PLANNING (SCOTLAND) BILL

AMENDMENTS LODGED FOR PART 3: DEVELOPMENT MANAGEMENT

This paper summarises the amendments that have been lodged for consideration by the Scottish Parliament's Local Government and Communities Committee in relation to Part 3 of the Planning Bill.

It sets out some information about what the development management system does, along with the Scottish Government's view of the likely consequences of the proposed amendments.

These amendments will be considered by the Committee from 24 October onwards.

What is development management?

Development management covers the process that considers and makes decisions on planning and related applications, including planning appeals and local reviews (i.e. appeal decisions made by a panel of local elected members).

The Town and Country Planning (Scotland) Act 1997 (the 1997 Act) requires applications to be determined in accordance with the development plan, unless material considerations indicate otherwise. Within that decision-making structure, it is a matter for the decision-maker (in most cases the local planning authority) to reach a reasoned decision on individual applications. The process needs to be responsive, reliable, transparent and efficient.

Only around 1% of planning applications relate to major or national developments; of the remainder roughly 50% are for householder development and 50% for other local developments. The planning service in Scotland currently deals with around 35,000 applications annually, around 30,000 of these being planning applications.

What's the Bill aiming to achieve and how might amendments change that?

The review of planning, including the Planning Bill, aims to strengthen planning's contribution to inclusive economic growth, delivery of development and empowering communities. We want planners to focus their talents on delivering great places, rather than being focused on micro management of the built environment or processes that do not add value. The Bill included some technical changes to development management, but we agreed with the independent panel that this part of the system does not need fundamental reform.

Amendments already agreed by the Committee relating to Part 1 (development planning) could add a number of additional processes, statements, assessments and reports into the development planning process. Strategic development plans, which the Bill had sought to remove to help streamline the system, have also been retained as a result of amendments.

Some of the amendments proposed for development management could also make the system more complex than it is at present. Some would bring new activities within the planning system, others require new assessments or reports, and many seek to remove or limit planning authorities' discretion when making their planning decisions. Some amendments may not appear significant on their own, but collectively they could introduce substantial burdens, delays and costs to both applicants and planning authorities.

As a general approach, as the Committee moves on to consider development management, the Scottish Government will continue to seek to avoid any unnecessary new processes and costs, while supporting reforms that will enable planning activity to positively enable good development for our communities.

It's also important that the Bill is not burdened by policies and clarifications which should more appropriately be contained in guidance or in secondary legislation. Once provisions are included in primary legislation, the opportunity to update and review are very limited.

The tables below set out forthcoming amendments and potential effects in abbreviated text, covering:

- What should be included in the meaning of development?
- Who should be notified when a planning application is submitted?
- How should planning applications be handled, and when should permission be granted or refused?
- Should the ability to refuse to deal with 'repeat' applications be extended?
- Should the 'material considerations' to be applied in every case?
- Should some permitted development rights be restricted?
- Should the powers for Ministers to call in planning applications be restricted or pre-defined?
- Should rights to submit an appeal on a planning decision be changed?
- Should arrangements for planning obligations be changed?

What should be included in the meaning of development?

How this works
Section 26 of the 1997 Act defines 'development' which requires planning permission. Development includes building, engineering, mining or other operations and also material changes in use of buildings or land. These provisions also include various exemptions, explicit inclusions and clarifications as to what constitutes development. Exemptions are mainly routine operations or uses which do not need to be regulated through planning. Any changes which bring any new or additional operations or changes of use within the definition of development will increase the need for planning permission across all parts of Scotland.
Proposed amendments to be considered by the Committee
• Planning permission to be required for use of land for agriculture and forestry, if a material change of use; this duplicates existing licensing and consenting regimes; additional regulation for landowners, businesses and public authorities; extent of impact unknown. • Planning permission to be required for any change of use of a house or flat to any purpose other than as sole/main residence; specific reference to use as 'holiday or second home', but not exclusively so and not defined; applicable across Scotland; no judgement whether change is material; could include secondary uses of residential properties such as running a business from home. • Planning permission to be required for use of a house or flat for short-term holiday lets (undefined) unless property is the sole/main residence of the landlord; applicable across Scotland; no judgement whether change is material. • Planning permission to be required for operations or uses of land which are not currently defined as development if, in the opinion of the planning authority, there is significant flood risk and operations could increase that risk; impracticality and uncertainty for anyone carrying out routine/minor activities, including works to interior of buildings, routine use of a house and garden, road maintenance etc.

Who should be notified when a planning application is submitted?

How this work
The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013 set out requirements for publicising planning applications, including neighbour notification and consultation with relevant public bodies.
Proposed amendments to be considered by the Committee
• Neighbour notification by planning authorities: increase notice to neighbouring land from 20 metres from application site to 100 metres. The cost of neighbour notification falls for planning authorities; this proposal increases the area covered by 25 times, resulting in a very significant increase in administration costs in built-up areas, and also additional costs to applicants where a newspaper notice is required (where there are no premises neighbouring land). • Require neighbour notification of applications for listed building consent. In most cases this would duplicate neighbour notification of an associated planning application; internal works have no impact on neighbours but would nevertheless trigger notifications. • Planning authority to give notice of major applications to councillors, MSPs and MPs. This goes beyond applications for planning permission and to other related approvals.

How should planning applications be handled, and when should permission be granted or refused?

How this works
The 1997 Act enables the detailed requirements for making a planning application to be set out in secondary legislation; in the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013. This allows the detail to be more easily updated to reflect experience and new approaches. In addition to basic information about the proposals, applications may require to be accompanied by an Environmental Impact Assessment, design statement and access statement, where relevant. Planning authorities can also request any other information they need in order to determine the application, which allows these requirements to be tailored to the individual circumstances. Planning authorities are required to determine applications in accordance with the local development plan, unless material considerations indicate otherwise. They are required to have regard to any material considerations relevant to the case. This plan-led approach which also gives discretion to decision makers to take into account wider considerations where necessary is a long-established feature of the Scottish planning system. Planning applications can be granted with conditions if they meet the six tests: being necessary to make the development acceptable; relevant to planning; related to the development; precise; enforceable; and reasonable in all other respects.
Proposed amendments to be considered by the Committee
Many of these amendments seek to limit the flexibility of the current arrangements. This could result in requirements being imposed where they are not relevant or appropriate or require decisions that are not in the wider public interest. • Applicant for a major development must provide a report on the capacity of education, health, leisure and recreation services and anything else they think relevant. The content is a matter for the applicant. • Applicant for national or major development must submit a national infrastructure needs assessment (related amendments were not agreed) • Applications by local authorities and health boards to include evidence of considering population growth and projection (not restricted to changes to services; new facilities may be led by private sector partners) • Applications (circumstances to be prescribed) must include a statement of how the development would achieve an energy performance certificate asset rating of C or above (this is largely met for new housing through building standards and an inappropriate measure for non-domestic buildings.)

- Planning authority must consider likely health effects of a national or major development before permission can be granted. This is already achieved through existing assessments where necessary.
- Planning authority cannot grant permission for a major development without taking account of impacts on education, health, leisure and recreation services and any other services the applicant thinks relevant, regardless of relevance.
- Planning permission may not be granted for development on green belt land if the applicant has not demonstrated why it could not be on brownfield land, or if it would have an adverse effect on natural or cultural heritage value of the green belt.
- Planning permission may not be granted where flood risk exists; including a veto by SEPA
- Condition must be imposed on permission for four or more houses, to include community open space (no specification of how to calculate open space or allow for offsite provision).
- Planning permission may only be granted for certain developments if subject to a condition requiring provision of changing places toilet.
- Presumption to grant planning permission for housing for older people or disabled people (cuts across ability of authority to consider material considerations; no definition of the categories of people or what housing would meet their needs).
- Planning permission must not be granted for development which involves demolition of a building subject to an unimplemented repairing standard enforcement order.
- Planning permission may not be granted for a major development if it would be likely to have an adverse effect on air quality in an area with an air quality plan.
- Decision notice to include a statement as to whether the application is in accordance with the development plan, including reasons for reaching that conclusion; but not to set out the material considerations which also influenced and gave context to the decision. This also contains a direct link to several amendments on appeal rights.

Should the ability to refuse to deal with 'repeat' applications be extended?

How this works
Where an application is refused permission by Ministers, where either they have called it in or an appeal has been made to them, or by the planning authority on local review, the planning authority can already decline to determine a 'similar application' made within the next two years. This is provided there is no significant change to the development plan, as relevant to the proposal, or other material considerations. Where there is no such decision, then the planning authority can decline to determine an application where two (or more) similar applications have been refused in the previous two years. 'Similar applications' are where the development and the land involved are the same or substantially the same.
Proposed amendments to be considered by the Committee
• Extend period within which a planning authority may decline to determine a 'repeat' application from 2 years to up to 10 years. Assessing whether any significant changes have occurred to the development plan or other material considerations over such a period may be very difficult and could lead to procedural unfairness. • Remove the right to make one similar application before an authority's power to decline to determine applies (Note: a proposal cannot be varied on appeal to Minsters to address grounds of refusal). • Requirement to publish guidance on what constitutes a 'similar application' and 'significant changes' to the development plan and other material considerations (such guidance is impractical). • Potential to charge a higher application fee for 'repeat' applications (appears to be a fee higher than the normal fee for the development, not just removal of the current 'free go' for some repeat applications).

Should there be a single definition of 'material considerations' to be applied in every case?

How this works
Enshrined in the planning system, decisions must be made in accordance with the development plan, unless material considerations indicate otherwise. There are two main tests in deciding whether a consideration is material and relevant: • It should serve or be related to the purpose of planning, so should relate to the development and use of land • It should relate to the particular application The range of considerations which might be considered material in planning terms is very wide and can only be determined in the context of each case. The decision-maker must decide what considerations are material, along with the weight to be attached to each in reaching a decision. Ultimately it would be a matter for the Courts to decide in a specific case. Some examples of the types of matters which could be material considerations are published in Scottish Government Planning Circular 3/2013: *Development Management Procedures.* However this is not an exhaustive list; nor could it be. Defining the material considerations for each and every case is impossible. We could, for example, end up listing matters which the authority had to consider in every case regardless of their actual relevance to the individual case. Aside from the added work for planning authorities, there is the risk a consideration(s) that would be material in one or more cases is missed off the list.
Proposed amendments to be considered by the Committee
• A statutory definition for material considerations to be prescribed in regulations. How this relates to long-established principles, or the extent to which the regulations would be expected to codify in law what can be a material consideration is not clear; but limitation of the decision-maker's judgement seems the likely effect.

Should some permitted development rights be restricted?

How this works
Scottish Minsters may provide for the granting of planning permission in development orders or regulations. This can be procedures for dealing with applications for planning permission or a development order could itself grant planning permission. Permitted development (PD) rights refers to the planning permission granted by a general permitted development order. This removes the need to apply for permission where the restrictions and conditions attached to the PD rights can be complied with. The Scottish Government has an ongoing research project exploring they types of development that may, or may not, benefit from PD rights.
Proposed amendments to be considered by the Committee
• Prevent permitted development rights from allowing for the demolition of public houses, wine bars or other drinking establishments (the latter not defined – e.g. coffee shops?). An application for planning permission would always be required. • Prevent permitted development rights for private ways / hill tracks on land used for shooting or other field sports, or for any purpose within a national park, a site of special scientific interest or a national scenic area. • Make provision for granting applications for planning permission or possibly introduce permitted development rights for use of land as a Gypsy/Traveller site if in accordance with the development plan

Should the powers for Ministers to call in planning applications be restricted or pre-defined?

How this works
The vast majority of planning applications are decided by local planning authorities; over 35,000 applications decided in Scotland last year. Those authorities are best placed to make decisions about matters which affect their areas. The Scottish Ministers have a general power to intervene by 'calling in' any planning application for their own determination. This is a long-established feature of the planning system, exercised by successive governments and by all UK administrations. In practice, Ministers call in applications very rarely and where proposed developments, or issues raised by them, have been considered to be of national importance in some way. A 2009 review of the Scottish Government's approach to its involvement in individual applications led to a substantial reduction in the number of cases coming before them. Currently Scottish Ministers annually call-in around 5 cases from the 35,000 different applications going through the system each year.
Proposed amendments to be considered by the Committee
• Removal of Scottish Ministers' ability to call in planning applications which raise issues of national importance, other than where the proposal is for a 'national development' designated in the National Planning Framework. • Prevent Scottish Ministers from calling in any application before the end of the period for the planning authority to make a decision; irrespective of the circumstances of the case or national interest. • Setting out the circumstances in which it may be appropriate for Scottish Ministers to call in applications in legislation; this could either limit ability or oblige call-in. • Oblige Scottish Ministers to call in and decide every application on which SEPA has objected on grounds of flood risk, irrespective of scale of development or impact.

Should rights to submit an appeal on a planning decision be changed?

How this works
Applicants for planning permission can either appeal to the Scottish Ministers or request a review by the planning authority in relation to the terms of the decision made on their application, or against the authority's non-determination of their application. The planning system is inclusive and enables anybody interested in a proposed development or plan to be able to make their views known to the decision-maker in advance of any decision being made. On an appeal or local review, the decisions must be made in accordance with the development plan, unless material considerations indicate otherwise. We have already sought to strengthen and broaden involvement in the development plan.
Proposed amendments to be considered by the Committee
Multiple variations on changes / additions / restrictions to appeal rights: • New right for any person to make an appeal against a planning authority's decision on an application: (i) if they had previously made a submission to the planning authority, and (ii) on the grounds that the person considers the authority's decision was not in accordance with the development plan. • New right for any person to make an appeal if they had previously made a submission to the planning authority, and to community councils in defined circumstances: (i) where the planning authority considers the development is not in accordance with the development plan; (ii) the planning authority has an interest in the development; (iii) development requiring EIA; or (iv) there is an outstanding objection by a statutory consultee. • New right for any person to make an appeal in relation to national and major developments if they had previously made a submission to the planning authority, and to community councils, where the planning authority considers the development is not in accordance with the development plan; no accounting for material considerations. • New right of appeal for applicant, any person who had previously made a submission to the planning authority, and community councils in circumstances where a member of a planning authority is found guilty of maladministration or criminal activity in relation to planning applications. • No right of appeal for applicants where the planning authority considers the development is not in accordance with the development plan; no accounting for material considerations. • No right of appeal for applicants if land not allocated for development; impacts all unallocated development, householder development, windfall sites etc. • In deciding an appeal, Scottish Ministers may only reverse or vary the planning authority's decision if that decision was manifestly unreasonable in all the circumstances.

Should arrangements for planning obligations be changed?

How this works
Modify or Discharge Planning Obligation • Section 75A(1)(a) of the 1997 Act sets out a planning obligation may only be modified or discharged where there is an application for agreement under subsection (2) or in accordance with Section 75B (appeals). There is no provision for modifying or discharging planning obligations outwith the statutory application process. Publication of Planning Obligations • Under the 1997 Act, planning authorities are required to keep a register of applications for planning permission. As part of the register, the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013 requires planning authorities to keep a Report of Handling of applications, which must contain a summary of the terms of any planning obligation entered into under section 75 of the Act in relation to the application. • For planning obligations to be binding they have to be registered with the Registers of Scotland (RoS)and so they are publicly available via a request to RoS. However, there is a fee for this and the search takes a couple of days. • There are no other existing requirements (beyond those above) for those who enter into a planning obligation to publish details of it. Annual Reporting • Through annual planning performance framework reports, planning authorities provide information to the Scottish Government on the number of legal agreements undertaken and the timescale for these. This is undertaken on a voluntary basis. • Authorities submit statistics on planning permissions to the Scottish Government and this includes an indication of legal agreements as part of permissions. There is no requirement to provide details on the type of legal agreement.
Proposed amendments to be considered by the Committee
• Enable developer and planning authority to amend a planning obligation without following the application process to do so. • Requirement for planning authority to publish planning obligations, promote them and bring them to the attention of residents. • Requirement for person who enters into a planning obligation to publish details of it. • Requirement for planning authorities to publish an annual report detailing certain statistics on planning obligations secured within that area.