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# FACULTY OF ADVOCATES

14 February 2008

Development Planning Regulations Consultation  
Planning Directorate,  
Scottish Government,  
2H Victoria Quay,  
Edinburgh,  
EH6 6QQ

Dear Sir or Madam:

**DISCUSSION PAPER ON DRAFT REGULATIONS ON DEVELOPMENT  
PLANNING; AND PLANNING ENFORCEMENT REGULATIONS 2007**

Please find enclosed the Faculty's approved response.

Yours sincerely,

ff Andrew F. Stewart.

*Encl.*

THE CLERK OF FACULTY

Telephone +44 (0)131 260 5626 Facsimile +44 (0)131 225 5341

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**RESPONSE**

by

**THE FACULTY OF ADVOCATES**

to

**THE SCOTTISH GOVERNMENT**

on

**(1) CONSULTATION PAPER, DRAFT REGULATIONS ON DEVELOPMENT  
PLANNING; and**

**(2) CONSULTATION PAPER, PLANNING ENFORCEMENT REGULATIONS  
2007**

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**COMMITTEE**

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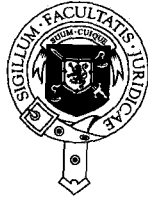
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**The Faculty has been asked to formulate a Response to a Consultation Document by the Scottish Government on (1) Draft Regulations on Development Planning; and (2) Planning Enforcement Regulations. The response is attached hereto.**

**Edinburgh  
February 2008**

**IN NAME OF THE COMMITTEE**

  
**Convener**



# FACULTY OF ADVOCATES

**RESPONSE**

*by*

**THE FACULTY OF ADVOCATES (“the Faculty”)**

*to*

**THE SCOTTISH GOVERNMENT**

*on*

**(1) CONSULTATION PAPER, DRAFT REGULATIONS ON DEVELOPMENT  
PLANNING; and**

**(2) CONSULTATION PAPER, PLANNING ENFORCEMENT REGULATIONS  
2007**

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1. The Faculty welcomes the opportunity to respond to the above-named consultation papers.
  2. We have no comment to make in relation to the draft regulations on development planning.

3. We do, however, have a number of comments to make in relation to the draft Town and Country Planning (Amount of Fixed Penalty) (Scotland) Regulations appended to the consultation paper, Planning Enforcement Regulations 2007.

- First, it is by no means clear that the provision of escalating fixed penalties for breaches of “subsequent” enforcement notices and breach of condition notices is *intra vires*. The Town and Country Planning Act 1997, as amended by the Planning etc (Scotland) Act 2006, provides that, where the planning authority has reason to believe that a person is in breach of either an enforcement notice or a breach of condition notice, it may serve a fixed penalty notice “as respects that breach”: section 136A(1); section 145A(1). The fixed penalty notice must specify the step specified in the enforcement or breach of condition notice which has not been taken or the activity specified which has not ceased. Subsection (3) of each section then provides that it shall not be competent to serve more than one fixed penalty notice in relation to a particular step or activity.
- That being so, it respectfully seems to us that the primary legislation was not designed with the intention of punishing subsequent failures relating to the step or activity specified in the original enforcement etc. notice. It seems at least arguable that in substance the step or activity specified in the subsequent notice will be likely to be the same as was specified in the first. After all, the regulations (reg 1(1)) make it clear that the “subsequent” enforcement notice etc. is issued in respect of the *same* breach of planning control as the first.
- We would add that the fixed penalty amounts appear somewhat high for what might in many cases amount to only trivial breaches of planning control. In such a case, an individual may feel obliged to submit to criminal prosecution rather than pay a disproportionate fine. This possibility would be contrary to the underlying intention of the regulations which is to circumvent legal proceedings. It is also unfortunate that the primary legislation appears to give the planning authority no discretion to

waive a penalty notice, for example should the breach be cured after it has been served.

- Finally, we would have expected the regulations to provide for the form of the fixed penalty notice. This should make clear that the fixed penalty is an alternative to criminal proceedings and that the recipient has the right to ignore the fixed penalty and choose between the two. In this respect, we question the somewhat conclusory language of the consultation paper, which argues that “offences go unpunished” because prosecution is regarded by planning authorities as “a potentially lengthy and expensive process, with no guarantee that the desired outcome will be achieved”. This is to pre-suppose that an offence has in fact been committed, which is precisely what the criminal process, with its attendant guarantees of due process, is intended to establish.