

## SUPPLEMENTARY EVIDENCE FROM THE LAW SOCIETY OF SCOTLAND

The Law Society of Scotland's Planning Law Sub-Committee refers to the Scottish Parliament's Economy, Energy and Tourism Committee's call for supplementary evidence on how the duty to promote sustainable economic growth as referred to in Section 4 of the Bill might impact, (positively and/or negatively), on a regulator or regulated activity compared with applying a duty to promote sustainable development when exercising regulatory functions.

The Law Society of Scotland's Planning Law Sub-Committee Convenor, Frances McChlery forwarded this request to the Planning Law Sub-Committee for consideration following upon her appearance before the Economy, Energy and Tourism Committee on 26 June 2013.

The Sub-Committee has had sight of additional written evidence prepared by Professor Andrea Ross, School of Law, University of Dundee who is also a Sub-Committee member, and is broadly in agreement with the terms of Professor Ross's paper and in particular, the examples she refers to.

The Sub-Committee considers that both planning decision makers, and developers and promoters already understand the concept of 'sustainable development' as an internationally well established, balanced and self contained phrase. The phrase, is already embedded in Scots law and policy relating to development planning and environmental permitting. 'Contributing to sustainable development' the existing legal duty, already reflects the need to support development, but also the obligation, shared internationally, to evaluate development proposals against any adverse environmental or social impact, and not to support development which is environmentally unsustainable, in that permitting it would prejudice or undermine the duty of stewardship of the world's resources. In common with several witnesses before the Committee, the Sub-Committee does not consider that an additional duty to promote 'sustainable economic growth' would add anything positive to the existing principle, and considers that the proposed new duty introduces some confusion about what should and should not be considered in any decision making process. Accordingly, the Sub-Committee questions the requirement for an additional duty in respect of 'sustainable economic growth'.

In terms of examples of ill effects of the duty, were it to be imposed on the existing planning or environmental permitting systems, the Sub-Committee would highlight that it is likely to lead to a perception in the application process that developers and / or decision makers should have detailed regard to the economic aspects and prospects of the proposals during the planning or environmental permitting process. The planning system does not handle such financial evidence well, and it has long been the established view that assessing the benefits, or indeed prospects of success, of an investment is not a proper concern for the planning or environmental system. The environmental permitting system has slightly wider financial assessment duties to enable them to evaluate the cost of environmental protection measures, but these are still not sufficiently wide to include the business prospects of any application. Both the planning system and the environmental permitting systems are designed to have regard to geography, including human geography, and for the management of space. These systems are not currently equipped to extend their considerations to the economic benefits or prospects of success of development proposals, in any but the most general sense, such as the prospects for

employment, and the adequacy of the supply of land in the right location. It is submitted that investment issues should remain a matter for the investor, and if public intervention is involved, that should continue to be policed by the enterprise function of government.

To revert to the question of whether there would be benefits in principle, the Sub-Committee further notes that, on the basis that there is to be a duty based on economic growth, then the wording appears to raise the implication that scales are permanently tilted in favour of the economic arguments to the detriment of all others. Although individually this difference in each decision may be at the margins, the cumulative effect is that if every marginal decision prioritises economic over other considerations, then this may mean that the environmental balancing process will be skewed away from protecting the environment. As some of our legal commentators have observed, this could well mean despite any perceived increase in economic prosperity that we would be poorer in other respects and, adopting the Scottish Government's own language, Scotland may be wealthier, but not fairer, safer or greener. This contrasts with existing government policy about the environment of Scotland which recognises the immense value of high environmental standards to the Scottish economy in their own right.

On this point and by way of further practical examples of anticipated problems, there are a significant number of examples throughout Scotland's economic history where economically based decisions have later come to be regretted, in particular, unregulated heavy industry and mineral extraction or exploitation in Scotland which was permitted to operate in ways that left a legacy of contaminated land and river pollution for future generations to address. The modern approach, which the Sub-Committee would regard as well established as fit for purpose, is intended to avoid such bad decisions, and ensure appropriate management. Because of enhanced scrutiny, we would hopefully now be able to identify and avoid sustainability disasters like the Highland Clearances, which appeared to be the economic answer at that time, or leaving to future generations the legacy of dereliction and pollution from an earlier age where the environment was ignored, or regarded as inexhaustible. Portavadie village, never used for its purpose, and now derelict for 20 years, was another example of poor decision making in the past where undue emphasis on the hope of economic development led to a wasteful exercise in planning terms.

Recent experience with the liquidation of coal operators, or indeed with the delays in delivering the benefits promised with the Trump golf resort proposals, demonstrate that it cannot all be left to bonds or conditions to ensure either clean up or delivery of the promised benefits. Some things have to be carefully examined from first principles at the time of decision.

In all development permission decisions the issues are finely balanced, and that balance is already well reflected in the phrase 'sustainable development'. In all cases regulators in taking individual decisions would be putting into their considerations a host of different considerations - economic, social and environmental – and the concern is that if there is a duty based on economic growth, then the scales are permanently tilted in favour of the economic arguments to the detriment of all others, notwithstanding their importance.