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The Planning (Wales) Act 2015: a case study in evidence-based planning reform under devolution

Huw Williams and Victoria Jenkins¹

Introduction

The Planning (Wales) Bill was introduced into the National Assembly for Wales on 6th October 2014 and received Royal Assent on 6th July 2015. This Act is the second piece of legislation in a series that began with the introduction of the Well-being of Future Generations (Wales) Act 2015. It has been followed by new laws on environmental and heritage protection.

The Planning (Wales) Act 2015 builds on distinct Welsh policy and administrative innovations that even pre-date the election of the First National Assembly in 1999. However, this new primary legislation marks a leap forward in the adoption of a distinctive approach, particularly to development planning in Wales; and one devised from a significant evidence base. The background and foundations of this Bill have already been considered in some depth by the authors in works previously published in this journal, so this paper concentrates on how the new Act takes the process of redesign and reform forward.²

We begin by considering how the new Act builds upon previous developments in policy, administration and secondary legislation. This is followed by a discussion of the evidence base assembled, in particular by the Independent Advisory Group (IAG). It then outlines the provisions of the Act before discussing how they respond to the work of the IAG and the evidence base. The final section considers how this new approach to land use development in Wales will work alongside the development of laws on the well-being of future generations, environmental protection and heritage conservation.

The process of reform is still evolving and the position described in this article is at 31st January 2016.

Planning Law in Wales Prior to the Planning (Wales) Act 2015³

The position up to 2004

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² H. Williams and M. Jarman "Planning Policies and Development Plans in Wales – Change and Coexistence" [2007] J.P.L 985 and V Jenkins, 'The Proposals for the Reform of Land Use Planning in Wales' *Journal of Planning Law* (2014) Issue 10 1055-1204.

³ For a more detailed discussion of planning law in Wales from 1964 to 2007 see Williams and Jarman *ibid.*

Town and Country Planning was one of the earliest topics devolved to the Welsh Office on its foundation in 1964. However, for many years the only significant feature to distinguish the planning system operating in Wales from that in England was that the functions of the Secretary of State were exercised in Wales by the Secretary of State for Wales.

Nevertheless, by the election of the First National Assembly, in 1999, the Welsh planning system had already begun to acquire some distinctive features. First, there was the introduction of unitary development plans following the establishment of unitary authorities as the single tier of principal local authorities in Wales under the Local Government (Wales) Act 1994. Secondly, there was the adoption in 1995 of a unified national planning policy statement, published initially as Planning Guidance (Wales) and now referred to as Planning Policy Wales, supported by a series of Technical Advice Notes. In progressively updated editions⁴ this remains the basic structure for national planning policy in Wales today and in many respects this approach prefigured the National Planning Framework and the Planning Practice Guidance now in place in England.

The Government of Wales Act 1998 transferred the secondary legislative powers of the Secretary of State to the National Assembly for Wales (then in its original form as a single unitary body). In light of the importance of secondary legislation to land use planning this devolution of powers was not insignificant.⁵

However, it is important to recall that at this point in the story of Welsh devolution the Assembly still had to negotiate with the UK Government if it wished to pursue policies that required primary legislation, both to secure consent for its proposals and for legislative time to be made available at Westminster.

Post 2004 England and Wales Planning Legislation Relating to Wales

The Planning and Compulsory Purchase Act 2004

The first legislative opportunity for Welsh planning reform was presented by the Planning and Compulsory Purchase Act 2004. The powers gained under that Act enabled the National Assembly to strike a distinctively Welsh path in relation to statutory development planning.

⁴ Currently Planning Policy Wales edition 8 published on the 4th January.

⁵ See further Jenkins above n.1 above.

The Act did so by providing a statutory basis for the Wales Spatial Plan (WSP). This had been in preparation on a non-statutory basis and implemented the European Spatial Planning Perspective (1999) on a national level - unlike England where Regional Spatial Strategies were adopted. However, although founded in statute the WSP was not given development plan status and this was to prove a serious weakness in terms of its influence on the development plan making process in Wales.

Wales also retained the principle of a single statutory development plan and proposals map for each Local Planning Authority (LPA) through a system of Local Development Plans (LDPs). This represented an evolution of the existing system of unitary development plans, rather than following the more radical (and subsequently much criticised) core strategy and development plan documents model adopted in England at the same time.

The Planning Act 2008

The next major piece of planning legislation to be passed by the UK Parliament was the Planning Act 2008. This is of interest in relation to Wales as a demonstration of the cumbersome hybrid legislative arrangements enacted in the Government of Wales Act 2006. Part 3 of the Act created a system whereby Parliament could confer powers on the National Assembly to make primary legislation in the form of Measures.⁶ Such powers were conferred either through an Order in Council procedure, known as a Legislative Consent Order (LCO), or directly by provisions in an Act of Parliament.

The Planning Act 2008 was an example of the latter procedure and gave legislative powers over statutory plan making in Wales to the national Assembly.⁷ As a result, complete legislative control over the distinctive Welsh LDP system was devolved. However, for reasons that are now obscure, primary legislative powers over the development control system were retained by the UK Parliament.

The Planning Act 2008 had a number of other effects in relation to Wales. The Community Infrastructure Levy (CIL) was enacted with its extent covering both England and Wales.⁸ This was due to its financial character, as the UK Government considered it akin to a taxation measure and for that reason falling outside the devolved subject of Town and Country Planning. This was notwithstanding the interaction of the machinery of CIL with the powers relating to planning agreements between planning authorities and developers under section 106 of the Town and Country Planning Act 1990. This created doubts over the ability of the National Assembly to legislate in relation to s.106.

⁶ Government of Wales Act 2006 Part 3

⁷ Section 202 Planning Act 2008 section 202 amending Part 1 of Schedule 5 to the Government of Wales Act 2006 (Assembly measures: matters within Assembly's legislative competence).

⁸ Planning Act 2008, Part 11

The Development Consent Order (DCO) system introduced for nationally significant infrastructure projects was applied to Wales, but only in relation to projects where Welsh Ministers did not have devolved responsibility. Principally these are energy generating projects with an installed capacity of over 50 Mw on-shore and 100 Mw off-shore, certain overhead electricity lines and port development.⁹

Finally, the 2008 Act gave the Welsh Ministers secondary legislative powers to apply in Wales certain modifications to planning legislation introduced in England.¹⁰

Primary Law Making Powers for Wales in the Field of Planning Law

The Localism Bill of 2010 as introduced would have given the National Assembly primary legislative powers by Measure over the development control system in Wales. However, while the Bill was still in Parliament the implementation of Part 4 of the Government of Wales Act 2006 was approved by the Welsh electorate in a referendum on 3rd March 2011.

Accordingly, the Fourth National Assembly, elected in 2011, had powers to pass primary legislation (Acts of the National Assembly) in 20 conferred subjects, including local government, planning, public administration and the Welsh Language.¹¹ Thus the devolved institutions have gained control over both development planning and development control (subject to a few exceptions including some major energy and ports development and the CIL, as already noted).

The Legislative Programme 2011 – 2015

⁹ Planning Act 2008 Part 3. Also included are underground gas storage and construction of pipelines longer than 16.09km

¹⁰ section 189 (compensation where development order or local development order withdrawn);

- section 190 (power to make non-material changes to planning permission);
- section 194(1) and Schedule 9 (use of land: power to override easements and other rights);
- section 195 (applications and appeals by statutory undertakers);
- section 196 and Schedule 10 (determination of procedure for certain proceedings);
- paragraphs 2(3) and (4) and 3(3) of Schedule 7 (powers of LPA to decline to determine subsequent or overlapping applications).

See Planning Act 2008, section 203.

¹¹ Government of Wales Act 2006, Part 4.

The Planning (Wales) Act 2015 forms one element of a substantial programme of legislation in the broader environment field which includes three further Acts. The Well-being of Future Generations (Wales) Act 2015 (the Well-being Act), aims to make sustainable development the “central organising principle” of public administration in Wales; the Environment (Wales) Act 2016 (the Environment Act) which sets out a statutory purpose for the Natural Resources Body for Wales NRW)¹² and creates a framework for natural resource planning for Wales; and the Historic Environment (Wales) Act 2016 (the Historic Environment Act) which reforms the arrangements for the protection ancient monuments, historic gardens and landscapes.

The Welsh Government has described the linkage between the three Acts, in terms of what is necessary for Wales to develop sustainably by providing: first, a clear idea of what we are aiming for and an understanding of the key principles that will guide us; secondly, a clear picture of the natural resources we have, the risks they face and the opportunities they provide; and, thirdly, an efficient process that ensures the right development is located in the right place to make it happen.

The three pieces of legislation aim to do this in four ways. Firstly, by legislating for seven “well-being goals” and requiring public bodies to apply the sustainable development principle in five key ways (Well-being Act). Secondly, by putting in place a modern statutory process to plan and manage our natural resources in a joined up and sustainable way (Environment Act). Thirdly, by improving the existing Planning process to ensure the right development is located in the right place (Planning (Wales) Act 2015).¹³

Finally, the introduction of land use planning reform alongside new approaches to planning for future generation, natural resource management and heritage protection provided a unique opportunity to create an entirely innovative and ‘joined up’ approach to these aims. However, as outlined below, each of the new acts has created a different ‘planning’ architecture that does not necessarily provide or pave the way for an integrated approach – or at least not on the face of the legislation.

¹² Established under powers conferred on the Welsh Ministers under the Public Bodies Act 2010 to enable the merger of the Countryside Council for Wales with the Welsh functions and operations of the Environment Agency and the Forestry Commission.

¹³ See Welsh Government “The link between Well-being of Future Generations Wales Bill, the Planning (Wales) Bill and the Environment Wales Bill” <http://gov.wales/docs/desh/publications/150223-three-bills-diagram-en.pdf>

The Evidence Base for the Planning (Wales) Act 2015

As outlined in our previous work, the Draft Planning Bill was based on a substantial evidence base, most of which was commissioned by the Welsh Government.¹⁴ A further piece of research was commissioned from the RTPI on the operation of planning committees in Wales in response to a recommendation by the Independent Advisory Group (IAG) that an independent study should be carried out to assess whether there was a link between the efficiency and effectiveness of planning committees and their size.¹⁵

The IAG which produced one of the most influential reports in the evidence base was appointed by the then Minister for Environment and Sustainability, John Griffiths¹⁶, with a remit to:

Identify the key policy objectives that the planning system is required to deliver now and in the future;

Assess existing institutional delivery arrangements, noting areas of good practice and areas in need of improvement; and

Propose options for the future delivery of the planning system, including plan making and development management services.

The IAG delivered their report in the early summer of 2012. Entitled “*Towards a Welsh Planning Act: Ensuring the Planning System Delivers*”¹⁷ it made a total of 97 recommendations. These included the following: an overarching statutory purpose for the planning system based on the land use aspects of sustainable development; Welsh Ministers taking decisions on nationally significant devolved infrastructure schemes; preparation of a national framework within which local planning authorities can deliver LDPs; the introduction of a statutory framework for strategic planning at a level above individual LPAs (which could accommodate a City Region approach to spatial planning); the establishment of a planning advisory and improvement body; and a number of detailed changes to development management and enforcement.

¹⁴ECOTEC, *Evaluation of the Processes used to Develop National Planning Policy in Wales* (Welsh Government, 2007); *Planning for Sustainable Economic Renewal: Research Report to Welsh Government* (Welsh Government, 2011); *Delivery of Planning Services in Statutory Designated Landscapes in Wales* (Welsh Government, 2012); ARUP and Fortismere Associates, *Research into the Review of the Planning Enforcement System in Wales* (Welsh Government, 2013); and Fortismere 13). Available at <http://wales.gov.uk/topics/planning/planningresearch/publishedresearch/?lang=en>.

¹⁵Fortismere Associates and ARUP, *Study into the Operation of Planning Committees in Wales* (RTPI Associates and ARUP, *Evaluation of the Planning Permission Process for Housing* (Welsh Government, 20Cymru. See available at 2013).

<http://wales.gov.uk/topics/planning/planningresearch/publishedresearch/operation-of-planning-committees/?lang=en>

¹⁶ The members of the IAG were: John Davies MBE (Chair – former Chief planning Inspector for Wales), Jane Carpenter, CBI (Redrow Homes), Andrew Farrow, Flintshire County Council, Chris Sutton, CBI (Jones Lang LaSalle), Lucy Taylor, Planning Aid Wales (Newport City Council), Mike Webb, RSPB and Huw Williams, Law Society (Geldards LLP).

¹⁷ *Towards a Welsh Planning Act: Ensuring the Planning System Delivers: Report to the Welsh Government by the Independent Advisory Group* (IAG, 2012). Available at

The IAG's report gave an overview of the reformed system that it envisaged would emerge from their recommendations and it is worth recounting this in full to enable a judgement to be made as to whether the final piece of legislation has actually met these aims:

“The system we propose will be recognisable as an evolution of the planning system put in place in 1947 that has adapted to meet the needs of greater complexity, the need for development to be sustainable, and the particular requirements of Wales.

Planning law will set an overarching purpose of planning in the 21st century based on the use of land for sustainable development. This will provide a common focus for all participants and guide decision making when there are gaps in plans or policies.

Democratically elected local planning authorities remain at the heart of the delivery of planning.

As a small country, Wales will retain only two tiers of planning at national and at unitary authority level. Nonetheless, the national level is enhanced to allow nationally significant projects and planning goals to be achieved.

The national and unitary level is supplemented by arrangements at regional and community level to address the weaknesses of the present system we have identified.”¹⁸

It was clear from this report that the key principles underlying the Planning (Wales) Act 2015 should be: the need to espouse sustainable development as the overall purpose of the planning system; to ensure that this was underlined by a system founded in democratic decision making; and to provide a system appropriate to a small country but with national and regional leadership. Introducing the IAG's report in the National Assembly on 25th September 2012 the Minister stated that the Bill would “build on the vision of the IAG”, but also heavily emphasised the need for the planning system to respond to concerns for sustainable growth and economic recovery in Wales.¹⁹

The Planning (Wales) Act 2015

Having assembled its evidence base and announced its intention to legislate, in December 2013 the Welsh Government published a White Paper along with a draft Planning (Wales) Bill: *Positive Planning: Proposals to reform the planning system in Wales* for consultation.²⁰

<http://wales.gov.uk/topics/planning/planningresearch/publishedresearch/towardsawelshplanningact/?lang=en>

¹⁸ Ibid, page 122.

¹⁹ [http://www.assembly.wales/record%20of%20proceedings%20documents/the%20record%20\(pdf,%20967kb\)-25092012-238757/rop20120925qv-english.pdf](http://www.assembly.wales/record%20of%20proceedings%20documents/the%20record%20(pdf,%20967kb)-25092012-238757/rop20120925qv-english.pdf)

²⁰ <http://wales.gov.uk/consultations/planning/draft-planning-wales-bill/?lang=en>

It is also important to note the place of primary legislation in a wider programme of planning reform. The White Paper estimated that of the IAG's recommendations that had been adopted only about a third would require new or amended primary legislation. The remainder would be achieved by applying or commencing existing statutory powers; through new or amended secondary legislation under existing powers; or through new or amended guidance and policy.

The White Paper identified a need for culture change, moving away from regulating development towards encouraging and supporting development. It grouped the Government's proposals into four themes: supporting culture change; active stewardship; improving collaboration; and improving local delivery.

The Act is arranged in nine parts, as follows²¹:

Part 1 - Introduction

Part 2 – Sustainable Development; establishing a legislative link with the Well-being Act.

Part 3 - Development planning, including the preparation of a National Development Framework (NDF) for Wales, and the designation of strategic planning areas.

Part 4 - Pre-application procedure for applications for planning permission.

Part 5 – Applications to Welsh Ministers, including applications for planning permission for DNS

Part 6 - Development Management.

Part 7 - Enforcement and appeals.

Part 8 - Town and village greens, including restrictions on the time and circumstances within which applications to register land as a town or village green may be made.

Part 9 – General Provisions

Part 1 - Introduction

As is now customary for Welsh legislation the Act starts with an overview setting out briefly what each succeeding part of the Act is about.²²

²¹ When the Bill was published a "Keeling Schedule" was also produced showing how the provisions in existing legislation would read when amended. However, the Schedule should be treated with caution as it was not kept up to date during the passage of the Bill.

²² Section 1 Planning (Wales) Act 2015.

The Act (with the exception of part 2 – Sustainable Development) proceeds by way of amendments to the Town and Country Planning Act 1990, the Planning and Compulsory Purchase Act 2004, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990 and the Commons Act 2006. Consequently these now contain a mixture of provisions common to England and Wales alongside England-only and Wales-only provisions.

The Commons Act 2006 is also amended in respect of town and village greens. There are minor and consequential amendments to other specified pieces of legislation.

Part 2 – Sustainable Development

The functions of the Welsh Ministers, a Local Planning Authority (LPA) or any other public body exercising statutory plan making functions (i.e. the NDF, a strategic development plan or a LDP) relating to plan making or development must contribute to sustainable development²³. This requirement also applies to any function related to an application for planning permission made (or proposed to be made) to the Welsh Ministers or to a local planning authority in Wales.²⁴

This duty is expressed as a requirement for these functions to be exercised for the purposes of ensuring that the development and use of land contributes to improving the economic, social, environmental and cultural well-being of Wales, as part of carrying out sustainable development in accordance with the Well-being Act.²⁵ In complying with the duty a public body must take account of guidance issued by the Welsh Ministers, including guidance under this Act.²⁶

There are two further points to note. First, the definition of “public body” covers a number of statutory consultees – Natural Resources Wales, national park authorities, fire and rescue authorities and Public Health Wales. Other consultees, for example water and sewerage undertakers, the Health and Safety Executive and the Coal Authority are not subject to this duty or the requirements of the Well-being Act in their roles in the planning system.²⁷ The excluded bodies are ones which only exercise functions in Wales either in relation to non-devolved subjects or in cases where there is limited devolution (such as water).

²³ Sections 2(1) and 2(2) Planning (Wales) Act 2015.

²⁴ Ibid.

²⁵ Section 2(2) Planning (Wales) Act 2015.

²⁶ Section 2(3) Planning (Wales) Act 2015.

²⁷ A public body is defined by reference to s.6 Well-Being of Future Generations (Wales) Act 2015 as follows:

- (a) the Welsh Ministers;
- (b) a local authority;
- (c) a Local Health Board;
- (d) the following NHS Trusts—
 - (i) Public Health Wales;
 - (ii) Velindre;
- (e) a National Park Authority for a National Park in Wales;

Secondly, this duty does not of itself affect the statutory duties of planning authorities in determining planning applications; either in terms of the duty under section 70 (2) of the Town and Country Planning Act 1990 to have regard to the development plan, so far as material and any other material planning considerations; or the weight to be given to any consideration to which regard is to be had.²⁸ Accordingly, the sustainable development duty will be an “other material consideration” to be weighed in the “planning balance” in determining a planning application.

Part 3 - Development Planning

The National Development Framework

The Welsh Ministers will be under a duty to prepare and keep up to date a national land use plan, known as the NDF for Wales.²⁹ The evidence base for the Act showed that the Wales Spatial Plan did not provide a sufficient steer at an appropriate scale to influence LDPs directly and its lack of statutory development plan status exacerbated this situation.³⁰

The NDF will be kept under review and within five years of publication the Welsh Ministers must either undertake a revision or publish an explanation of why they have decided not to revise it.³¹ Importantly, the NDF will have development plan status.³²

The NDF (unlike the Wales Spatial Plan) may make site specific allocations and the Welsh Ministers have power to designate such allocated development as nationally significant development.³³

The Act sets out requirements for public participation and consultation in the preparation of the plan.³⁴ It also provides for the carrying out of a sustainability appraisal that must include an assessment of likely effects on the Welsh language.³⁵

-
- (f) a Welsh fire and rescue authority;
 - (g) the Natural Resources Body for Wales;
 - (h) the Higher Education Funding Council for Wales;
 - (i) the Arts Council of Wales;
 - (j) the Sports Council for Wales;
 - (k) the National Library of Wales;
 - (l) the National Museum of Wales.

S2(4) Planning (Wales) Act 2015. Meaning of “public body”

²⁸ Section 2(5) Planning (Wales) Act 2015.

²⁹ S60 Town and Country Planning Act 1990.

³⁰ See further IAG report n. above.

³¹ Section 60C Town and Country Planning Act 1990.

³² S38(4) Planning and Compulsory Purchase Act 2004.

³³ S60(3) Town and Country Planning Act 1990.

³⁴ S60A Town and Country Planning Act 1990.

³⁵ S60B (1) and (2) Town and Country Planning Act 1990 respectively.

Having consulted on the draft Framework, the Welsh Ministers must then lay the draft before the National Assembly along with a report on consultation setting out the representations made and how the draft responds to them.³⁶ The National Assembly then has 60 days to consider the draft.³⁷ The process for consideration is under the control of the Assembly and its standing orders. It remains to be seen how the National Assembly will decide to examine the draft Framework. The Welsh Ministers must “have regard” to any resolution or recommendation of the National Assembly.³⁸ At the same time as the Framework is published in its final form, the Ministers must also lay before the Assembly a statement explaining how they have had regard to the Assembly’s resolution or recommendation.³⁹

Local and Strategic Development Plans

LDP preparation is also addressed in the Act. The sustainability appraisal of LDPs must now include the likely effects on the Welsh Language.⁴⁰ There is also requirement for local planning authorities to notify the Welsh Ministers of any resolution to withdraw their LDP.⁴¹ This is intended to ensure that LDPs which are potentially capable of adoption are not withdrawn for non-planning reasons (e.g. a change in political control of an LPA). Perhaps most significantly LDPs will have to include an end date for LDPs after which they cease to be a development plan for the purposes of decision making. Consequently, planning applications determined after the LDP expires will have to be determined in the light of the remaining extant tiers of development plan, i.e. the forthcoming NDF, any relevant SDP, and national planning policy as expressed in Planning Policy Wales.⁴²

The Act also includes powers to designate strategic planning areas and establish Strategic Planning Panels (SPPs), as recommended by the IAG. The Panels will have corporate status and be responsible for creating a Strategic Development Plan (SDP).⁴³ The SDP’s give a statutory basis to a City Region approach to land use planning to be focused potentially around Cardiff/Newport, Swansea Bay and North-East Wales.⁴⁴

³⁶ S60B(3) Town and Country Planning Act 1990.

³⁷ s60B(5) Town and Country Planning Act 1990.

³⁸ S60B(5) Town and Country Planning Act 1990.

³⁹ S60B(6) Town and Country Planning Act 1990.

⁴⁰ S61(2)(a) Planning and Compulsory Purchase Act 2004.

⁴¹ S66A Planning and Compulsory Purchase Act 2004.

⁴² S62 Planning and Compulsory Purchase Act 2004.

⁴³ Sections 60D to J Planning and Compulsory Purchase Act 2004.

⁴⁴ See further IAG report n. 17above.

The Welsh Ministers will have the power to direct two or more local planning authorities to produce a joint LDP.⁴⁵ The options for joint working are also improved by the updating of the powers to establish Joint Planning Boards under the Town and Country Planning Act 1990, which will be enabled to discharge all planning functions of an LPA and not just development control as at present.⁴⁶ The Act also makes provision for Welsh Ministers to introduce regulations (subject to Assembly approval) to allow a joint planning board to exercise the development control powers of a national park authority. However, the functions relating to a national park authority's LDP would remain with the park authority due to the need to maintain the connection with the national park's management plan.

Part 4 - Pre-Application Procedure

The Act includes a requirement for early community consultation on some developments, which will be specified in a development order,⁴⁷ but with the intent that the requirement is to apply to "major developments" and DNS applications.⁴⁸ Applicants will be required to publicise their proposal and carry out consultation before submitting their applications. They will also be required to submit a pre-application consultation report with their applications. This is intended to ensure that communities and statutory consultees can influence major development proposals before a planning application is submitted. There is also provision for the Welsh Ministers to make regulations in respect of the pre-application advice to be provided by the Welsh Ministers and by local planning authorities.⁴⁹ This is intended to provide a consistent approach to pre-application services across Wales. Welsh Government have consulted and put legislation before the Assembly on setting a fee for LPAs to charge for the delivery of the pre-application service as set out in regulations.⁵⁰ So far as statutory consultees are concerned, the Act includes provision for statutory consultees in the planning application process to be required to provide substantive responses to pre-application consultation requests.⁵¹

⁴⁵ S72 Planning and Compulsory Purchase Act 2004.

⁴⁶ Section 62(7) and s. 78(3) Planning and Compulsory Purchase Act 2004.

⁴⁷ S61Z Town and Country Planning Act 1990.

⁴⁸ See further the consultation paper Frontloading the Development Management System (Welsh Government, 2015) WG 23314.

⁴⁹ S61ZI Town and Country Planning Act 1990.

⁵⁰ See further the options discussed in the consultation paper at n.49 above. The legislation was placed before the Assembly on 26th January.

⁵¹ S61Z(1)(9) Town and Country Planning Act 1990 (inserted by section 17 Planning (Wales) Act 2015).

Part 5 - Applications to Welsh Ministers

Developments of National Significance

The Act includes power for the Welsh Ministers to decide on planning applications for DNS to Wales.⁵² Categories of nationally significant developments will be specified in regulations,⁵³ but is expected to cover many of the categories of nationally significant development that in England are dealt with under the Planning Act 2008.⁵⁴

The NDF can specify specific locations for some developments, which will then become subject to the DNS procedure.⁵⁵ The Welsh Ministers will also have powers to require applications for “secondary consents” that relate to or are connected with nationally significant development of land, to be made to them to enable co-ordinated decision-making.⁵⁶

Where a DNS application is made, the LPA must prepare and the Welsh Ministers must have regard to a Local Impact Report (LIR and part of the application fee is intended to be shared with the LPA for preparing the LIR.⁵⁷

Direct applications to the Welsh Ministers

With regard to the efficient running of the planning system, there will be a power for the Welsh Ministers to designate a LPA as underperforming and to give applicants for planning permission the right to apply directly to the Welsh Ministers.⁵⁸

Part 6 - Development Management

The Act introduces a number of practical measures to improve the development management process. They include:

- A simple paper based appeal procedure to resolve disputes about validation.⁵⁹
- Removal of the duty to submit a design and access statement with every application.⁶⁰

⁵² Sections 62D and E Town and Country Planning Act 1990.

⁵³ S62D(3) Town and Country Planning Act 1990.

⁵⁴ See Welsh Government Consultation WG25023 “Developments of National Significance” issued 20th May 2015

⁵⁵ See n. 32 above.

⁵⁶ Sections 62F-H Town and Country Planning Act 1990.

⁵⁷ Sections 62I-K Town and Country Planning Act 1990.

⁵⁸ Section 62M Town and Country Planning Act 1990.

⁵⁹ S62ZA-D Town and Country Planning Act 1990.

⁶⁰ By amendments to amendments to article 7 of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012. See Consultation on Proposed amendments to secondary legislation for development management covering: • Statutory Consultees • Design and Access Statements • Houses in Multiple Occupation. Welsh Government Consultation Document WG26011 3 August 2015.

- Powers to specify the form of decision notice, a requirement to specify the documents and plans describing the development as approved and the introduction a deemed condition that the development must conform to them.⁶¹ This implements the IAG's recommendation that the decision notice is maintained as a "living document" that is updated each time there is an amendment or a reserved matter or a condition is approved. This will be a welcome provision for those seeking to establish the planning history of a development for the purposes of future property transactions and will also aid enforcement by making it easier to establish if a development conforms to the approved reserved matters or details.
- A requirement for developers to notify their local planning authorities of the date on which development is to begin and the details of the planning permission they are implementing.⁶² The intention of this provision is to remove confusion that can often result when carrying out operations claimed to have implemented planning permissions.
- A requirement that a copy of the planning permission must be displayed on site throughout the development. This will further aid enforcement.⁶³
- Provisions regarding the duration of "amended" permissions granted under section 73 of the Town and Country Planning Act 1990.⁶⁴
- The inclusion of the Welsh language as a material consideration in applications in relation to Wales – although it is made explicit that this should not alter decisions as to whether regard is to be had to any particular consideration or the weight to be attached to any consideration.⁶⁵
- Extension of the duties on statutory consultees to respond to consultations on applications for the approval of reserved matters or details pursuant to a planning condition and applications for non-material changes to planning permission.⁶⁶
- Allowing applications to stop up or divert public paths to be made before planning permission is granted.⁶⁷
- Prohibiting retrospective applications where there has already been an enforcement appeal.

⁶¹ S71ZA Town and Country Planning Act 1990.

⁶² S71ZB Town and Country Planning Act 1990.

⁶³ S71B(2) Town and Country Planning Act 1990.

⁶⁴ S91 3ZA-D Town and Country Planning Act 1990.

⁶⁵ S70(2aa) and s70(2ZA) Town and Country Planning Act 1990.

⁶⁶ S100A Town and Country Planning Act 1990

⁶⁷ S259 Town and Country Planning Act 1990.

- Powers to make regulations to prescribe the size of planning committees and to introduce a national scheme of delegation. This provision implements the recommendations of the research study carried out by the RTPi on the recommendation of the IAG as part of the evidence base.⁶⁸

Part 7 - Enforcement and Appeals

Enforcement

The Act includes provisions aimed at improving enforcement and reducing the opportunities to delay effective enforcement action.

It gives a statutory basis for the sending of warnings stating that unless an application for permission is made within a specified period, enforcement action may be taken.⁶⁹ It also removes the right of appeal against an enforcement notice on the ground that permission should be granted, if the unauthorised development has already been considered and rejected on appeal.⁷⁰

Appeals

The Act also makes changes to the planning appeals process. Most significantly the Act provides the Welsh Ministers with broad powers to make regulations prescribing the procedure to be followed in any appeal, hearing or consideration on the basis of written representations and in deciding applications on DNS.⁷¹ There are also provisions on the Welsh Ministers costs in relation to such applications which are to be recovered from the applicant.⁷² The Act also includes a restriction on varying applications once notice of an appeal has been served.⁷³ This will mean applicants must give proper consideration to and make early decisions about the form of their application as the application subject to appeal will be the same as it was before the LPA. Provision is also made for appeals against untidy land notices to be made to the Welsh Ministers instead of the Magistrates Court.⁷⁴

⁶⁸ Sections 319ZA-B Town and Country Planning Act 1990.

⁶⁹ Section 173ZA Town and Country Planning Act 1990.

⁷⁰ Section 78 (4A) Town and Country Planning Act 1990.

⁷¹ S323A Town and Country Planning Act 1990.

⁷² S322C Town and Country Planning Act 1990.

⁷³ S78 (4BA) Town and Country Planning Act 1990.

⁷⁴ S217 Town and Country Planning Act 1990.

Part 8 - Town and Village Greens

The Act amends the Commons Act 2006 in relation to applications to register new town or village greens. The initial proposals to adopt the reforms already in place in England were watered down during the legislative process. As a result the period of two years from the withdrawal of access to make a registration application is retained. Furthermore a site will only gain “immunity” from a registration application once planning permission is granted, rather than from the point at which a site enters the planning system (whether by a statutory plan allocation proposal or through a planning application) as is the case in England.⁷⁵

Other elements of the Reform Programme

It is important to bear in mind that the Planning (Wales) Act 2015 is part of the wider programme of reform that includes many measures that do not require amendments to primary legislation. As already noted, in its White paper the Welsh Government estimated that of the IAG’s recommendations that have been adopted only about a third will require new or amended primary legislation. The remainder can be achieved through new or amended secondary legislation, new or revised policy initiatives or the creation of non-statutory working arrangements. This section sets out the most significant initiatives.

Establishment of a Planning Advisory and Improvement Service

The IAG recommended the establishment of a Planning Advisory and Improvement Service to identify and encourage good practice and to offer support to local planning authorities. The IAG attached considerable importance to the service as an engine of culture change in the planning system. The Welsh Ministers responded to this recommendation by setting up an interim Board to scope the Service’s future remit.⁷⁶ The interim Board published an extensive and detailed report in February 2015.⁷⁷ The Report noted the breadth of the role envisaged for the Service in the IAG Report as well as the varied perceptions of stakeholders consulted by the interim Board during the preparation of their report. The report made recommendations as to the early priorities of Service, its mode of operation. It concluded that governance arrangements should ensure a degree of “arm’s length” separation from the other planning functions of the Welsh Ministers.⁷⁸

⁷⁵ Sections 15A-C Commons Act 2006.

⁷⁶ The members of this Board are Peter Burley (formerly Chief Planning Inspector for Wales) Chair, Morag Ellis, QC (Planning and Environment Bar Association), Simon Gale (Rhondda Cynon Taff County Borough Council), Hannah Parish (Flintshire County Council), Chris Potts (Savills) and Wendy Richards (The Urbanists).

⁷⁷ The Planning Advisory and Improvement Service: proposals for its future role, structure and governance – February 2015 <http://gov.wales/docs/desh/publications/150520pais-final-report-en.pdf>

⁷⁸ Ibid.

The Welsh Ministers, having considered the findings of the Report, decided not to set up a new independent body to deliver the work and have opted for a “partnership approach between key stakeholders” to be pursued through a Planning Advisory Group. The Group’s remit will focus on local planning authorities “with leadership, resilience, skills and knowledge and sharing of good practice/experiences [as] key areas to be addressed”⁷⁹.

Revised Circular on Planning Conditions

The IAG recommended early progress in publishing an updated Circular on Planning Conditions to encourage greater use of standard conditions and this has now been issued.⁸⁰

Exercise of “powers to apply”

As already noted, the Planning and Compulsory Purchase Act 2004 and the Planning Act 2008 both made a number of reforms to development management in England. The Welsh Government was also given powers to apply the changes in Wales and these have now been commenced.

Mezzanine Floors

Section 49 of the 2004 Act to require planning permission for the development of mezzanine floors in excess of 200 m. sq. in retail developments⁸¹.

Dual Jurisdiction

Section 50 of the 2004 Act to specify a period during which a LPA can make a decision on an application notwithstanding that the application is already the subject of a non-determination appeal.⁸²

Temporary Stop Notices

Section 52 of the 2004 Act to serve temporary stop notices.⁸³

Duty of statutory consultees

Section 54 of the 2004 Act to make regulations to enforce a statutory duty placed on consultees to respond when consulted.⁸⁴ The Welsh Government consulted on the implementation of this provision;⁸⁵ and in its paper it refers to the definition of “substantive” response adopted in England⁸⁶. However, informed by the IAG report, which highlighted the significant influence of

⁷⁹ Welsh Government – Positive Planning implementation Plan December 2015, section 2.

⁸⁰ The Use of Planning Conditions for Development Management (WGC 016/2014)
<http://wales.gov.uk/docs/desh/publications/141007circular16-2014-en.pdf>

⁸¹ This was commenced by SI 2015/340 – The Planning and Compulsory Purchase Act 2004 (Commencement No. 14 and Savings) Order 2015

<http://www.legislation.gov.uk/ukSI/2015/340/contents/made>.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Welsh Government consultation WG23314 – Frontloading the development management system. October 2015, section 4.

⁸⁶ Article 22 of the Town and Country Planning (Development Management Procedure) (England) Order

statutory consultees in the development management system, the Welsh Government has adopted an approach that ensures consultees will have a positive role in helping to find solutions to enable developments to proceed. Accordingly, a reference by a statutory consultee to current standing advice will not constitute a substantive response in Wales. If a consultee provides advice then the advice will have to include the reason for the objection in cases where the proposal raises significant concerns that would result in an objection being raised by the consultee or in all other cases an explanation of how the developer can address specific concerns or issues in order to enable the proposal to proceed.

Fees

Section 199 of the Planning Act 2008 will allow local planning authorities and the Ministers greater scope to recover the full cost of processing planning applications and appeals.⁸⁷

Non-material minor amendments

Section 190 of the Planning Act 2008 which applied section 96A Town and Country Planning Act 1990 in Wales introducing a simplified formal procedure for making non material minor amendments to planning permission from 1st September 2014.⁸⁸

Houses in Multiple Occupation

The Government has consulted (November 2015) on a recommendation in the study on the “Evaluation of the planning permission process for housing” to amend the Town and Country Planning (Use Classes) Order 1987 by introducing a new use class C4 (houses in multiple occupation occupied by not more than six residents). This proposal would increase the number of new HMOs which require planning permission, allowing local planning authorities the opportunity to consider the impacts of proposed new HMOs, for example in areas with high concentrations of HMO’s let as student accommodation.

⁸⁷ This was commenced by SI 2014/1769 – The Planning Act 2008 (Commencement No.2) (Wales) Order 2014 - <http://www.legislation.gov.uk/wsi/2014/1769/contents/made>.

⁸⁸ Section 190 was applied to Wales via an order made under Section 203 of the Planning Act. Section 203 gives Welsh Ministers the powers to make an order giving effect in Wales to certain reforms to the land use planning system provided in the Act which would otherwise have effect only in England – this includes Section 190. The order made under Section 203 was subject to the affirmative scrutiny procedure of the National Assembly for Wales. The Town and Country Planning (Non-Material Changes and Correction of Errors) (Wales) Order 2014–
<http://www.legislation.gov.uk/wsi/2014/1770/contents/made>.

Comment on the Provisions of the Planning (Wales) Act 2015

The Planning (Wales) Act 2015 is grounded upon a considerable evidence base; not least the very comprehensive IAG report to which it has remained largely faithful. Perhaps the most significant omission in the original Bill was the lack of a statutory duty to place sustainable development at the heart of land use planning. This was addressed during the passage of the Bill and the final Act includes a duty that links the duties of public authorities with respect to land use planning with their obligations in relation to planning for the well-being of future generations under the Well-being Act ⁸⁹

One of the key recommendations of the IAG report was that there should be greater leadership in land use planning by the Welsh Government which now has a duty to carry out national development planning and take decisions with respect to DNS. The power of Welsh Government to take decisions on nationally significant projects should ensure greater efficiency in the decision making process. The significance of these powers is increased by two recent developments. First, the proposals in the Draft Wales Bill to devolve powers over all on-shore wind energy generating stations and any other type of energy generating station (including off-shore wind) under 350MW. The Planning (Wales) Bill also includes provisions on the devolution of powers over developments in the ports sector. During the passage of the Bill the Minister declared himself satisfied that the DNS process being adopted in Wales was “fit for purpose” to deal with these applications. Secondly, the determination of onshore wind farm applications over 50Mw has been removed from the jurisdiction of the Secretary of State under s.36 of the Electricity Act 1989 (which carries with it deemed planning permission) and from the nationally significant infrastructure development consent regime under the Planning Act 2008⁹⁰. The purpose of this is to enable all on-shore wind power applications in England to be determined by local planning authorities and transferring to Welsh Ministers the power to specify the arrangements for determining planning applications for on-shore wind generating stations in Wales. The Welsh Ministers have decided that planning applications for on-shore wind generating stations in excess of 10Mw shall be designated DNS and determined by the Welsh Ministers⁹¹.

To address the need for a City Region approach to economic development in Wales a new strand of regional planning has also been introduced. SDP's therefore give a statutory basis to such a City Region approach to land use planning, with Cardiff/Newport, Swansea Bay and NE Wales potential strategic planning areas. SDP's were criticised during the passage of the Planning (Wales) Bill for introducing an additional tier of plans. However, the Government made clear in its White Paper that where an SDP was put in place there would be a corresponding “light touch” approach to the LDP's for

⁸⁹ Section 2(2) Planning (Wales) Act 2015.

⁹⁰ See the Onshore Wind Generating Stations (Exemption)(England and Wales) Order 2016 and the Infrastructure Planning (Onshore Wind Generating Stations) Order 2016.

⁹¹ See the Developments of National Significance (Specified Criteria and Prescribed Secondary Consents)(Wales)(Amendment) Regulations 2016.

the individual local authorities, thus the intention seems to be that the overall plan content will be redistributed rather than increased.

Some stakeholders have criticised what they view as the centralisation of decision making power under the Act. Of particular significance therefore, is the amendment during the passage of the Bill to include provisions on consultation surrounding adoption of the NDF. This will be the stage at which stakeholders should become involved in the process of national planning; particularly the spatial aspects⁹². It is also important that two-thirds of the membership of SPPs will be local authority members and even though independent experts will sit on these panels they will not have voting rights. Furthermore, in the interests of representative democracy, it is proposed that the composition of the Panels will have to take account of the desirability of achieving gender balance.

Most of the provisions on development management were uncontroversial. However, there were three issues of note. First, the IAG report referred to the need to address the frustration of development proposals created by Town and Village Green registration applications. This however, caused some controversy during the passage of the Bill and, as outlined above, the final provisions were watered down. Secondly, powers to make regulations to prescribe the size of planning committees and to introduce a national scheme of delegation were criticised as an interference with local decision making.⁹³ However, these provisions were introduced following the recommendations of the report commissioned by the Royal Town Planning Institute that concluded that there were wide variations across Wales and that introducing greater consistency could help improve efficiency. Finally, during the passage of the Bill significant amendments were made following effective lobbying by proponents of the Welsh language. This has resulted in specific reference to the need to refer to the Welsh language in the sustainability appraisal of development plans and, perhaps most controversially, to ensure that this is recognised as a valid material consideration.

Land Use Planning in Wales and the Wider Programme of Legislation

The Planning (Wales) Act 2015 followed the introduction of the Well-being Act, which aims to place sustainable development planning at the heart of public bodies including the Welsh Government. The legislative framework now ensures that these two processes of planning will be fully integrated as the new well-being plans must be considered in decisions taken as part of land use development planning and decision making. However, this requirement was only included following criticism by stakeholders during the passage of the Bill.⁹⁴

⁹² It is relevant therefore that the first consultation on the NDF, launched on 1st February 2016 relates to the preparation of the Statement of Public Participation which sets out the key stages and timetable for preparing the NDF and the steps the Welsh Government will take to engage stakeholders and the public. These proposals include: (i) the stages for the preparation of the NDF, (ii) the dates for each stage, (iii) the strategy to secure engagement across the process and (iv) details of the SA/SEA process.

⁹³ Sections 319ZA-B Town and Country Planning Act 1990.

⁹⁴ See further National Assembly for Wales Environment and Sustainability Committee Environment (Wales) Bill: Stage 1 Committee Report (October, 2015).

Similarly, the Environment Bill as introduced did not include any reference to the relationship between the new systems for natural resource planning and land use planning. Thus, following appeals by stakeholders, once more an amendment to the Bill was introduced at the second stage of the legislative process. The Planning and Compulsory Purchase Act 2004 now makes a link between the Environment Act and Planning (Wales) Act 2015. The aim of the amendment is two-fold. First, to ensure that the NDF takes account of the National Natural Resource Policy that will be produced by the Welsh Government under the Act. Secondly, to enable area statements produced by Natural Resources Wales with respect to sustainable management of natural resources at the local level to form part of the evidence base for LDPs.

The final piece of legislation is the Historic Environment Act. This has been broadly welcomed but it is clear that it provides only minor changes to the existing regime rather than an entirely new approach to heritage protection in Wales. In particular, it has done little to integrate the heritage protection and land use planning regimes or to make links with the other developments in the legislative programme.⁹⁵

Conclusions

Planning in Wales has been gradually becoming more distinct from England for many years. However, the new Planning (Wales) Act 2015 will take a further leap forward in this regard. Many of the details of development management will now be different as well as the more obviously radical changes to land use development planning. The Act is one of the first pieces of primary legislation to be passed by the National Assembly for Wales and as such provides an interesting case study of the process. The amendments that have been made to the existing frameworks of legislation for planning in England and Wales have also created a very confused legislative landscape.

⁹⁵ See further the evidence of Chris Mynors and UKELA Wales to the Environment and Sustainability Committee. National Assembly for Wales Environment and Sustainability Committee Historic Environment (Wales) Bill: Stage 1 Committee Report (October 2015).