

Citation for the published version:

Walton, W. (2019) The Planning (Scotland) Bill 2017: Can Local Place Plans Restore Community Confidence in the Scottish Planning System?. *Juridical Review*, -(2), 160-181.

Document Version: Accepted Version

Link to the final published version available at the publisher:

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The *Planning (Scotland) Bill 2017*: Can Local Place Plans restore community confidence in the Scottish planning system?

The Planning (Scotland) Bill 2017 seeks to affect further significant changes to the Scottish planning system to supplement those introduced through the Planning etc (Scotland) 2006 Act. In an acknowledgement of a decline in trust in the planning system the bill allows community bodies to produce their own Local Place Plans (LPPs). This paper reviews the regulatory framework governing the preparation of similar plans in England before considering the proposals for LPPs in Scotland. It then examines the concerns raised by the Scottish Parliament about the proposals and finally considers a critical geographical mismatch issue overlooked by planning reformers.

PLANNING REFORM IN SCOTLAND

“My great fear is that there is already too much conflict and mistrust in the system”.¹

Following what First Minister, Nicola Sturgeon, referred to in 2015 as a ‘root and branch’ review of the planning system the Scottish Government published a new planning bill (the *Planning (Scotland) Bill*) in December 2017.² The *Planning (Scotland) Bill* (‘the Bill’) seeks to introduce important reforms to the *Town and Country Planning (Scotland) Act 1997* (‘the 1997 Act’) as amended through the *Planning etc (Scotland) Act 2006* (‘the 2006 Act’).³ There are four substantive areas that are covered: development planning; simplified planning zones; development management; and payment for infrastructure. In addition, the Bill also includes sundry measures such as granting greater powers to councils to set their own

¹ Kevin Stewart, Minister for Local Government and Housing, Official Report of the Local Government and Communities Committee, 21 March 2018, clmn.55.

² Crawford Beveridge, Petra Biberbach and John Hamilton, *Empowering planning to deliver great places: An independent review of the Scottish planning system*, Scottish Government 2016 (referred to hereafter as the ‘Beveridge Committee’).

³ Deborah Peel and Greg Lloyd, ‘The twisting paths to planning reform in Scotland’ [2006] *International Planning Studies* 11(2) 89-107.

planning fees, establishing a requirement for councillor training on planning matters and introducing means for the recovery of expenses incurred in taking enforcement action.

The proposed reforms to development planning comprise six main elements. First, the Bill withdraws strategic development plans (SDPs) which are prepared for each of the four city regions (Edinburgh; Glasgow; Dundee; and Aberdeen) to provide a framework for the preparation of lower tier local development plans (LDPs). Second, the Bill enhances the role performed by the National Planning Framework (NPF) to help fill the gap left by the withdrawal of SDPs. Third, the Bill withdraws the 'Main Issues Report' (MIR) which performs a screening role in the early stages of LDP preparation removing less suitable sites from further consideration.⁴ Fourth, the Bill extends the duration of LDPs from five to ten years. Fifth, the Bill splits the LDP examination process into two stages with the introduction of an assessment of evidence report (also called a 'gatecheck') to determine whether the draft plan's strategy is sound. Finally, the Bill introduces local place plans (LPPs) to provide greater opportunity for local people to engage in the planning process and produce a plan that will help shape their neighbourhood.

These LPPs are based largely upon the neighbourhood plan (NP) initiative introduced in England through the *Localism Act 2011* ('the 2011 Act'). These have already proven to be highly popular with over 500 plans having been adopted by May 2018. The 2011 Act allows organisations representing local communities – such as parish and town councils – to apply to the 'parent' council (the local planning authority or LPA) to prepare a statutory land use plan to guide new development within the neighbourhood. Underpinning this initiative is the belief that both the process and the end product are likely to be far more sensitive to the needs and aspirations of local people than can be provided through district-wide local plans which are prepared by the 326 councils across England, each with an average population of around 163,000.

The timing of the LPP proposals in Scotland is noteworthy. There is growing evidence that the reforms to LDPs introduced through the 2006 Act have significantly reduced the scope for local people to meaningfully question and challenge the planning authority's (PA) strategy.⁵ This has led to increased resentment by local community councillors and local residents, and contributed more generally to a growing belief amongst citizens that they

⁴ MIRs were introduced in the 2006 Act (s.9 and s.17) and replaced the preparation of a consultative draft local plan. The Bill proposes that they be replaced with an 'evidence report' setting out the basis of the planning authority's (PA) proposed LDP. Once this is approved by the Minister (the so-called 'gatecheck' stage) the PA can proceed to prepare its LDP which will then be published for interested parties to make representations on. These representations will be examined by an independent Planning Reporter who is empowered to make de facto binding amendments to the plan.

⁵ The term 'planning authority' (PA) is used in Scotland as a synonym for the council or national park authority whereas in England the equivalent is local planning authority (LPA).

have little or no influence on shaping planning strategies or the outcome of planning applications. The independent panel charged with investigating the operation of the post-2006 Scottish planning system concluded that “(P)articularly in communities where there is significant development pressure, the evidence *overwhelmingly* (author’s emphasis) suggests that public trust in the system has declined rather than grown”.⁶ Amongst the reasons cited by witnesses for this lack of trust was the lack of opportunity to work in partnership with the PA to help shape development plans.⁷ Further evidence of community distrust was provided in a Scottish Government commissioned research report.⁸ Another report commissioned by the National Trust for Scotland found that across all age ranges from 16 to 65+ and all income groups, 60% stated that they had ‘no influence’ in planning decisions and a further 27% stating that they only had ‘little influence’.⁹

Following amendments introduced by the 2006 Act objectors to LDPs no longer have a right to have their objections heard through a public inquiry, with the mode of examination (whether it be through written representations, an informal hearing or a public inquiry) being determined instead by the Reporter. This has resulted in the near complete disappearance of local plan inquiries from the Scottish planning landscape with the new informal hearings also only being used exceptionally. Now, virtually all representations are considered in writing by Reporters sitting behind closed doors and few plans are materially amended following the examination process.

The purpose of this paper is to consider whether the Scottish Government’s proposed LPPs are likely to restore the trust of local communities in the planning system which has declined further following the 2006 reforms. To do this the paper commences by examining England’s NP initiative introduced by the Coalition Government in 2011. It then moves north of the border, identifying the current statutory arrangements governing community engagement in plan making. Next, the paper considers the proposals within the Bill for LPPs before reviewing the issues and concerns ventilated by witnesses appearing before the Scottish Parliament’s Local Government and Communities Committee in early 2018. Finally, a series of proposals are suggested to resolve an issue, so far overlooked by the Beveridge

⁶ See *supra*. note 2, para. 8.4.

⁷ There is no report containing a transcript of the oral proceedings between the witnesses and the members of the Beveridge Committee since the hearings were, unusually, held *in camera*. Following a freedom of information request a brief summary of proceedings was supplied to the author by the Scottish Government.

⁸ Yellow Book Ltd, *Barriers to community engagement in planning: a research study* (Scottish Government 2017).

⁹ National Trust for Scotland, *Planning without the people* (2017) <<https://www.nts.org.uk/What-we-do/News/Planning-without-the-people>> [Accessed 23 January 2018].

Committee, the Scottish Government and the Scottish Parliament, arising from the geographical gap between LDPs and LPPs.

NEIGHBOURHOOD PLANNING IN ENGLAND

The introduction of NPs by the Cameron-led coalition government in the 2011 Act represented another chapter in the ongoing quest for an institutional planning framework best suited to meet the competing needs of economic growth, regional equity, public support, environmental protection and administrative efficiency.¹⁰ A concomitant of this initiative was the abolition regional spatial strategies (RSS) which had been introduced by Labour in the *Planning and Compulsory Purchase Act 2004* ('the 2004 Act'). The short lived RSSs had been introduced to replace top-tier county structure plans – abolished in the 2004 Act¹¹ - which had provided a strategic framework since their introduction in s.2 of the *Town and Country Planning Act 1968*. The RSSs were drawn up by indirectly elected assemblies representing each of the eight economic regions of England.¹² Under s.24(1) of the 2004 Act the policies contained within the lower tier local development document (a local plan) prepared by the elected district council had to be in general conformity with the RSS.

The regional assemblies comprised elected councillors from the constituent local authorities as well as a significant number of representatives (typically about 30%) from the business, voluntary and educational sectors. However, although they were promoted by the Blair Government Labour as representing a collaborative approach to tackling regional problems they were soon viewed by the Conservatives as unaccountable, remote bureaucracies which sought to impose their untested new housing targets on elected local councils. In introducing the second reading of the *Localism Bill 2010*, and advocating the arguments for the abolition of RSSs and the introduction of NPs, Secretary of State for Communities and Local Government, Eric Pickles stated:

“This Bill will reverse the centralist sweep of decades and replace it with local control. It is a triumph for democracy over bureaucracy. It will fundamentally shake up the balance of power in this country, revitalising local democracy and putting power back where it belongs, in the hands of the people”.¹³

¹⁰ Sue Brownill, 'Neighbourhood planning and the purposes and practices of localism', in Sue Brownill and Quintin Bradley (eds) *Localism and neighbourhood planning: Power to the people?* (Policy Press 2017).

¹¹ s.38 and schedule 8, s.2(3)(a) *Planning and Compulsory Purchase Act 2004*

¹² These are: the South-East; the East; the East Midlands; the South-West; the West-Midlands; Yorkshire and Humberside; the North-West; and the North-East.

¹³ Localism Bill Deb 11 January 2010, col 558.

The populist tone of Eric Pickles' Parliamentary speech raises the question as to whether NPs are part of a genuine desire to devolve powers to new forums away from unelected regional assemblies and elected local councils, or whether they are simply a new form of governance created to implement the work of central and local government in a more cost effective way?¹⁴

In support of the former view one can say that invariably local communities contain significant levels of expertise, experience and creativity which can be brought to the fore for the benefit of the local area. Local people working together will be able to devise new solutions to problems possibly not previously considered by planning professionals and will be more likely to formulate plans that carry the support of the bulk of the community, so reducing the factions that often plague local planning. However, it is naive to believe that this community capacity is evenly spread; those groups which are most likely to be able to effect change are likely to be composed of middle class professionals and / or well educated retirees.¹⁵

In support of the latter view, one can say that the parameters within which the new forums operate are tightly circumscribed by government ministers, civil servants and government agencies.¹⁶ Planning remains very hierarchical with NPs at the pyramid base with the parent local plan and the new National Planning Policy Framework (NPPF) above. Thus, any suggestions that the introduction of neighbourhood plans has allowed local groups to challenge the prevailing technocratic orthodoxy around issues such as housing and population projections has almost certainly been misplaced.

STATUTORY PROCEDURES FOR NEIGHBOURHOOD PLANS

NPs were introduced under Chapter 3 of Part 6 of the 2011 Act which amended s.61 of the *Town and Country Planning Act 1990* ('the 1990 Act'). Under the provisions any parish council or any organisation designated as a neighbourhood forum can apply to the LPA for a neighbourhood development order by which it is authorised to prepare a NP for a specified area¹⁷. For an organisation to be recognised as a neighbourhood forum it must have been

¹⁴ Katherine Brookfield, 'Getting involved in plan-making: Participation in neighbourhood planning in England' [2017] *Environment and Planning C: Politics and Space* 35(3) 397-416.

¹⁵ See Gavin Parker and Emma Street, 'Planning at the neighbourhood scale: localism, dialogic politics, and the modulation of community action' [2015] *Environment and Planning C: Politics and Space* 33(4) 794-810.

¹⁶ *Ibid.*

¹⁷ See National Association for Local Councils, *A Prospectus for Ultra-Localism: Working with Government to Help Communities Help Themselves* (NALC 2017). According to the national association there are around

formed to promote the social, economic or environmental qualities of the area, have a membership open to all local residents, those locally employed and local council representatives and have a written constitution. Unless the LPA considers that the specified area is not appropriate for designation it must confirm the application and create the order, allowing the parish council or forum to proceed to plan preparation. Under s.140(1) of the *Housing and Planning Act 2016* an application to proceed with preparation of a NP is deemed to be granted if the council does not respond within a prescribed period.

The purpose of the NP is to provide an allocation or (exceptionally) an advanced planning permission for any form of development except categories defined as 'excluded' (such as mineral extraction and waste management, nationally important infrastructure and developments requiring an environmental assessment under EU law). In preparing a NP the 2011 Act requires the LPA to provide information and assistance to the local forum on matters such as the sewerage capacity of a settlement and its implications for housing development. The neighbourhood forum is required to engage in full public consultation in such a manner as to ensure that all residents and those working in the area are likely to be aware of the proposals. In line with the requirements of due process and fairness interested parties, such as landowners and developers, are to be provided with the opportunity to make representations on development proposals.

Once this stage is completed the forum is required to send a copy of the draft NP, a copy of a consultation statement and a statement confirming that the process complies with the prescribed regulations to the LPA. On receipt, the LPA is required to publicise the draft NP and provide a further opportunity for interested parties to make representations. Following this, the LPA will make provision to hold an examination into the draft NP before a suitably qualified appointed person. No doubt because of workload constraints, the 2011 Act does not specify that the examination be conducted by a Planning Inspector and many of those carrying out such examinations are planning consultants.

The 2011 Act specifies that, as a default position, the examination is to be conducted through written representations. However, where the appointed person considers that a particular issue needs to be ventilated orally (such as a controversial housing proposal) then he may hold a public hearing at which interested parties can present their case. Significantly, discretion is given to the appointed person to determine whether opposing parties are permitted to cross examine a witness, thus permitting the hearing to take on a more inquisitorial and less adversarial form if thought appropriate.

Once the examination is complete the appointed person submits his report to the LPA. The report should include a recommendation as to whether the draft NP (or draft order) should

10,000 parish and town councils in England equating to an average population of around 5,300 per council.

be submitted for referendum, whether it should be modified and then submitted for referendum or whether it should be refused. The appointed person's recommendations are not binding on the LPA and if it does decide to depart from a recommendation in support of the plan because of a change in circumstances then it must consider whether to hold a new examination.

Separate regulations have been introduced governing the holding of NP referendums. These include the wording of the question i.e. whether or not those living and working in the area wish to have the NP (or order) adopted? There is no scope for supporting one part of the plan but not another; it is an all or nothing decision. Before the referendum the LPA must issue an 'information statement' setting out the date for the vote (not less than 28 days after the statement), publicising the plan and identifying the places where people can vote. Through a simple majority the NP (or order) is either adopted as part of the statutory planning framework or is rejected.

THE RELATIONSHIP BETWEEN NEIGHBOURHOOD PLANS AND LOCAL PLANS

Because they performed what were almost entirely mutually exclusive functions, the relationship between the old county structure plans and the lower tier local plans and, thereafter between RSSs and local development documents, was generally very clear. The former provided a broad strategy which the latter sought to translate into site specific allocations. Following the abolition of structure plans and RSSs, local plans are now required to perform both the strategic and the site specific functions. Thus, under the arrangements laid down in statute unitary-style local plans include a strategic element comprising the calculation of projected population, household and employment changes over the plan period and the identification of broad locations (e.g. town specific) for new development, and a local element comprising the identification of specific sites for new development¹⁸.

There are no restrictions as to when a NP can be prepared. However, since communities are advised that the NP should align "...with the strategic needs and priorities of the wider local area.... and...should not promote less development than is shown in the local plan or undermine its strategic policies" it would seem that the Government expects them to be produced in between the preparation of the strategic and the local elements of the local plan.¹⁹ The need for an examination – at which the NP's proposals can be closely scrutinised – provides a check preventing adoption of a plan which is out of step with the strategic element of the LPA's parent local plan. In the event that the LPA has adopted a local plan –

¹⁸ *Town and Country Planning (Local Development) (England) Regulations 2004/2204*. Regulation 6(3)-(6).

¹⁹ Department for Communities and Local Government (hereafter 'DCLG') *National Planning Policy Framework* (DCLG 2012, para. 184).

identifying specific sites for development – then any later adopted NP will take priority even where it is in direct conflict with the local plan.²⁰ Thus, a hypothetical site on the edge of Poole allocated for 200 units of housing in a local plan adopted in 2019 can be de-allocated and protected from development by a NP adopted in 2020, but, only so long as the 2020 plan provides another development site(s) of equivalent size in lieu so as to comply with the strategic policy governing the scale of development in the settlement.²¹

In order to limit the possibility of NPs being used simply as a foil by disgruntled residents to prevent much needed new housing the recently revised National Planning Policy Framework seeks to place qualifications on the application of their policies. Planning applications that are in conflict with an adopted NP can be refused permission if the plan is less than two years old, contains policies and allocations to meet its housing requirement, and the LPA has a three year supply of identified housing land and has met at least 45% of its delivery requirement over the previous three years.²⁴ Whilst a NP older than two years will still be part of the statutory development plan it seems that the Government takes the view that other material considerations – such as a possible housing land shortfall – should be accorded greater weight in the decision making calculus. Where there is an absence of relevant, up-to-date development plan policies (because there is no adopted local plan and / or no adopted NP) there will be a presumption in favour of granting permission for housing proposals that are ‘sustainable’ and which do not conflict with other protective designations (such as national parks). Restrictive policies in an emerging (i.e. not adopted) NP are unlikely to provide a sound justification for refusing a proposal.²⁵ .

NEIGHBOURHOOD PLANNING IN PRACTICE

Local communities have responded positively to the opportunities presented by the Localism Act. By May 2018 over 540 NPs had been approved.²⁸ Around 1,900 other communities across England with a combined population of around 10m people were thought to be at various stages of plan preparation. On average 89% of those voting

²⁰ s.38(5) *Planning and Compulsory Purchase Act 2004*.

²¹ See *supra*. note 19, para. 185. It should be noted, however, that if a planning application had been submitted and granted in the interim for, let’s say 150 houses, that permission could not be annulled without the payment of compensation to the developer.

²⁴ Ministry of Housing, Communities and Local Government, *National Planning Policy Framework* (DCLG 2019, para. 14).

²⁵ See, for example, planning appeal ref APP/A0665/A/11/2167430 (Taporley, Cheshire).

²⁸ Lichfields, *Local Choice: Housing Delivery Through Neighbourhood Plans*. London.

supported the plans with turn-out averaging 32.4%.²⁹ The period of gestation for most NPs from conception to adoption is around 2.5 years.³⁰

As might be expected, however, there are geographical variations in uptake with the socio-economic characteristics of the population being a dominant factor.³¹ More deprived communities are generally least likely to make applications for NPs with those in areas subject to strong growth development pressures most likely to embark on the process.³² To encourage more deprived communities to become involved in NP preparation the DCLG makes grants of up to around £14,000 that can be used to help fund professional planning assistance and meet other associated costs such as undertaking surveys.³³

Underlying the move to neighbourhood planning is the implicit belief that communities might well be willing to accept more development than required by the local plan if it is a decision that they make for themselves. So far, however, there has been little evidence of this. Nevertheless, the Government opted against including any financial incentives to local communities to persuade them to accept increased development when drafting the *Neighbourhood Planning Bill 2016*. Instead, the Government considers that the benefits provided to the local community via s.106 planning obligations (the equivalent to a s.75 planning agreement under the 1997 Act)³⁴ and the Community Infrastructure Levy (CIL)³⁵ to be sufficient. Under the latter, NP communities can retain 25% of the money levied.

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²⁹ DCLG, *Notes on Neighbourhood Planning*. Edition 19 (DCLG 2017).

³⁰ Gavin Parker and Kat Salter, 'Taking stock of neighbourhood planning in England 2011-2016', *Planning Practice & Research* 32: 4 478-490.

³¹ Gavin Parker, 'The uneven geographies of neighbourhood planning in England', in Sue Brownill and Quintin Bradley (eds) *Localism and neighbourhood planning: Power to the people?* (Policy Press 2017).

³² Turley Associates, *Neighbourhood Plans: Plan and Deliver?* (Turley Associates 2014).

³³ DCLG, *Notes on Neighbourhood Planning*. Edition 13 (DCLG 2015).

³⁴ The courts have held that offers of planning gain must be relevant to planning, relevant to the proposed development, proportionate in scale and kind, and reasonable (see *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759).

³⁵ A s.106 planning obligation can be used for a variety of purposes including the funding of associated off-site infrastructure and affordable housing. The Community Infrastructure Levy can be used to fund a range of public benefits linked to the scheme other than low cost housing. The levy is expressed as a tariff payable per square metre of new development to the council. The new Scottish Planning Bill is proposing the introduction of an infrastructure levy system.

Since their establishment under Part IV of the *Local Government (Scotland) Act 1973*, community councils have been the principal body for the representation of neighbourhood interests regarding the delivery of local government services. There are around 1,200 community councils spread across Scotland's 34 PAs³⁶, implying an average of just under 40 community councils per PA with an average population of around 4,500 as against around 170,000 for each PA.³⁷ Because of lack of interest in some areas, many community councils struggle to survive with members being co-opted to serve. Consequently, there is inevitably a question as to the extent to which community councils are truly representative of the residents in whose name they act.

In 1996 community councils were accorded the status of a statutory consultee in regard to the determination of planning applications within pre-agreed categories of development.³⁸ However, the position of community councils vis a vis development plan preparation is slightly different. The PA is required to consult with, and have regard to the views of, 'key agencies' and 'prescribed persons' when *compiling* the MIR (the initial stage of LDP preparation).³⁹ Community councils do not fall within the definition of a 'key agency'⁴⁰ or a 'prescribed person' and thus, unlike Scottish Enterprise or the Scottish Environment Protection Agency, do not have the opportunity to shape the council's plan at the earliest stage.⁴¹ Instead, on completion of the MIR the PA is required to take steps to ensure that likely interested persons, including community councils, are made aware that the document has been prepared, that it can be viewed and that they can make representations within a reasonable time period.⁴² The Beveridge Committee proposed that community councils be accorded the status of a statutory consultee for development plan preparation but there is no such provision within the Bill.⁴³

³⁶ These comprise 32 councils and 2 national park authorities.

³⁷ In order to achieve the economic and administrative efficiencies inevitably demanded by the twentieth century Scotland's 867 parish councils were abolished as units of local government through s.1 *Local Government (Scotland) Act 1929* and their duties concerning poor relief, lunacy and mental deficiency were transferred to town councils and county councils. They remain primarily as organisational units for the Church of Scotland.

³⁸ Town and Country Planning (General Development Procedure) (Scotland) Amendment Order 1996 No. 467.

³⁹ Town and Country Planning (Scotland) Act 1997. s. 17(4)

⁴⁰ Town and Country Planning (Scotland) Act 1997 s.23D

⁴¹ Town and Country Planning (Development Planning) (Scotland) Regulations 2008: 426). Regulation 11(a-c) (hereafter 'the 2008 Regulations')

⁴² Town and Country Planning (Scotland) Act 1997 s.17(6)

⁴³ See *supra*. no. 2. Recommendation no. 45.

This unwillingness to confer such status on community councils in development planning is rather strange given their position in regard to planning applications and given that the same Scottish Government introduced the impressively sounding *Community Empowerment Act 2015* ('the 2015 Act') which sought to '...enable participation in decision making by specified persons having public functions...'⁴⁴ The 2015 Act requires local councils to form 'community planning partnerships' with community councils and other local bodies and to prepare a locality plan for those areas suffering from deprivation aimed at improving service delivery and enhanced socio-economic outcomes.⁴⁵ Granting community councils the same rights in development plan preparation as accorded to organisations such as Scottish Enterprise would be a step in helping realise the aims of the 2015 Act and would help promote a greater level of engagement in the process.

As already stated, there has been an increasing view among citizens that the 2006 reforms have failed by some considerable distance to measure up to the rather lofty ambitions set out by the Ministers. Going back to the White Paper, *Modernising the Planning System*, which laid the foundations for the subsequent *Planning etc (Scotland) Bill*, then First Minister, Jack McConnell and then Deputy First Minister, Nicol Stephen stated:

"We have consistently said that our objectives for modernising planning are to make the system more efficient and to give local people better opportunities to participate in the decisions that affect them....Our proposals will restore confidence in the planning system..."⁴⁶

Further on in the White Paper, we read:

"The central aim of our modernisation proposals is to reinforce the primacy of development plans....Our reforms will ensure that....local people will be more involved in their preparation"⁴⁷

Three pages further on we read:

"To ensure that local people's voices are fairly heard, we propose a mandatory examination for strategic development plans and local development plans where objections have not

⁴⁴ Community Empowerment Act 2015 (hereafter 'the 2015 Act').

⁴⁵ Mindful of the risk of such community planning partnerships being unrepresentative of the local population, the Scottish Government, in collaboration with the Scottish Community Development Centre and WhatWorksScotland has produced a set of guidelines to promote inclusion (Scottish Government, *National Standards for Community Engagement* (Scottish Government, 2015)).

⁴⁶ Scottish Executive, *Modernising the Planning System*. (Scottish Executive 2005, 4).

⁴⁷ *Ibid.* p.25.

been heard”.⁴⁸ There was, however, a degree of ambiguity in relation to the critical issue as to the means by which objections made by interested parties to draft LDPs would be examined. In a preceding consultation paper issued in 2003 – which fed into the 2005 White Paper – the Scottish Executive had given a firm commitment to retain the “...basic statutory right...” of objectors to have their case heard by public inquiry.⁴⁹ Although the subsequent White Paper stated that in future far less use would be made of public inquiries and far greater use would be made of informal hearings and written representations in resolving objections it was by no means clear whether this would be achieved through exhortation (which would be consistent with the undertaking given in the 2003 consultation paper) or by a change in the law.⁵⁰ However, the subsequent *Planning etc (Scotland) Bill 2005* confirmed that the intention was to withdraw the right to have an objection heard by public inquiry with the decision on the mode of examination to be left in the hands of the planning Reporter.⁵¹ This was passed into law following the enactment of the 2006 Act.

Responsibility for the drafting of the statutory instruments necessary to give effect to various provisions of the 2006 Act, and for their subsequent implementation fell, however, to the new Scottish National Party government following its defeat of the sitting Labour / Liberal Democrat coalition at the May 2007 elections. Since 2010, when the first LDP was adopted under the new regulations, the use of public inquiries into local plan objections has virtually disappeared. Moreover, despite the assurance in the White Paper, informal hearings have not taken their place, being used exceptionally infrequently, resulting in shorter LDP examinations. By 2012-13, LDP examinations had fallen to an average duration of 29 weeks compared to 70 weeks under the pre-reform procedures.⁵²

The Scottish Executive claimed that the reduction in the use of public inquiries would produce significant economic benefits without the loss of the necessary scrutiny to safeguard the rights of objectors and the environment. This emphasis on creating a more efficient, streamlined planning system dovetailed neatly with the new SNP Government’s overarching objective of achieving what it termed ‘sustainable economic growth’ outlined in

⁴⁸ *Ibid*, p.28. For clarification, local authorities had previously been required to hold an inquiry into unresolved objections into local plans. Unresolved objections into draft structure plans were considered by the Scottish Minister who had the power to determine both whether an examination-in-public should be held and who should be permitted to participate.

⁴⁹ Scottish Executive (2003) *Modernising Public Local Inquiries: A Consultation Paper*. Edinburgh. Para. 56.

⁵⁰ See *supra*. note 40. Appendix 7.

⁵¹ *Planning etc (Scotland) Bill 2005* s.19(5)

⁵² See figures on p.17 of Directorate of Planning and Environmental Appeals, *Review of the year 2012-2013* (Scottish Government, 2013).

its policy statement issued in 2007.⁵³ This placed enhanced emphasis upon securing the delivery of new infrastructure projects and increased levels of housing development, the latter as a means of promoting greater affordability and reducing rigidities in labour markets.

An examination of the Reporter's recommendations in nine LDP reports to test the Scottish Executive's claims concerning procedural robustness reveals that local communities' objections to housing development proposals are rarely successful, however.⁵⁴ The covering letter for each report identifies the number of issues examined and the mode of examination.⁵⁵ Altogether, 570 issues were considered (i.e. around 63 per plan), with all bar hearings into the issue of housing land supply in the Perth & Kinross, Aberdeenshire, Fife, Stirling and Midlothian examinations being dealt with by written representations.

The Reporters recommended significant net *additional* housing allocations for four of the LDPs: Perth & Kinross (+1200 units); East Dunbartonshire (+560 units); West Lothian (+230 units); and Aberdeenshire (+500 units). The other five LDPs – Stirling, Fife, Midlothian, Angus and East Renfrewshire – had few, if any, material modifications to the net / gross housing allocations. Most of the settlement specific housing allocation proposals were subject to representations (usually objections) from the relevant local community council as well as from individual residents. With the notable exception of the proposed Perth & Kinross LDP – where twelve sites were removed in whole or part from the plan – and to a lesser extent that for East Dunbartonshire (where a highly controversial proposed housing allocation at Redmoss Farm at Milton of Campsie was removed) – Reporters have left proposed allocations virtually untouched.⁵⁶

THE SCOTTISH PLANNING BILL'S PROVISIONS FOR LPPs

⁵³ Scottish Government, *The Government Economic Strategy* (Scottish Government, 2007)

⁵⁴ Perth & Kinross LDP; East Renfrewshire LDP; Angus LDP; Aberdeenshire LDP; Fife LDP; East Dunbartonshire LDP; Stirling LDP; Midlothian LDP; and West Lothian LDP. All of the reports are available for inspection at the Directorate of Planning and Environmental Appeals (DPEA) web site.

⁵⁵ An 'issue' refers to a defined topic within the proposed LDP on which representations from interested parties have been made. Typically such issues include the overall strategy, the overall level of housing required, housing and other development proposals for each of the settlements identified within the plan as well as an assortment of other topics such as the location of wind energy projects and waste transfer facilities. Most examinations involve inspection of between 50 and 100 issues.

⁵⁶ See Michael Pacione, 'The power of public participation in local planning in Scotland: the case of conflict over residential development in the metropolitan green belt', (2014) *GeoJournal* 79 31-57, and William Walton, 'A comment on Michael Pacione's 'The power of public participation in local planning in Scotland; the case of conflict over residential development in the metropolitan green belt'. (2018) *GeoJournal* 83 (1) 1-9 for a detailed discussion of the Redmoss Farm planning saga.

Notwithstanding the potential significance which the new LPPs might have for planning practice in Scotland, the relevant provisions are set out in just one section (s.9) in the Bill, containing four short sub-sections, and a short schedule (schedule 19 to be incorporated into the 1997 Act).⁵⁷ In contrast the 2011 Act in England and Wales contains two very substantive schedules addressing all aspects of NP preparation and adoption. The Scottish Government has stated that it expects to issue future regulations governing the details of the preparatory process, form and content of LPPs by 2019 / 2020.⁵⁸

The Bill allows a 'community body' or a community council to prepare an LLP.⁵⁹ The body preparing the LPP will have to '...have regard to...' the emerging or adopted LDP, to the NPF and to any other prescribed matters.⁶⁰ Likewise the PA, when preparing its LDP, will have to '...have regard to...' any LPP already in place.⁶¹ Thus, as with NPs the intention is that LPPs can be prepared either in advance of, or following, the adoption of the 'parent' LDP. However, and highly significantly, in contrast to the position in England, LPPs will not be part of the statutory development plan (comprising the NPF and the LDP) and will simply factor as a 'material consideration' in the determination of planning applications.⁶² As with any other material consideration, the weight to be attached to it will be at the discretion of the decision maker. Where that is the PA (rather than a Planning Reporter or the Minister) and the LPP is at odds with the LDP it is likely that it would be given little weight.

One would expect that the Minister will stipulate what steps the community council must take to consult with residents and other affected interests in much the same way that the 2011 Act does in England. As to form and content it is likely that the Scottish Government will want to ensure a reasonably consistent style of presentation for the general benefit of users of the planning system as well as identifying those topics – such as national infrastructure provision - which are off limits to community bodies when drafting their LPP.

⁵⁷ The Bill was accompanied by a Policy Memorandum, a Financial Memorandum and an Explanatory Note.

⁵⁸ Scottish Government Planning and Architecture Division, *Review of the Scottish Planning System: Technical Paper* (SGPAD 2017).

⁵⁹ A community body is defined under s.19 of the 2015 Act. The term community council is used hereon and includes other forms of community body.

⁶⁰ Planning (Scotland) Bill 2017. s.4. (to be inserted into the Town and Country Planning (Scotland) Act 1997 as 'Schedule 19').

⁶¹ *Ibid.*

⁶² A 'material consideration' is any issue which has been held by the courts as being one which a PA must have regard to in determining a planning application. Planning policy, as contained in an LPP, or in any national guidance such as Scottish Planning Policy, is one of those considerations. However, the weight accorded to the material consideration is a matter for the decision maker, whether it be the PA, a planning reporter or the Minister (see *Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281).

Like their English counterparts, Scottish LDPs are essentially two-part documents containing higher-order strategic policies followed by lower-order settlement specific policies. Apropos new housing development, each PA is required to prepare a 'Housing Need and Demand Assessment' (HNDA) to inform land allocation strategies for defined local housing market areas (LHMAs) for the plan period.⁶³ A housing need figure is generated for each LHMA which then feeds into development land requirements for sub-areas, each of which might contain several towns and villages.⁶⁴ These aggregate sub-area figures are then translated into site specific allocations in the second part of the LDP (usually in a chapter dealing specifically with individual settlements). The relationship between sub-areas and site specific allocations – and the potential implications for the timing of LPP preparation - will be expanded upon later in this paper.

In parallel with the neighbourhood plan regulations in England, the Bill stipulates that the community council send a copy of the completed LPP to the PA. But the Bill goes no further than that and there is no suggestion that this issue will be dealt with through further regulations. By omission one must assume that the PA will subject the LPP to officer scrutiny to ensure that it complies with the NPF, the emerging (or adopted) LDP and any other prescribed matters and then, via an affirmative motion in an appropriate committee, note the plan. But this is by no means spelt out. Significantly, in contrast to England, there is no provision for the holding of any local referendum.

The implications of this omission are potentially very significant. The Beveridge Committee had recommended that LPPs would become part of the statutory planning framework and, thus, would effectively determine the outcome of planning applications under s.25 of the 1997 Act.⁶⁵ However, s.8 of the Bill ('Development Plan') omits any reference to LPPs as being part of the statutory development plan. Thus, the intention of the Scottish Government – at least at this point in time – is that the LPP should be no more than a material consideration which PAs must have regard to when determining planning applications. It is likely that in many instances LPPs will, in effect, provide an alternative, competing vision to that set out in the parent LDP. In such instances their status will be tested when the PA has to determine an application where the policies in the two 'competing' plans are directly at odds with one another. So, to take a Scottish equivalent of the Poole example offered earlier, what will happen when an application for 200 houses is

⁶³ Scottish Government, *Scottish Planning Policy* (Scottish Government 2010, paras. 67-76).

⁶⁴ Reference to a sample of Scottish LDPs serves to illustrate this point. Strategic level housing allocations are expressed in the Angus LDP (2016) in 4 housing market areas, in the Fife LDP (2017) in 4 strategic development plan areas, in the Stirling LDP (2014) in 2 strategic areas, in the Perth & Kinross LDP (2014) in 5 sub-areas and in the Moray LDP (2015) in 5 local housing market areas.

⁶⁵ See *supra*. note 2. Recommendation 44.

submitted for a site on the edge of Perth allocated for development in the 2018 LDP but identified for protection in the 2020 LLP? The law states that the application should be determined in line with the development plan (the LDP and the NPF) *unless* material considerations (the LPP and others) indicate otherwise. If the non-statutory LPP identifies alternative sites for development of around equivalent capacity then, as in England, it is possible that the PA (and possibly the Scottish Minister on any subsequent appeal) will exercise its discretion, and accept that local opinion should override the statutory LDP and refuse planning permission. Such decisions will ultimately, of course, be matters of planning judgement that will turn on matters of fact and degree.

PARLIAMENTARY SCRUTINY OF THE PROPOSALS

Following a call for evidence announced in December 2017 the Local Government and Communities Committee started taking evidence on the Bill in late February 2018. The committee comprised seven members: three MSPs from the Scottish National Party (Doris (convenor); Gibson; and Gilruth); two from the Scottish Conservative and Unionist Party (Simpson and Stewart); one from the Scottish Green Party (Wightman); and one from Scottish Labour (Lennon). It published its report and recommendations for amendments to the Bill on the 17th May 2018. In addition to evidence from Scottish Government planners and ministers it received oral submissions in four sessions from 26 witnesses including representatives of national organisations such as the Royal Town Planning Institute, Planning Democracy and Community Land Scotland.⁶⁷ It received a further 311 written submissions from interests including community councils, PAs, planning consultants, developers and private individuals.⁶⁸ Finally, it received feedback from three community events held in Motherwell, Skye and Stonehaven as well as from a conference held in Stirling.

During the Scottish Parliament oral hearings the convenor focused, in particular, on eliciting views from witnesses on the status which LPPs should be accorded and the timing of their preparation. Many of the witnesses held that LPPs should be incorporated into the development plan and placed on a statutory footing. As Dr Inch (Planning Democracy) stated:

⁶⁷ The sessions were held 28 February and 7th, 14th and 21st March 2018.

⁶⁸ The written submissions were not available to the public at the time this paper was written.

“A risk of a weak status for LPPs in decision making is that communities and others can invest hundreds of hours....into producing LPPs, only to find that subsequent decisions broadly disregard their provisions”.⁶⁹

Ian Cooke (Land Development Trust Association Scotland) stated:

“We are very supportive of the proposal for LPPs, but they will achieve very little unless they are accompanied by a clear statement about their purpose and status”⁷⁰.

Petra Biberbach (Planning Aid for Scotland) concurred:

“If you prepare something at the local level, it follows that it has to be part of the development plan if you want it to be meaningful and have a proper statutory role”.⁷¹

Aedan Smith (Scottish Environment LINK) stated:

“As they are currently constituted in the Bill, we are worried about LPPs progressing and raising false expectations. They need to be more formally part of the development plan”.⁷²

And finally, echoing further support, Diarmid Hearn (National Trust for Scotland) stated:

“I agree that LPPs should be built into LDPs”.⁷³

However, some witnesses expressed strong opposition to any suggestion that LPPs should be placed on a statutory footing. Speaking on behalf of the Scottish house building industry, one witness stated:

“...‘having regard to them’ (LPPs) is the right relationship. If you make LPPs part of the development plan or put a much stronger obligation on local authorities and the national Government to ensure that development plans reflect LPPs, you will have to put in a lot

⁶⁹ Dr Andy Inch, Official Report of the Local Government and Communities Committee, 28 February 2018, clmn.5.

⁷⁰ Ian Cooke, Official Report of the Local Government and Communities Committee, 28 February 2018, clmn. 5.

⁷¹ Petra Biberbach, Official Report of the Local Government and Communities Committee, 28 February 2018, clmn. 16

⁷² Aedan Smith, Official Report of the Local Government and Communities Committee, 14 March 2018, clmn 16.

⁷³ Diarmid Hearn, Official Report of the Local Government and Communities Committee, 14 March 2018, clmn. 15.

more checks and balances relating to how the plans are prepared and ultimately what can go in them, which would mean that communities would lose flexibility”.⁷⁴

Councillor Heddle, on behalf of the Convention of Scottish Local Authorities (COSLA), stated:

“As framed, that phrase (have regard to) is appropriate. We would be more supportive of local place planning if it were framed in that way, because it would leave decision making with elected representatives....Flexibility in allowing elected members to wrestle with problems is appropriate, and we would be content with the phrase “have regard to””.⁷⁵

Striking a more centrist position and making explicit reference to the potentially problematic relationship between an LPP and the parent LDP, Kate Houghton on behalf of the planning profession in Scotland, stated:

“If LPPs are prepared, they should be taken seriously....but the local authority will also be preparing the LDP, which will be the statutory development plan. I therefore think that it is important that, throughout an LDP’s preparation, there is a conversation about constraints and context with the planning authority, so that what the community puts down in the LPP is deliverable”.⁷⁶

Picking up on the frustration expressed by several witnesses concerning the lack of detail in the Bill over the sequencing of their preparation and how the potentially problematic relationship between the LPP and the LDP might be resolved, the committee convenor asked:

“If the LPP goes off in one direction and the LDP goes in another, how can they mesh together? How can one be adopted by the other? There must be much closer articulation between a LPP and a LDP”.⁷⁷

In trying to answer these questions it might have helped had one of the MSPs or witnesses sought to provide a hypothetical situation to illustrate more precisely the nature of the problem. What follows is an attempt to do just that. Let’s suppose we have a council with a population of around 150,000 which we shall call Balfour. Let’s also suppose that Balfour Council (the PA) contains 40 community council areas which cover just 70% of the

⁷⁴ Tammy Swift-Adams, Official Report of the Local Government and Communities Committee, 7 March 2018, clmn. 21.

⁷⁵ Councillor Heddle, Official Report of the Local Government and Communities Committee, 14 March 2018, clmn, 64.

⁷⁶ Kate Houghton, Official Report of the Local Government and Communities Committee, 7 March 2018, clmn. 73.

⁷⁷ Bob Doris, Official Report of the Local Government and Communities Committee, 21 March 2018, clmn. 29.

population.⁷⁸ Let's further suppose that 10 of the community councils are dormant. Finally, let's suppose that one of the active community councils with a population of around 2,000 people is located in an area of high development pressure and is called Blair & Cameron Rural CC (B&CRCC).

In January 2019 Balfour Council announces that it intends to commence preparations on a new LDP with a 10-year life span to replace the existing one (which we shall call BLDP2 and BLDP1 respectively) which has an end date of January 2022. So at what point in the process should B&CRCC start preparing its LPP? According to Petra Biberbach, preparation of the LPP should commence immediately so that its content informs BLDP2 rather than the other way around.⁷⁹ The reason for doing things in this order, she argues, is that local communities are likely to be better placed than the PA for gathering intelligence and evidence in their neighbourhood on matters such as the availability of gap sites for new housing. In short, the preparation of the LPP is seen almost as a one for one replacement of the Main Issues Report stage which the bill proposes to withdraw.

The essential problem with this approach, however, is that B&CRCC will be acting in a void in determining how many sites for how many houses will be required because Balfour Council will probably not have produced any HNDAs for its LHMA's. A possible solution would be to encourage B&CRCC to produce a LPP capable of accommodating several different development scenarios that might eventuate in the Balfour LDP (a high, medium or low approach).⁸⁰ Proceeding on the assumption, however, that B&CRCC and neighbouring community councils reject this scenario approach and instead produce LPPs with only very limited development provision there is the obvious possibility that unrepresented communities without LPPs might become target areas for house builders and other developers.

In response to this sequencing conundrum Professor Cliff Hague suggested that the process would commence by the PA announcing its intention to commence a new LDP and then

⁷⁸ Graham Simpson MSP told the committee that within his constituency there are big gaps in community council coverage, a point endorsed by Petra Biberbach and Andy Inch. Official Report of the Local Government and Communities Committee, 28 February 2018, clmn. 9.

⁷⁹ Petra Biberbach told the committee "The plans (LPPs and LDPs) should come together right at the start. The best starting point in driving LDPs is for them to be informed by LPPs, so there should be a fusion", Official Report of the Local Government and Communities Committee 28th February 2018, clmn. 13.

⁸⁰ Thus, B&CRCC could produce a LPP providing for the phased release of sites in line with a low, medium and high development scenario (say, preferred sites up to 150 houses, less preferred sites for 151-300 houses and least preferred sites for 301-400 houses respectively) to meet the needs of the eventual Balfour LDP. It is possible however, that B&CRCC would refuse to produce a LPP providing for a medium / high development scenario for fear of being seen to accede to an unacceptable principle, undermining its ability to oppose any proposals for these sites.

inviting local communities to 'bid' for permission to prepare an LPP. Implicitly, it seems that this invitation would not occur until the PA had finalised the strategic element of the LDP identifying the overall scale and broad location of new development across its jurisdiction.⁸¹ This would provide the frame of reference for the preparation of a relatively small number of LPPs at stage 2 "...in negotiation with the local planning authority".⁸² This approach comes close to recommendation number 8 made by the Beveridge Committee.⁸³ Taking this a stage further, one can see that if the LPPs could be produced relatively quickly they could be incorporated by the PA into the draft LDP to be submitted for examination and thus, indirectly, gain the statutory status which many witnesses sought.

Although not asked directly to explain the relationship between the LDP and the new LPPs the Minister nevertheless told the committee:

"I want to ensure that communities have their say in planning, but other factors come into play.....[T]here are...requirements to deliver for an area as a whole and not necessarily just one community...[A]t some point, a local authority also has to be able to take into account either necessary policy objectives or national planning framework objectives....[W]hen people know that certain things have to take place in a particular area they exercise good judgment. If we achieve that level of communication, people will formulate place plans that will take account of what is necessary for the particular place, again removing unnecessary conflict..."⁸⁴

Following completion of stage 2 of the parliamentary scrutiny process the Scottish Government produced a revised version of the Planning (Scotland) Bill in November 2018. Responding to criticisms from MSPs and others concerning the absence of any detail concerning the issue of timing in the original Bill the new S.9 (1A) reads:

⁸¹ Professor Cliff Hague, Official Report of the Local Government and Communities Committee, 7th March 2018. Clmn. 71.

⁸² Professor Cliff Hague, Official Report of the Local Government and Communities Committee, 7th March 2018, clmn. 75.

⁸³ See *supra*. note 2, p.11. "*Development plan examinations should be replaced with a frontloaded 'gateway' of the plan.* Early independent involvement could take the form of mediation, a gateway or peer review. This could focus on key aspects of the plan, including housing land requirement. Only after agreement is reached on key parameters for the plan, should a fuller, locally driven discussion on place and development sites move forward. It is important to ensure that all of those with an interest are involved at an early stage. Where early agreement is achieved there should be no need for further scrutiny or intervention at this later stage". The Bill includes a provision for gateway check under s.16A of the Town and Country Planning (Scotland) Act 1997 but does not include repeal of the requirement to hold an independent examination of the LDP prior to adoption.

⁸⁴ Kevin Stewart MSP, Official Report of the Local Government and Communities Committee, 21st March 2018. Clmns. 22-23.

“Preparation of local development plan: Invitation to produce local place plans.

Before preparing a local development plan, a planning authority are to publish in such a manner as they consider appropriate;

- (a) An invitation to local communities in their district to produce local place plans in accordance with schedule 19;
- (b) Information on –
 - (i) The manner in which and the date by which such local place plans are to be prepared in order to be taken into account in the preparation of the local development plan,
 - (ii) The assistance available from the planning authority for local communities to prepare local place plans”.⁸⁵

Whilst this amendment adds some clarity it is still not clear whether the PA will have already determined what level of new development will be required for each of its plan sub-areas. But even if the PA has resolved the issue of the broad scale and geography of development need to its own satisfaction it is quite likely that communities will be wary of committing fully to the process until the LDP has been satisfactorily ‘gatechecked’ by the external examiner. .. Even after the LDP has been satisfactorily gatechecked, however, individual community councils will still not have sufficient information regarding development allocations to be able to prepare an LPP confident that it will comply with the approved strategy because of what I call the ‘geographical mismatch issue’.

THE GEOGRAPHICAL MISMATCH ISSUE

The appropriate allocation problem arises because of the geographic gap between the relatively large LDP sub-areas (or whatever equivalent term is used by the particular PA) used as the basis for setting out the planning strategy and the relatively small community council areas (covering towns / villages) within which site specific LPPs are to be prepared. Reference to two recently approved LDPs, the Midlothian LDP 2017 and the Aberdeenshire LDP 2017, should serve to illustrate the issue.⁸⁶ Both LDPs were prepared in the context of a

⁸⁵ Planning (Scotland) Bill [as amended at Stage 2], November 2018. Following a defeat in the Local Government and Communities Committee in September 2018 the Scottish Government amended the Bill and withdrew its proposal to abolish SDPs. See Scottish Parliament, *Official Report, Local Government and Communities Committee, Wednesday 19 September, Session 5* (2018).

⁸⁶ Midlothian Local Development Plan 2017 (2017) http://midlothian-consult.objective.co.uk/portal/midlothian_local_development_plan_2017?pointId=4791461#document-4791461 [Accessed 10 July 2018] and Aberdeenshire Local Development Plan 2017 (2017)

parent SDP.⁸⁷ Both cover suburban and rural hinterlands subject to strong growth pressures associated with the economic centres of Edinburgh and Aberdeen respectively and are thus the type of areas where the Beveridge Committee said that trust in the planning system was regressing.

If we turn first to the Midlothian LDP we will see that the strategy for development across the district 2014-2024 is set out in the second chapter, 'Strategy for Sustainable Growth'. Here the PA explains that the main focus for growth will be within three 'strategic development areas' (SDAs), namely: Shawfair; the A7 / A68 and Borders Railway corridors; and the A701 corridor. Taking the A701 corridor SDA as an example, we see that the parent SDP identifies a need for 15ha of employment land and 1,600 houses 2014-24. The base map for the Midlothian LDP sets out the boundary of the A701 corridor SDA which contains the settlements of Loanhead, Bilston, Roslin and Penicuik.

It is this strategic level of plan making that the Beveridge Committee recommended should be subject to the preliminary gatecheck prior to the preparation of any LPP. Once the LDP strategy has been approved then Loanhead & District Community Council, Roslin & Bilston Community Council and Penicuik & District Community Council can each start preparing their LPP for their jurisdiction. But how does each go about resolving what share of the 1,600 houses and 15ha of employment land it is required to allocate in its LPP?

Identical issues arise with the Aberdeenshire LDP 2017. We see that most of the proposed development is to be focused within 4 separate strategic growth areas (SGAs) as identified in the parent SDP. These SGAs are: Aberdeen City; the Aberdeen to Peterhead corridor; the Aberdeen to Huntly corridor; and the Aberdeen to Laurencekirk corridor. The SDP proposes that for three phases covering 2015-2035 the level of development should be split 50 / 50 between Aberdeen City and Aberdeenshire, with 75% taking place within the four SGAs (i.e. 25% of the overall growth should take place within the three Aberdeenshire SGAs). The SGA for Aberdeen City is sub-divided into brownfield and greenfield whilst each of the three corridor-shaped SGAs within Aberdeenshire is sub-divided by the boundary of the Aberdeen Housing Market Area (AHMA) which arcs around the city's commuting hinterland.⁸⁸ The sub-areas within the AHMA have higher housing land allocations than those outwith. Again, as with Midlothian, it is these sub-area allocations which would provide the basis for any subsequent LPPs.

<https://www.aberdeenshire.gov.uk/media/20616/local-development-plan-2017-part-1.pdf> [Accessed 10 July 2018]

⁸⁷ The two SDPs are the *Edinburgh and South East Scotland SDP* (2013) and the *Aberdeen City and Shire Strategic Development Plan* (2014) respectively.

⁸⁸ The AHMA extends about 15-20 miles from the city centre and includes market towns such as Inverurie, Banchory and Stonehaven.

The 15km long Portlethen-Stonehaven sub-area of the Aberdeen-Laurencekirk SGA immediately south of Aberdeen serves to illustrate the issues that will be typically confronted in the LPP preparation process. Being within the AHMA this sub-area has a substantial allocation of 2,400 houses 2017-2026. The sub-area is covered by four community councils: Portlethen & District Community Council; North Kincardine Rural Community Council; Newtonhill, Muchalls & Cammachmore Community Council; and Stonehaven and District Community Council. Again, how will each determine what proportion of the 2,400 units it should seek to accommodate so that the overall allocation for the sub-area is translated into four mutually compatible LPPs?

The Minister clearly believes that the communities will ‘exercise good judgment’ and so take their appropriate share of new development.⁸⁹ The problem in determining just what is an ‘appropriate’ share arises, however, because of the aforementioned mismatch between the course grained jurisdictional geography of LDP sub-areas (for example, the Portlethen–Stonehaven sub-area has a population of around 22,000) and the finer grained jurisdictional geography of community council areas, some of which contain just a few hundred people. Although the identification of this fundamental issue is hardly revelatory, it is worth noting that none of the committee witnesses mentioned it in their evidence. Had they have investigated how the system operates south of the border they would have discovered that many LPAs use parish and town councils as the geographical units for expressing housing allocations so as to facilitate the preparation of NPs. Where this is not the practise the Government encourages LPAs to set out indicative housing figures when asked to do so by neighbourhood planning bodies.⁹⁰

POSSIBLE SOLUTIONS TO THE GEOGRAPHICAL MISMATCH ISSUE

It is not difficult to envisage the proposed arrangements becoming something of a nimby charter with community councillors representing small communities arguing that the lion’s share of new development should be allocated to the larger neighbouring settlements with a greater level of service provision, and those representing the larger settlements arguing that it is surely somebody else’s turn to accept the burden of new housing and industrial estates. It is probably because community councils might well be considered to have under provided for new development that the Bill proposes no more than a need for PAs to take into account LPPs when preparing the LDP and determining planning applications. But if the Scottish Government does want to engage local communities in the planning process then it

⁸⁹ See *supra*. note 84.

⁹⁰ See *supra*. note 24, paras. 65 and 66.

will need to resolve the possibility of the uncertainty (or chaos) that could result from conflicting plans. Five possible options are outlined below although each has its drawbacks.

First, the Scottish Government might copy practise in England and require PAs to take a geographically finer grained approach when articulating their strategy at the preliminary (gatecheck) stage, identifying aggregate development allocations for individual settlements (such as, say, Penicuik and Stonehaven) rather than larger sub-areas. The corresponding community council (where there is one) would then have the relatively straight forward task of translating these allocations for housing and industry into site specific proposals within its LPP. There are, however, objections to this approach. First, requiring this level of detail at the preliminary stage of LDP preparation will cause significant delay since it would require the planners to assess infrastructure capacity settlement by settlement . Second, it would result in the gatecheck stage becoming considerably more protracted as individual communities – wanting to protect their areas from over development - contest proposed allocations, so undermining the Scottish Government’s intention for a more expedited LDP preparation process. Finally, community councils might conclude that the strategy had, in effect, pre-empted any real choice over sites at the local level, so rendering the notion of local engagement as little more than a fiction.

Second, the Scottish Government could require community councils within sub-areas to cooperate with each other in preparing their LPPs. In England plan making bodies (councils and national park authorities) are under a statutory duty to constructively cooperate with neighbouring bodies when preparing local plans in order to help achieve sustainable development.⁹¹ A similar statutory duty in Scotland, albeit at a jurisdictionally lower level, would help ensure that community councils produce LPPs that are mutually compatible and collectively accommodate the entire development allocation within a sub-area. A community council would be required to evidence that it had held joint meetings with neighbouring community councils to help produce a shared vision. Any community council that refused to cooperate with its neighbours would face the sanction of having the materiality of its plan downgraded by the PA.

However, this approach might be highly unrealistic. To return to Aberdeen, the city has 30 community councils covering the two (brownfield and greenfield) LDP sub-areas . If we assume a 50 / 50 split, that implies a need for each community council to co-operate and liaise with 14 ‘neighbouring’ communities and produce a plan within little more than around 12 months. Imposing a duty of cooperation between so many voluntary bodies, some of which might have threadbare levels of membership, could well amount to an undue burden more likely to produce anger than collaboration. And, as already stated, there is by no

⁹¹ See s.110 (Duty to co-operate in relation to planning of sustainable development), Localism Act 2011.

means any guarantee that the community councils would be able to arrive at a consensus over development shares.

Third, community councils might be encouraged to pool their resources with their neighbours and produce a joint LPP (for example, an 'A701 corridor LPP' in Midlothian or a 'Portlethen-Stonehaven LPP' in Aberdeenshire). Thus, instead of a resultant patchwork of 20-30 LPPs across a PA jurisdiction there might instead be, say, 5 or 6 LPPs (or 'sub-area place plans') with each covering a population of around 20-30,000 people. This would considerably simplify the external organisational logistics but at the cost of magnifying the complexity of internal working relationships, not to mention the risk of undermining the 'local' quality of the plan which ultimately provides the rationale for community involvement. The prospect of such an arrangement being successful would depend upon the degree of geographical commonality between the areas, the level of mutual trust and understanding between the various community councillors and the strength of their desire to reach a consensus.

Fourth, the PA might act as a conduit and bring the relevant community councils from the sub-area together to express their planning ideas and, perhaps with professional support from the planners, translate them into an LPP. This would help address the concern ventilated by many of the witnesses regarding the capacity of community councils to produce LPPs. However, it is possible that the community council would fear that such close involvement by the PA would taint its ideas and result in it being persuaded into producing a LPP which was more to the PA's liking than its own. Indeed, as the Minister readily admitted to the committee:

"A number of places around the country have already formulated place plans with no resource input from anywhere else. In some cases, I have heard it said that folk did not want the resource input, because they thought that that might mean there would be interference from elsewhere".⁹²

Finally, where a community council had indicated at the gatecheck stage that it wished to prepare an LPP the PA could refrain from identifying any sites for that area within its LDP, leaving that task instead to the local residents. However, such a process would, in effect,

⁹² Kevin Stewart MSP, Official Report of the Local Government and Communities Committee, 21st March 2018. Clmn. 23. The 'place plans' he refers to include the pioneering *Linlithgow: A Plan for the Future 2015-2030* produced by the Linlithgow Planning Forum to inform the West Lothian LDP. Available at <<https://linlithgowplanningforum.files.wordpress.com/2015/09/plan-for-future-sept05.pdf>> Accessed 9th July 2018.

require the LPPs to have statutory authority. It would also result in the plan preparation process becoming more protracted since it would consist of three rather than two stages: stage 1 - LDP gatecheck strategy identifying housing allocations at the sub-area level – say 1600 houses in the A701 corridor over the plan period; stage 2 - LDP settlement allocations – say 450 houses in Penicuik over the plan period; and finally stage 3 - LPP site specific allocations - say 150 houses on site X within Penicuik over the plan period. Only once the final stage had been completed could the LDP be examined and adopted. Whilst this would constitute a logical progression for policy formulation it is likely that the Scottish Government would consider the process unduly lengthy.

FINAL THOUGHTS

The proposed introduction of LPPs represents a potentially significant downward rescaling of the Scottish development plan framework and a bold response to the acknowledged loss of trust by communities in the post-2006 planning system. Changes to the examination procedures in 2006 have considerably reduced local communities' influence on development plan making. However, in failing to grant LPPs statutory status it is evident that the Scottish Government is unwilling to return real power to local communities, no doubt because it believes that they will derail attempts to considerably expand the supply of new housing through producing highly restrictive plans. Whether PAs and the Scottish Minister will be willing to give significant weight to LPPs, when determining applications and appeals, remains to be seen.

Although the Scottish Government has now clarified at what stage in the LDP preparation process commencement of LPPs should occur it has not addressed the more important matter concerning how the local community council should determine just what share of the sub-area development allocation it should be expected to shoulder within its relatively small area. The failure on the part of the Beveridge Committee and the Scottish Parliament committee to identify, let alone discuss, this geographical mismatch issue raises important questions about the quality of scrutiny in the Scottish planning reform project.

Each of the possible solutions to this mismatch conundrum examined in this paper has its own shortcomings. Finer grained LDPs will take longer to produce and be subject to greater community opposition. Imposing a duty of co-operation upon community councils is logistically unrealistic given the resource constraints which they work within. Joint LPPs, covering several community council areas, will be bereft of the intrinsic local quality which their English counter-parts have and undermine their intended purpose. PA-led LPPs are likely to be seen as little more than the imposition of a strategy from above via the back door. Finally, delegating exclusive responsibility for the critical function of site identification to LPPs will extend the LDP adoption process, counter to the aims of the Scottish Government.

Of course, in the absence of any statutory status for LPPs, it might be contended that resolution of the issue is ultimately not that important since the plan will not bind the PA when determining a planning application. Thus, if an LPP is out of kilter with those produced by the neighbouring communities it will be given very little weight by the PA. With so little detail included in the Bill it is likely that the gaps will eventually have to be filled by a revised Scottish Planning Policy note. This should indicate the spatial scale at which PAs should set out development allocations, when community councils should start preparing an LPP and what weight they should be given when determining a planning application. As things stand at present, the Scottish Government needs to give considerably more thought to the mechanics of LPPs if they are to help restore the loss of community confidence in the planning system identified by the Beveridge Committee.
