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**Scottish Government
Planning Enforcement Regulations 2007**

The Law Society of Scotland's Response

February 2008

INTRODUCTION

The Planning Law Sub-Committee of the Law Society of Scotland ("the Committee") welcomes the opportunity to comment on the consultation issued by the Scottish Government with regard to Planning Enforcement Regulations 2007 and, in answer to the questions contained within the consultation document, would respond as follows.

GENERAL COMMENTS

The Planning Law Sub-Committee submitted written evidence at stage 1 of the Scottish Parliament's Communities Committee's consideration of the Planning etc (Scotland) Bill ("the Bill"). This written evidence contained an indication that it had not been possible for the Sub-Committee to provide Parliament with detailed evidence on the effect of the Bill on the planning system in that the Sub-Committee had sight of neither the draft guidance for certain key sectors of the legislation nor the draft regulations which were to be required to secure full implementation. The Sub-Committee therefore indicated that it had been difficult to appreciate the full implication for the system of some of the key proposals as this would depend on the detail to be confirmed in the regulations which were to be issued in due course. The Sub-Committee at that stage indicated its regret that a draft of the principal regulations had not been available for consideration at the same time as the Bill.

The Sub-Committee would refer to its memorandum of evidence which is attached and which can be accessed at

<http://www.Scottish.parliament.uk/business/committees/communities/papers-06/cop06-04.pdf>

and the oral evidence provided on behalf of the Sub-Committee at the 1 February 2006 meeting of the Communities Committee of the Scottish Parliament which is further attached and can also be accessed at

<http://www.scottish.parliament.uk/business/committees/communities/or-06/co06-0402.htm#Col2953>

The Sub-Committee notes that some of the provisions of the Planning Etc (Scotland) Act 2006 includes notices of intention to implement development and fixed penalty notices which were duly initiated by letter dated 17 February 2006 from the Scottish Executive's Chief Planner. The Sub-Committee further notes these provisions have not been subject to as

much public participation and scrutiny as most of the other provisions of the Planning etc (Scotland) Act 2006 ("the 2006 Act"), but are likely to have a very immediate and potentially negative impact on members of the public. The Sub Committee has doubts about whether this is helpful to increased positive engagement with the modernised planning system. The Sub Committee suggests some circumspection and increased publicity among the community at large before full implementation.

The Society of course welcomes the opportunity to provide comments on these regulations, but it is noted that the consultation paper asked respondents to bear in mind that the Bill was approved and granted Royal Assent and that the Scottish Government is accordingly unable to consider comments seeking amendments of the provisions contained in the 2006 Act. The Sub-Committee would take that view that this statement and approach is perhaps somewhat regrettable as in order to comprehend both the mechanics and feasibility of the Scottish Government's proposals, both the primary and secondary legislation required to be considered together.

It is against this background that the Society would propose to comment on the questions contained within the consultation document.

Question 1

Do you support the proposal that penalties should be increased for continuing breaches and if not, why not?

The Sub-Committee would highlight the difficulty in reconciling the approach outlined in the consultation paper and in the draft regulations as regards the issue of subsequent notices within the terms of sub-sections 136A(3) and 145A(3) as introduced by the 2006 Act which provide that "it is not competent to serve more than one fixed penalty notice in relation to a particular step or activity". The Sub-Committee would take the view that where there is a continuing breach relating to the same step or activity then there is an apparent issue as regards the competency of subsequent notices. This is presumably an unintended consequence if a breach cannot subsequently be prosecuted and would ask whether it is intended to amend the 2006 Act in this respect.

Question 2

Do you have any views on the proposed amounts for the fixed penalty, in particular the proposed initial amounts?

The Sub-Committee is of the view that the higher the level of the fixed penalty the less likely it will be proportionate to the nature of the offence, the harm caused and the financial circumstances of the offender and the more it would appear to be likely that a person will refuse to pay the fixed penalty and take the chance that the matter is either not prosecuted by the procurator fiscal or that the court-imposed penalty will not be as high as the fixed penalty.

The higher level of penalties available for failing to comply with an enforcement notice could result in planning authorities choosing to use enforcement notices where they would otherwise currently use breach of condition notices and the Sub-Committee would question whether this is desirable.

Question 3

Do you have any views on the proposed increase in the amount of each subsequent fixed penalty, in particular with regard to the number of FPNs that would be required to reach the maximum and whether the fixed penalty should increase by a larger amount for each subsequent offence?

The Sub-Committee has no comment subject to the competency issues as raised above.

The Sub-Committee would also question the efficiency of multiple notices in view of the resource issues involved in likely officer time in administering such a system.

Question 4

Do you have any views on the proposed level of information requested in the NID or any suggestions for other information, for example declaring that any suspensive conditions had been met, might be useful?

The Sub-Committee notes the proposals. The Sub-Committee would ask whether planning authorities should be required to check the information provided as such a check would necessarily require liaison with other planning authorities. The Sub-Committee has reservations about the budgetary and logistical implications in the carrying out of such

checks. If such checks were not to be carried out then the question arises as to whether developers should be required to include the information. This would also raise the question with regard to developers with either a UK wide or worldwide interest. The Sub-Committee would highlight there is no mention in the draft regulations of any requirement to include anything other than information regarding notices served under the 1997 Act and/or details of judicial intervention in the Scottish Courts. Additionally, the Sub-Committee would highlight the question of the anticipated sanction should the developer fail to advise of relevant enforcement/court action taken by other planning authorities wherever located.

Question 5

Are you content with the proposed time limits for recording relevant enforcement action?

The Sub-Committee is of the view that the period of three years as outlined would appear to be realistic and appropriate.

Question 6

Bearing in mind that the purpose of the notice is to make people aware of the development and direct them to the appropriate contacts for further information, are you content with the level of information to be included?

The Sub-Committee is of the view that these provisions appear to be satisfactory.

Question 7

Are you content with the proposed categories of development for which notices would be required to be displayed, and if not, why not?

The Sub-Committee is of the view that these provisions appear to be satisfactory.

Question 8

Do you consider this sufficient, or would you like to suggest other criteria for the siting, display, size, etc, of these notices?

The Sub-Committee is of the view that these provisions appear to be satisfactory.

Question 9

Are you content with the proposed draft Regulations and if not, why not?

The Sub-Committee previously noted that the then Scottish Executive previously appeared confident that the measures proposed would be ECHR compliant. Previous consultees, including the Law Society, have expressed doubts about the safety of the proposed system from challenge. Similar doubts are now being expressed about similar proposals in England.

The Sub-Committee's ECHR concerns remain.

As the Sub-Committee previously noted, the service of a temporary stop notice could result in the withdrawal of permitted development rights without compensation being paid unless an application for a certificate of lawfulness ultimately meets with success. The Sub-Committee would state that this appears challengeable on the basis that it may not be ECHR compliant. Similar arguments have been advanced in context of similar provisions which have been introduced in England and Wales and that should a planning authority simply allow a Temporary Stop Notice to remain in effect for 28 days and then lapse, there is then no right of compensation, with human rights complications under ECHR Article 1, Protocol 1. In this context, the Sub-Committee in its previous evidence suggested that compensation for loss of use rights should be payable in every instance where there is no breach of planning control. The Sub Committee would also question whether the availability of an application for a judicial review against the issue of a Temporary Stop Notice is compatible with ECHR Article 6. The Sub-Committee would highlight the 14 November 2006 decision of the European Court of Human Rights in *Tsfayo v United Kingdom*. The decision of that case is authority for the proposition that the availability of the judicial review does not in itself guarantee ECHR compliance. It appears, as the Sub-Committee indicated on 1 February 2006, that the Scottish Executive is placing an undue reliance on access to the court as a basis for its position that the 2006 Act is ECHR compliant.

Question 10

Are there any other situations where you believe use of a Temporary Stop Notice should not be permitted?

The Sub-Committee would draw the comparison between the draft Town and Country

Planning (Temporary Stop Notice) (Scotland) Regulations and the Town and Country Planning (Temporary Stop Notice) (England) Regulations (SI 2005/206). In March 2007 a consultation was issued by the Department for Communities and Local Government concerning proposals to amend the English provision to allow local planning authorities to use 'Temporary Stop Notice' to prevent the occupation of caravans as main dwelling houses on unauthorised developments as long as an alternative authorised site is available on which caravans can be stationed. It is not clear whether this matter has been considered by the Scottish Government. If it has been considered, then the Sub-Committee would question why it has been decided not to pursue this additional provision.

Question 11

Do you wish to comment generally on the draft Regulations, RIA, EqIA, or other issues in respect of this consultation?

The Sub-Committee has no other comments.



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