

PLANNING (SCOTLAND) ACT 2019

EXPLANATORY NOTES

OVERVIEW OF THE ACT

PART 4 – OTHER MATTERS

Promotion and use of mediation etc.

Section 40: Promotion and use of mediation etc.

203. Section 40 of the Act inserts new section 268A into the 1997 Act. This provides that the Scottish Ministers may prepare guidance on the promotion and use of mediation in the circumstances of: the preparation of local development plans and related evidence reports; pre-application consultation; assisting in the determination of an application for planning permission; and any other matter related to planning that Ministers consider appropriate. The guidance may include provision about the form of mediation that is to be used in a particular circumstance, and the procedure to be followed in any such mediation. Ministers may also vary and revoke such guidance.
204. Local authorities must have regard to any guidance issued under this section. Ministers must consult planning authorities, and such other persons as they consider appropriate, before issuing any guidance, and must make it publicly available.
205. Subsection (7) of new section 268A provides a definition of “mediation” which includes any means of exploring, resolving or reducing disagreement between persons involving an impartial person that the Scottish Ministers consider appropriate.
206. Subsection (8) requires Ministers to publish the guidance within two years of the date on which the Bill for the Act received Royal Assent (by 25 July 2021).

Charges and fees

Section 41: Fees for planning applications etc.

207. Section 41 of the Act amends section 252 of the 1997 Act, which gives the Scottish Ministers powers to make regulations providing for the payment of fees and charges to planning authorities.
208. Section 41(2) inserts a new paragraph into section 252(1) of the 1997 Act, which sets out the activities in respect of which fees or charges may be payable to a planning authority. New paragraph (c) makes it clear that the regulations can make provision for a fee or charge to be payable in respect of the performance of functions by a person appointed by virtue of a scheme of delegation.
209. Section 41(3) of the Act introduces section 252(1ZA) into the 1997 Act, which enables the Scottish Ministers to provide by regulations for the payment of a charge or fee to the Scottish Ministers for their activities in relation to planning. Fees or charges may be specified in respect of the performance by the Scottish Ministers, or a person appointed by them under schedule 4 of the 1997 Act, of functions under the planning Acts and any

associated subordinate legislation, including anything which facilitates, is conducive or incidental to the performance of those planning functions. This could include where the Scottish Ministers, in performance of their planning functions, deliver a service for the benefit of local authorities or where the Scottish Ministers have a role in dealing with planning casework. Subsection (4) makes a consequential modification so that section 252(1A) of the 1997 Act, which clarifies what provision regulations may make, applies to regulations about fees payable to the Scottish Ministers too, instead of only applying to fees payable to planning authorities.

210. Section 41(5) of the Act adjusts section 252(1A)(b) of the 1997 Act so as to provide that this regulation-making power includes the ability to make provision allowing a planning authority to determine how the fee or charge is to be calculated.
211. Section 41(7) substitutes paragraph (e) of section 252(1A) of the 1997 Act and adds a further paragraph (ea). These paragraphs allow the Scottish Ministers to make provision within the regulations permitting a planning authority or the Scottish Ministers to decide whether to charge an applicant the full fee, a reduced fee or waive the fee entirely. They also allow the Scottish Ministers to set limits on that discretion. Further provision is made in subsections inserted by section 41(10). New section 252(1C) allows the regulations to set out steps the authority would be required to take before or after reducing or waiving a fee; for example, they might be required to publish a statement of the circumstances in which they would do so. New subsections (1E) and (1F) of section 252 provide that regulations may allow for fees and charges to be waived for developments that contribute to a social enterprise or not for profit enterprise, or are likely to contribute to improving the health of residents in the area.
212. Section 41(6) of the Act repeals subsection (1A)(da) of section 252 of the 1997 Act, and subsection (8) repeals subsections (1AA) and (1AB) of section 252 of the 1997 Act. These currently allow regulations to make provision for different levels of fees or charges to be payable to different planning authorities, and subsection (1AA) makes clear this may be done where the Scottish Ministers are satisfied that a particular authority is not, or has not been, performing its planning functions satisfactorily. Subsection (9) inserts a new section 252(1AC) which prevents similar provision being made in future on the basis of performance.
213. Section 41(10) introduces new subsections (1C), (1D), (1E) and (1F) into section 252 of the 1997 Act. Subsections (1C), (1E) and (1F) are described in paragraph 211 above. New section 252(1D) allows regulations to make provision for a surcharge to be imposed for retrospective planning applications. The surcharge may not be more than the fee that would be payable for the same application if it was not retrospective, that is, the total retrospective fee may not be more than twice the standard fee.
214. Section 41(11) repeals section 252(2) of the 1997 Act, which made provision for the Secretary of State (now the Scottish Ministers) to make regulations providing for a fee to be paid to him for any planning application deemed to be made to him. This power is replaced by new section 252(1ZA).
215. Section 41(12) of the Act amends section 252(3) of the 1997 Act, which allows regulations to provide for the remission or refunding of fees. The amendments are consequential on the inclusion of fees to be paid to the Scottish Ministers and the repeal of section 252(3).
216. Section 41(13) amends section 252(7) of the 1997 Act. That section currently provides that where a fee is calculated in pursuance of the regulations, planning authorities may only recover the cost of actually providing the function for which the fee is charged. In light of the insertion of section 252(1ZA) (which allows regulations to make provision for the payment of a fee to the Scottish Ministers), section 21(10) of the Act amends this rule so that it applies equally to the Scottish Ministers.

217. As discussed at paragraph 213 above, new section 252(1D) (as inserted by section 21(7) of the Act) enables the regulations to impose a surcharge in the case of applications for retrospective planning permission. Subsection (14) of section 21 of the Act inserts new section 252(9) to make it clear that the restriction in section 252(7) of the 1997 Act would not apply in this situation.

Enforcement

Section 42: Fines: increases and duty of court in determining amount

218. Section 42 of the Act sets out increases in the levels of maximum fine that may be imposed by the courts on conviction for various planning offences and, for certain offences, introduces a requirement for the courts to take account of financial benefit when setting amounts of fines.
219. Subsection (2) makes provision that the maximum penalties for non-compliance with a planning contravention notice set out in sections 126(4) and 126(6) of the 1997 Act are increased. Where the offence is failure to comply with the requirements of a planning contravention notice within 21 days of the date of service, the maximum penalty on summary conviction is increased by section 42(2)(a) of the Act from level three on the standard scale to level five on the standard scale. Where the offence is to knowingly or recklessly make a false or misleading statement in response to a planning contravention notice, the maximum penalty on summary conviction is increased by section 42(2)(b) of the Act from level five on the standard scale to the statutory maximum.
220. Subsection (3) provides that the maximum penalty on summary conviction for the offence of failure to comply with an enforcement notice, set out in section 136(8)(a) of the 1997 Act, increases from £20,000 to £50,000.
221. Subsection (4) relates to an offence where buildings or works have been removed in order to comply with an enforcement notice and subsequently reinstated at a later date (section 138(4) of the 1997 Act). The maximum penalty on summary conviction for this offence is increased from level five on the standard scale to the statutory maximum. Paragraph (b) inserts new section 138(5) which provides that, when a person is convicted of such an offence, the court is to have regard to any financial benefit or likely financial benefit that the convicted person may accrue in consequence of the activity which constituted the offence. This is intended to help ensure that the fine is set at a level that is a genuine deterrent.
222. Subsection (5) increases the maximum penalty on summary conviction for contravention of a stop notice, set out in section 144(5)(a) of the 1997 Act, from £20,000 to £50,000. Subsection (6) similarly increases the maximum penalty for contravention of a temporary stop notice to the same amount (section 144C(6)(a) of the 1997 Act).
223. Subsection (7) provides that the maximum penalty on conviction for the offence of not complying with a breach of condition notice, set out in section 145(12) of the 1997 Act, is increased from level three on the standard scale to level five on the standard scale. Paragraph (b) inserts new section 145(12A) which provides that, when a person is convicted of such an offence, the court is to have regard to any financial benefit or likely financial benefit that the convicted person may accrue in consequence of the activity which constituted the offence. This is intended to help ensure that the fine is set at a level that is a genuine deterrent.
224. Subsection (8) provides that the maximum penalty on summary conviction for the offence of displaying an advertisement in contravention of the [Town and Country Planning \(Control of Advertisements\) \(Scotland\) Regulations 1984](#) as amended (or any replacement regulations) increases from level three on the standard scale to level five on the standard scale. In the case of a continuing offence, the penalty increases from one-tenth of level three on the standard scale to one-tenth of level five on the standard scale for each day the offence continues after conviction.

225. ‘The standard scale’ refers to the standard scale set out in the Criminal Procedure (Scotland) Act 1995. Level three is currently set at £1,000 and level five currently at £5,000 (see section 225(2) of that Act). ‘The statutory maximum’ is also set out in the Criminal Procedure (Scotland) Act 1995, as amended, and is currently set at £10,000 (see section 225(8) of that Act, as read with the definition of “statutory maximum” in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010).

Section 43: Liability for expenses under enforcement notice

226. Section 43 of the Act amends section 135 of the 1997 Act and inserts new sections 158B to 158F into the 1997 Act to extend liability for the cost of direct action taken under section 135(1) of the 1997 Act in connection with an enforcement notice in order to remedy a breach of planning control, and to introduce powers for planning authorities to make charging orders to assist the recovery of those costs.
227. Section 43(2)(a) of the Act amends section 135(1)(b) of the 1997 Act to the effect that liability for the cost of direct action attaches to any person who is then or who subsequently becomes the owner of the land or any part of the land, whether or not that person remains an owner. This extension of the existing rule (that is, the addition of subsequent owners) will only apply to expenses for which an owner becomes liable on or after the date on which section 43 comes into force (see subsection (5)). Liability also attaches, just as it does under the existing provisions of the 1997 Act, to any lessee of the land at the time that the planning authority carry out the work, but that liability does not transmit under the statute to future lessees. Section 43(2)(b) and (c) of the Act together provide that an owner, lessee or occupier can recover any sums paid from the person who committed the breach of planning control, and can do so regardless of whether or not that person remains the owner, lessee or occupier.
228. Section 43(3) inserts new sections into the 1997 Act. New section 158B(1) sets out that where a planning authority or the Scottish Ministers (“the charging body”) have taken action in relation to land under section 135(1), they may make a charging order and apply to register it against the land with Registers of Scotland.
229. New section 158B(2) sets out that once a charging order is registered, the amount payable under section 135(1)(b) of the 1997 Act (i.e. the costs of direct action taken by the planning authority or the Scottish Ministers) becomes payable in instalments instead and can include administrative expenses and, where the charging order provides for it, interest charges. New section 158B(3) sets out what the administrative expenses and interest may cover.
230. Under new section 158C, the charging order must set out the number of instalments in which the total amount is to be paid and the date on which each instalment falls due. The date on which the first instalment is due must be at least 56 days after the date on which the charging order is served, and the number of annual instalments must be between three and 30. New section 158C(3) provides that the charging order may be paid off at any time, either in full or as a lower sum agreed with the charging body. New section 158C(4) establishes that the charging body may at any time waive or reduce the amount payable.
231. New section 158D sets out that a charging order may not be registered unless it is in the form prescribed by the Scottish Ministers in regulations. New section 158D(2) lists information that the regulations must require a charging order to contain. New section 158D(3) requires the charging body to serve a copy of the order on the owner of the land to which it relates.
232. New section 158E requires the charging body to register the discharge of a charging order in the appropriate land register as soon as reasonably practicable after receiving payment in full of the required amount. As with the original order, a discharge of a charging order may not be registered unless it is in the form prescribed.

233. New section 158F provides definitions of various terms in the other inserted sections.
234. Section 43(4) of the Act ensures that the rules in the 1997 Act dealing with restrictions on the display of advertisements can also apply the new provisions on charging orders to liabilities arising under those rules. The rules on display of advertisements are dealt with in section 186 of the 1997 Act and the current position is to allow the rules relating to enforcement notices to be applied with modifications.
235. Section 43(5) provides that the charging order provisions, as well as the amendments to section 135 of the 1997 Act, only apply to liabilities incurred after the date that section 43 comes into force.

Section 44: Enforcement charters: statement on major developments

236. Section 158A of the 1997 Act requires each planning authority to produce an enforcement charter, setting out their policies on enforcement, how breaches of planning control can be brought to their attention and how any complaints about enforcement action can be made and will be dealt with. Section 44 of the Act inserts a new subsection (1A) into section 158A of the 1997 Act, providing that the charter must also contain a statement about how the authority will monitor compliance with planning permissions for major developments, and how they will record such monitoring and make the records available to the public. Such monitoring is particularly important in relation to conditions placed on ongoing operations and restoration, such as for open-cast mining.

Training for taking planning decisions

Section 45: Power to impose training requirements: planning authorities

237. Section 45(1) of the Act provides that where a member of a planning authority has not undertaken the required training, as specified in regulations, they may not perform any function that is specified in the regulations on the planning authority's behalf, either on their own or as a member of a committee or any other decision making body (such as a local review body).
238. Section 45(2)(a) provides that specification of training requirements and the functions to which the prohibition applies will be set out by the Scottish Ministers in regulations. Paragraph (b) clarifies that 'planning authority' means either a local authority or a National Park authority, and paragraph (c) sets out what a "member of a planning authority" means in relation to a National Park authority.
239. Section 45(3) restricts the functions that may be specified in regulations to those conferred by the planning Acts.
240. Section 45(4) provides that any regulations made under this section can specify that training requirements may mean attendance on a training course, and that the Scottish Ministers may specify that the content and provider of the training must be accredited by them.
241. Section 45(5) makes provision that regulations may disapply the requirement for training in relation to either a particular planning authority or all authorities.

Performance of planning authorities

Section 46: Annual report by planning authorities on performance

242. Section 46 of the Act inserts a new Part 12A into the 1997 Act. The new Part 12A comprises new sections 251A, inserted by section 46 of the Act, and 251B, inserted by section 47, and deals with the performance of planning authority functions.

243. New section 251A(1) requires planning authorities to prepare a report on the performance of their functions (or such of their functions as the Scottish Ministers specify) on an annual basis. The report should be submitted as soon as reasonably practicable after the end of the financial year. New section 251A(2) requires the planning authority to submit a copy of the report to the Scottish Ministers and to publish the report.
244. New section 251A(3) makes provision for the Scottish Ministers to set out in regulations the form and content of the report, how it is to be prepared and how it is to be published. The regulations may include what quantitative and qualitative information is to be included in the report, and what outcomes are to be used to assess planning authorities' performance.

Section 47: National performance monitoring

245. New section 251B of the 1997 Act, inserted by section 47 of the Act, makes provision in subsection (1) for the Scottish Ministers to appoint a "national planning improvement co-ordinator" who will monitor the performance by of planning authorities of their functions, as well as providing advice to authorities and other persons on ways in which they may improve their performance. Subsection (2) allows the Scottish Ministers to make further provision by regulations about the appointment and functions of the co-ordinator.

Regulations

Section 48: Regulations

246. Section 275 of the 1997 Act makes general provisions about regulations. Subsection (2A) of that section states that regulations may make different provision for different purposes. Section 48 of the Act adds that they may make different provision for different areas.

Ministerial directions

Section 49: Publication of directions

247. Section 49 inserts a new section 275B into the 1997 Act, requiring the Scottish Ministers to publish any directions made under that Act and their reasons for making them. There are exceptions for: directions given in the form of a regulation or order, which will be published automatically as statutory instruments; directions given before this provision comes into force, and directions given under section 265A of the 1997 Act.
248. Section 265A relates to planning inquiries. It allows the Scottish Ministers or the Secretary of State to direct that evidence to an inquiry may only be heard or inspected by specified persons, if it relates to national security or the security arrangements for any premises or property, and disclosing it in a public inquiry would be contrary to the national interest. It follows that the direction describing such evidence should not be required to be published.

Chief planning officers

Section 50: Chief planning officers

249. Section 50 inserts a new section 1A into the 1997 Act, which requires each planning authority to have a chief planning officer to advise the authority about their functions under the planning Acts and any other functions relating to development. When appointing a chief planning officer, the planning authority must be satisfied that the officer has appropriate qualifications and experience, having regard to any guidance on that matter issued by the Scottish Ministers.

National Scenic Areas

Section 51: National Scenic Areas

250. Section 263A of the 1997 Act provides for the designation of National Scenic Areas, which are areas of outstanding scenic value in a national context. In exercising planning powers with respect to land in any such area, special attention is to be paid to the desirability of safeguarding or enhancing its character or appearance. Section 51(2) of the Act removes the words “the desirability of” from that provision.
251. Subsection (6) of section 263A of the 1997 Act requires the Scottish Ministers, before issuing a direction designating a National Scenic Area, to consult with Scottish Natural Heritage and such other persons as are prescribed. Section 51(3) of the Act adds new paragraphs to require consultation also with residents in and adjacent to the proposed area, and any community body with an interest in the area. Section 51(4) inserts a new section 263B to the 1997 Act, which requires the Scottish Ministers to produce a report on the consultation undertaken, in any year they have designated a new National Scenic Area. This must include the ways in which any views expressed were taken into account, and how the Scottish Ministers will improve their consultation process before issuing any future directions. Under section 3A(4A) of the 1997 Act, inserted by section 2(6) of the Act, the Scottish Ministers must have regard to any such report when preparing the National Planning Framework.

Notice by planning authority of applications for listed building consent

Section 52: Notice by planning authority of applications for listed building consent

252. Section 52 amends section 9 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. Section 9 deals with the making of applications for listed building consent, and subsection (3) enables regulations to make provision about how such applications are to be made, the manner in which they are to be advertised and how they are to be dealt with by planning authorities. The current regulations are the Planning (Listed Building Consent and Conservation Area Consent Procedure) (Scotland) Regulations 2015 ([SSI 243/2015](#)) and the advertisement of applications is dealt with in regulation 8. For planning applications, section 34 of the 1997 Act makes provision for regulations setting out how and to whom notice of applications is to be given, and the current requirements are set out in regulations 18 and 20 of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013 ([SSI 155/2013](#)).
253. Section 52(2) inserts new paragraphs into section 9(3) of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. These provide more detail about how the regulations may address the issue of giving notice and information about the application, and are in line with the powers relating to planning applications. This would allow Ministers, if they wish, to impose the same notification requirements on applications under both Acts.

Forestry and Woodland Strategy

Section 53: Forestry and woodland strategy

254. Section 53 of the Act adds a new section A159 to the 1997 Act, requiring planning authorities to prepare and publish a ‘forestry and woodland strategy’. Subsection (2) of new section A159 sets out what the strategy must cover, subsection (3) provides for consultation requirements, and subsections (4) and (7) requires the strategy to be published (including by electronic means). Subsection (5) and (6) provide that two or more planning authorities may act jointly to prepare a forestry and woodland strategy across their combined area.