involve communities in the preparation of the Development Plan Scheme?

We consider that the proposal for consulting communities on the proposed Development Plan Scheme is sensible, and should include community councils and other community groups.

PROPOSAL 7: GETTING PEOPLE MORE INVOLVED IN PLANNING

Q11. How can we ensure more people are involved?

We have no difficulty with proportionate and meaningful consultation on all aspects of planning. We consider the existing arrangements on the whole provide adequate mechanisms for public involvement. Motivating the public to become involved can be a challenge although we endorse he involvement of young people and children in planning.

Q11(a) Should planning authorities be required to use methods to support children and young people in planning?

Yes.

PROPOSAL 8: IMPROVING PUBLIC TRUST

Q12. Should requirements for pre-application consultation with communities be enhanced? Please explain your answer(s).

Whilst we consider that the current arrangements for pre-application for consultation are adequate there may be a case for proportionate and reasonable but enhanced pre application consultation for sites not allocated in the development plan.

Q12(a) What would be the most effective means of improving this part of the process?

We consider that enhanced requirements for pre-application consultation ('PAC') with communities may add to the timeframes required before an application can be submitted. We do not consider that a simple increase in the mandatory number of PAC events would necessarily lead to communities being measurably more involved in the development plan process. Focus should be placed upon ensuring the quality of events as opposed to merely increasing the quantity of events. Hosting a website or requiring documents to be deposited at community centres and libraries may assist. Whilst the Scottish Government's proposals provide that improvement will require to be secured by 'training and improved practice', it is not clear how it is intended that the training will be delivered.

Q12(b) Are there procedural aspects relating to pre-application consultation (PAC) that should be clarified?

Clarification should be forthcoming with regard to how long PAC applies once it is undertaken and if it can be used to support more than one application. It is generally accepted that modest changes to reduce the red line of a POAN are acceptable in a planning application pursuant to it but this should be clarified.

Q12(c) Are the circumstances in which PAC is required still appropriate?

Yes. We consider that the current circumstances in which a PAC is required are still appropriate.

Q 12(d) Should the period from the serving of the Proposal of Application Notice for PAC to the submission of the application form have a maximum time limit?

At the moment there is no shelf life of a POAN however it is accepted that as time goes by it will have less relevance to the community. If a time limit is to be introduced this needs to be proportionate and reasonable.

Q13. Do you agree that the provision for a second planning application to be made at no cost following a refusal should be removed?

We appreciate that communities can feel frustrated by the submission of revised applications. However, it is unrealistic to expect that it will be possible to get all applications "right" first time. Some applications require a fine balancing of material considerations and there is not necessarily a "correct" answer. A developer may have made a genuine attempt to propose the best development for a site (and sought to address the views of the community) but still find that the application is refused once the balancing exercise is carried out. We do not consider it unreasonable for a developer to be given an opportunity to submit a revised application without incurring any fee. As such we do not agree that the provision for a second planning application to be made at no cost following a refusal should be removed. This is particularly important should fees be increased.

In relation to fees for retrospective applications, we consider that it needs to be appreciated that a breach of planning control is not always deliberate. Many breaches are inadvertent and indeed it is not always clear cut whether there is a breach. Whilst we appreciate that there is a need to encourage development to follow the proper planning procedures, a balance needs to be struck. Fees for retrospective development should therefore not be set at a penal level.

Q14. Should enforcement powers be strengthened by increasing penalties for non-compliance with enforcement action?

We are satisfied with the proposal to introduce charging orders for enforcement costs. In terms of enforcement, planning authorities may have a limited budget to undertake direct action, although this will vary between authorities. The period for repayment under the charging order should be commensurate with the sum due.

We are also content with increasing penalties for breaches of planning control, assuming that this refers to the breach of an enforcement notice. However, we note that current enforcement guidance provides that the purpose of planning enforcement is to remedy the breach of planning control not to penalise. As explained above, care needs to be taken in relation to increases in fees for retrospective applications.

PROPOSAL 9: KEEPING DECISIONS LOCAL - RIGHTS OF APPEAL

Q15. Should current appeal and review arrangements be revised:

Although there is no specific question associated with it, the paper states that the Scottish Government does not propose to introduce a third party right of appeal. Despite this there appears to be a degree of political support either for introducing a third party right of appeal or by way of counter balance removing the right of appeal. Reference is frequently made in support of these proposals to planning systems in other jurisdictions. However, these other jurisdictions are not comparable with the Scottish planning system. Simply because a third party right of appeal exists in another jurisdiction does not mean that such a right would be appropriate in the Scottish planning system. We expressly support the views of the

independent panel and Scottish government on this issue and believes that to introduce a third party right of appeal would be a disincentive to investment in Scotland and mean that more decisions were made by central government without such a right necessary being representative of the wider community .

Q15(a) For more decisions to be made by local review bodies?

We have significant concerns about this proposal which seeks to extend the jurisdiction of LRBs. We have concerns regarding LRBs in terms of transparency, right to participate fully, and adequacy of their reasons, particularly when compared to those of reporters appointed by ministers who currently undertake this role.

We are unclear as to the purpose of paragraph 2.42 of the Scottish Government's proposals. The implication is that major developments that accord with the development plan should be determined by the planning officer. The text also suggests a right of review by the LRB for such developments. It is not clear why the Scottish Government considers that compliance with the development plan should be a trigger for treating some major applications differently from other major applications. If it is intended that such major applications should have a smoother/faster process through the system by means of the differential treatment this is a laudable aim. However, all applications will be subject to the balancing exercise required by s25 of the Town and Country Planning (Scotland) Act 1997 in any event. Further, it is unclear why the removal of the right of appeal to the Ministers is justified. For these larger developments we consider that any decision on appeal should be made by the Scottish Minsters or by a reporter delegated by them particularly: this is important in the context of the issues highlighted with LRBs in terms of transparency and perceptions of fairness.

It is unclear from the Scottish Government's proposals whether it is intended that planning enforcement appeals will be included within the decisions to be made by LRBs. Unlike planning application appeals, enforcement appeals frequently give rise to complex legal issues and we are concerned as to whether LRBs would be able to deal with these matters.

Whilst we appreciate the need to target resources there remains to be widespread concerns about how LRBs operate with wide variations in practice. The proposal to expand the role of LRBs was not considered by the independent review. As far as we are aware, no research has been undertaken into the current operation of LRBs. In our view, it would be unwise to expand the remit of local review bodies without undertaking research.

Q15(b) to introduce fees for appeals and reviews?

If planning application fees are being raised more generally then it is not clear why an additional fee requires to be introduced for lodging appeals or reviews. What happens if an appeal or review is successful? Is the fee refunded? If not then why should it be the successful appellant who is responsible for the cost of an appeal or review if the planning authority's decision is not upheld?

There is already provision for an award of expenses in circumstances where a planning authority acts unreasonably- such as where they refuse an application with no reasonable planning basis. There is also an opportunity for a planning authority to claim expense against a appellant or a third party if they behave

unreasonably. In those circumstances, provision would presumably need to be made for refund of the appeal fee (or payment by the planning authority) in addition to the award of expenses.

Such matters require to be clarified prior to reaching a determination as to whether fees for appeals and reviews should be introduced.

Q15(c) for training of elected members involved in a planning committee or local review body to be mandatory?

Although mandatory training of elected members would be helpful, it is not clear how such a requirement would ensure that the decisions of LRBs would be measurably improved.

Q15(d) Do you agree that Ministers, rather than reporters, should make decisions more often?

It is important to maintain the role of independent, professionally qualified Reporters in decision-making. The decision to be made is an exercise of planning judgment and in all but the most important cases it ought not to be necessary for Ministers to become involved. The independence of Reporters is an important element of ensuring the overall fairness and transparency of the planning system. We consider that the current allocation of appeals between reporters and Ministers works adequately, with the involvement of Ministers restricted to appeals which raise matters of national importance. The involvement of Ministers in an appeal process increases the potential for delay. We are not convinced that the theoretical increase in more democratic accountability through more ministerial decision-making outweighs the potential disadvantages of delay.

Q16. What changes to the planning system are required to reflect the particular challenges and opportunities of island communities?

We agree that an improved planning system should respond to the unique circumstances of all our communities and that some scope to depart from some elements of national policy within the local development plan may benefit island communities where a more tailored approach is required. We support the aim of giving island communities the tools to put proposed changes in place. However, it is suggested that the effort should be focused on how island community involvement can be integrated into the local development plan making process.

Chapter 3: Building more homes and delivering infrastructure

PROPOSAL 10: BEING CLEAR ABOUT HOW MUCH HOUSING LAND IS REQUIRED

Q17. Do you agree with the proposed improvements to defining how much housing land should be allocated in the development plan?

No. It seems to us that in order for Scottish Government to achieve the objective it sets in paragraph 3.7 of the consultation to “provide greater clarity and confidence on planning for all those involved”, there is a

need to identify specific housing requirement figures rather than “aspirations” or “estimated range of homes required”.

A specific housing requirement is likely to be beneficial to decision makers tasked with reaching a view on whether a particular planning application should be granted. In the absence of a fixed number, there is likely to be much greater uncertainty as to whether a proposal complies with the development plan and, assuming the general thrust of Scottish planning policy remains, whether policies for the delivery of housing land within the development plan should be considered up-to-date or not.

We agree that “signing off” the number of homes is needed at an early stage in the production of Local development plans is likely to be beneficial in terms of strategic infrastructure planning and decision making on individual applications.

PROPOSAL 11: CLOSING THE GAP BETWEEN PLANNING CONSENT AND DELIVERY OF HOMES

Q18. Should there be a requirement to provide evidence on the viability of major housing developments as part of information required to validate a planning application?

It is not clear to us that information on development viability is likely to be required for every major housing application.

Our understanding is that the Scottish Government intends to require additional information to be provided at the development plan allocation stage. If allocations in local development plans are only made following consideration of economic and market information, we would question the benefit of further viability assessments in all cases.

Viability assessments will involve further expense on the part of the developer and resources on the part of the Planning Authority to assess these. Scrutiny might require disclosure of commercially confidential information. This information, if held by a planning authority, will be subject to disclosure by that authority in terms of the Environmental Information Regulations, which regulations are less strict than FOI regulations with regard to withholding “confidential” information. Further, not all planning authorities have the appropriate in-house skills to interpret viability assessments. Planning authorities are to be encouraged to perform a greater role on delivery and unlocking obstacles to development. The Consultation does not go into detail in respect of powers and duties available to planning authorities such as compulsory acquisition powers.

Based on our experience, the majority of applications for sites which are not allocated in the Local Development Plan are unlikely to require viability assessments to support them. The fact that an applicant is willing to promote an application on an unallocated site with all of the costs that go with that is usually a demonstration that the applicant considers the development in question is viable.

There is, of course, no barrier to a developer submitting viability information with an appropriate Application if that is required to justify a particular outcome through the Planning Application process.

Q19. Do you agree that planning can help to diversify the ways we deliver homes?

Yes.

Q19(a) What practical tools can be used to achieve this?

We have no comment on this question.

PROPOSAL 12: RELEASING MORE DEVELOPMENT READY LAND FOR HOUSING

Q20. What are your views on greater use of zoning to support housing delivery?

Whilst this may confer some benefit in particular circumstances in reality this would require developers to be willing to frontload their investment and contribute to scheme preparation, including master planning, with the incentive of an uplift in the value of the land and possibly an earlier return on investment. We therefore consider that this proposal would be of limited benefit.

Q20(a) How can the procedures for Simplified Planning Zones be improved to allow for their wider use in Scotland?

We refer to our Answer to question 20.

Q20(b) What needs to be done to help resource them?

We refer to our Answer to question 20.

PROPOSAL 13: EMBEDDING AN INFRASTRUCTURE FIRST APPROACH

Q21. Do you agree that rather than introducing a new infrastructure agency, improved national co-ordination of development and infrastructure delivery in the shorter term would be more effective?

We do not agree that improved coordination of development and infrastructure delivery in the shorter term would be more effective than introducing a new infrastructure agency in the longer term.

Whilst improved coordination between existing agencies would undoubtedly be beneficial, it appears likely that a body with specific duties and powers to deliver infrastructure would be more effective in delivering infrastructure than an informal partnership between a range of public sector bodies which are not under any specific legal duty to coordinate and delivery necessary infrastructure.

The 2006 Act introduced the concept of key agencies and strategic development plan authorities. The Act required cooperation between these bodies but it appears from submissions made to the planning review that the 2006 Act has not succeeded in successfully delivering the necessary infrastructure to support development. It seems to us that any step change in delivery of infrastructure is not likely to be achieved through informal partnership working and we consider that a new infrastructure agency would be more likely to drive forward delivery of infrastructure, particularly if it was in a position to collect developer contributions and borrow money to deliver that infrastructure based on projected developer contributions in future.

Q22. Would the proposed arrangements for regional partnership working support better infrastructure planning and delivery?

See our answer to question 21.

Q22(a) What actions or duties at this scale would help?

See our answer to question 21.

Q23 Should the ability to modify or discharge Section 75 planning obligations (Section 75A) be restricted?

We do not believe that the ability to modify or discharge section 75 planning obligations should be restricted. An examination of the DPEA's Annual Report demonstrates that relatively few Applications to modify section 75 obligations have been taken through the appeal system. Of those that have, only around 50% of appeals were successful. In our view, this demonstrates two things: first that in most cases developers and landowners are content to accept the terms of the section 75 obligation to which they have agreed; secondly, there is a small number of cases where Scottish Ministers have found, following thorough examination of the issues, that planning authorities have required landowners or developers to enter into planning obligations that do not comply with national policy of the development plan.

The ability to apply to modify a section 75 planning obligation is an important check on the powers of a planning authority. In the absence of an ability to make such an application, a landowner or developer may well find itself in a position where, to secure planning permission, it has to accept the terms of a section 75 obligation, regardless of how reasonable it is or whether it relates to the development in question. We consider that it is important to the fair operation of the planning system for the application process to remain.

Criticisms are made of the timescales for concluding agreements, and we are currently working on a pro forma style of section 75 agreement with aim of assisting the early completion of these such as to enable planning permission to be issued.

PROPOSAL 14: A MORE TRANSPARENT APPROACH TO FUNDING INFRASTRUCTURE

24. Do you agree that future legislation should include new powers for an infrastructure levy? If so,

We consider that there may be merit in future legislation making provision to allow for a form of infrastructure levy linked to proposed development in the relevant area although the report by the CIL Review Team in England has recommended a number of key changes to their system and in particular that the Government should replace the Community Infrastructure Levy with a hybrid system of a broad and low level Local Infrastructure Tariff (LIT) and section 106 for larger developments. We suggest that the Scottish Government examine the report of the Review Team carefully. The question that this proposal raises is whether CIL will lead to the effective and timely delivery of strategic infrastructure.

As indicated in the report CIL has not removed the need for section 106 agreements (their equivalent of section 75 agreements), particularly for the delivery of affordable housing and site specific planning gain. Should CIL be introduced in Scotland, section 75 agreements would still be used for these items, at least to some extent negating any advantage of CIL in making the consent process quicker. In the Report it states that CIL has not achieved its original objectives of a faster, fairer and more transparent method for collecting contributions towards necessary infrastructure. Concern has been expressed at the sheer complexity of the regime, which is unwieldy and draws considerable resources to operate it. CIL was originally introduced in 2010 and whilst there is almost complete coverage in London, implementation in the north, Midlands and Wales remains patchy.

The CIL system was considered by many to be inflexible when compared to discrete s 106 agreements for planning gain, and led to some nostalgia amongst developers for the pre-CIL world that currently exists in Scotland. The operation of exemptions from CIL and viability issues mean that the funds recovered are likely to be materially less than anticipated.

The report recommends a new approach to planning gain, proposing a low level tariff combined with section 106 agreements for larger sites. This would enable contributions to be optimised from smaller sites which might not otherwise contribute under a section 106 agreement, and ensure that more substantial infrastructure needs of larger sites are met in timely fashion. In this way all development (with virtually no exceptions) would make some contribution to the wider cumulative infrastructure need. This new CIL is called a local infrastructure tariff (LIT). These proposals do not solve the difficulty of providing upfront funding for infrastructure, but are considered to offer greater certainty of payment and ease of collection for local authorities and perhaps a greater encouragement to front-fund infrastructure. LIT might encourage a local authority to borrow on the improved strength of recovery. The report also recommends a strategic infrastructure tariff, a low level tariff which could be deployed across combined local authority areas.

The Scottish Government should not underestimate the resources required to set up a charging scheme and keep it under review. There would still be a role for planning agreements in relation to site-specific contributions. CIL does not overcome the issue of front funding, but may provide greater confidence to local authorities to front fund necessary infrastructure and recover the costs.

We would not wish to underestimate the complexity of delivering a CIL or related scheme and if it is left to an informal partnership rather than a national agency, we reasonably anticipate delays and difficulties in delivering a viable and workable scheme.

We consider it is important to the success of the overall planning reform proposals that the primary legislation proposed by Scottish Government addresses all of the detailed mechanisms by which a levy could be imposed and administered at this stage. If it does not, and these matters are left over to secondary legislation that comes forward at a later stage, there is a risk that the implementation programme for the reformed system is delayed. For example, planning authorities might find it extremely difficult to make land allocations in their local development plans with without the ability to plan in parallel for infrastructure that might be funded through a new levy. It seems to us that infrastructure funding legislation must be sufficiently clear on its scope, purpose and procedures from the outset to increase the chances of a step change in delivery of sustainable development.

There needs to be a clear demarcation between CIL and the continued role of section 75 agreements to ensure that the contribution burden on development is not increased and there is no in effect double counting.

24(a) at what scale should it be applied?

The scale at which the levy should apply is likely to depend upon the circumstances of the particular area in question. It may be sensible to permit local authorities to identify strategic infrastructure necessary to support development and to produce a report in consultation with the infrastructure agency referred to in our response to question 21 to justify the infrastructure and provide details of its likely cost. Once the report was produced, it could be subject to consultation and any representations to the report would be scrutinised by a DPEA Reporter and a view ultimately reached on the appropriateness of the report by Scottish Ministers.

24(b) to what type of development should it apply?

The levy could be applied in a proportionate way to different types of development (e.g. all housing development within the defined area could contribute towards education infrastructure, but retail development in that area would only contribute towards strategic roads infrastructure).

24(c) who should be responsible for administering it?

The infrastructure agency which had participated in its production would become responsible for driving forward delivery of the necessary infrastructure and also receiving and utilising the infrastructure levy itself.

24(d) what type of infrastructure should it be used for?

It should be used for infrastructure which is a necessary consequence of development identified in or supported by the development plan.

24(e) If not, please explain why.

We have no comment on this question.

PROPOSAL 15: INNOVATIVE INFRATSRUCTURE PLANNING

25. Do you agree that Section 3F of the Town and Country Planning (Scotland) Act 1997, as introduced by Section 72 of the Climate Change (Scotland) Act 2009, should be removed?

Yes for the reasons given in the paper.

Chapter 4: Stronger leadership and smarter resourcing

PROPOSAL 16: DEVELOPING SKILLS TO DELIVER OUTCOMES

PROPOSAL 17: INVESTING IN A BETTER SERVICE

PROPOSAL 18: A BEW APPROACH TO IMPROVING PERFORMANCE

PROPOSAL 19: MAKING BETTER USE OF RESOURCES – EFFICIENT DECISION MAKING

We are answering questions 26 – 33 with reference to, where appropriate, all of the above proposals.

Q26. What measures can we take to improve leadership of the Scottish planning profession?

We do not consider it appropriate for us to comment on this question. This is matter for the planning profession, Heads of Planning and the Scottish Government.

Q27. What are the priorities for developing skills in the planning profession?

We refer to our answer to question 26. We do however acknowledge the steps that have been taken to move to a "can do" approach to planning and welcome that. The establishment of the concordat between the City of Edinburgh Council and the Edinburgh Chamber of Commerce in terms of setting up a planning framework is a good example of collaborative working with a view to assisting in a cultural change to a "can do" culture.

At this time of economic uncertainty, it is important that the planning profession are aware of the impacts on the economy of delays in determinations. The planning profession could benefit from training on development economics and viability. If greater information on viability is to be required for applications and allocations this will be particularly important.

Q28. Are there ways in which we can support stronger multidisciplinary working between built environment professions?

The negotiation and completion of planning obligations (section 75 and section 69 agreements) are often cited as a reason for delays in planning permissions being issued. There is benefit in all of the related professionals within a local authority (transportation, education, housing, planning and legal) and the developer's agents and solicitor coordinating at an early stage to align their advice in order that Heads of Terms may be struck and the draft Agreement can be ""oven ready" at the point that the application is approved. This would foreshorten the period of time for the issue of the planning permission which will be dependent on the planning obligation being completed. The payment of the costs of the planning authority in this process, if they are to be paid by the developer should be put on a statutory footing in order to avoid the disparity that currently exists amongst planning authorities.

Q29. How can we better support planning authorities to improve their performance as well as the performance of others involved in the process?

We have no comments on this question other than to indicate that lack of resources at planning authorities is often cited as a reason preventing better performance.

Q30. Do you agree that we should focus more on monitoring outcomes from planning (e.g. how places have changed)?

We would suggest that local authorities could be measured on whether they have delivered the developments which are identified in its LDP, potentially at the end of the 10 year period, alongside an annual measurement of construction of housing and commercial developments. It must, however, be acknowledged that delivery of development is not within the control of the planning authority.

Q31. Do you have any comments on our early proposals for restructuring of planning fees?

Increasing planning fees will place an additional burden on the private sector and any such increase must be proportionate and reasonable. We are aware that others have required a link between an increase in fees and planning performance.

We have concerns with the proposal to charge higher fees for applications on unallocated sites, bearing in mind the intention to move to a 10 year cycle for LDP reviews. In the absence of any detail on how the LDP is to be kept updated within that 10 year period, it is almost inevitable that unallocated sites will come forward as an LDP can only ever be a snapshot based on inter alia land ownerships and the market at that time.

We do not support higher fees for retrospective planning applications as set out above.

We do not support the proposal to introduce a charge for appeals and reviews of decisions, unless there is a mechanism for the charge to be reimbursed if the appeal is successful. It is not clear what the charge is designed to cover.

We do not agree that agencies should be able to charge for their input to the development management process. Planning is a public service, which brings benefits to the wider community. It is not clear why, for example, the Roads Department should be entitled to make a charge for carrying out what is, in effect, their statutory duty.

Planning authorities continue to charge for negotiating and completing the legal work undertaken in planning obligations. It would be important for these to be put on statutory footing.

Some authorities already charge a fee for pre-application discussions. There is no transparency over how that charge is calculated nor is there clarity of the statutory basis on which the fee is charged. Imposing a fee discourages early engagement with the planning authority. If a fee is to be charged, there needs to be agreed outcomes which are delivered as part of those discussions to justify the fee which is charged.

We do not support the justification for removing the developer's right to submit a revised application (the "free go"). The planning authority has discretion to accept variations during the processing of a planning application. As such, they dictate when the changes require a new application to be submitted. The "free go" allows for applications to varied to address the authority's concerns and so benefits both the authority and the developer. Removal of the right to re-submit is likely to lead to increased appeals and/or a reduction in collaborative discussions with planning officers.

While on the face of it, receiving an enhanced or fast tracked service in return for a higher fee being paid would be attractive to developers, this would appear to mean that those less able to pay will a slower service. It would be preferable to ensure that planning authorities are properly resourced to be able to deal with all applications efficiently.

Q32. What types of development would be suitable for extended permitted development rights?

We support the suggestions for extended permitted development rights put forward in the consultation but there may be further examples which arise in future where it would be appropriate to provide for such rights.

Q33. What targeted improvement should be made to further simplify and clarify development management procedures?

33(a) The planning system has always allowed for the duration of planning permission in principle to be varied from the statutory three year period for submission of further details. However, the changes made under the Planning Reform etc (Scotland) Act 2006 have led to confusion and we would welcome a return to the duration (or variation thereof) being set out as a condition on a planning permission. The condition can specify timescales in which different parts of the development will be brought forward. If the timing has to subsequently change, this can be achieved through a section 42 application and all interested parties are aware that the timing is being changed. Under the current system, in the absence of a time limit condition, applicants apply to vary a different condition on a permission to obtain a new permission, and thus a longer period for implementation.

PROPOSAL 20: INNOVATION, DESIGNING FOR THE FUTURE AND THE DIGITAL TRANSFORMATION OF THE PLANNING SERVICE

Q34. What scope is there for digitally enabling the transformation of the planning service around the user need?

Digital tools such as visualisations, 3D models or “fly-throughs” may be of assistance in the planning process. However, these should not be required if it will simply add further cost (and time) to the process.

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