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Planning Law in Wales: Part 3 Further Developments

Introduction

In the previous articles in this series the authors have outlined the provisions of the Planning (Wales) Act 2015 (“the Planning Act”) and considered what lessons can be drawn from the passage of the Bill in relation to law-making by the devolved institutions in Wales.¹ In this final article, they consider the programme for implementing the further reforms to the Welsh planning system and a number of developments that are likely to affect land-use planning in Wales in the future and in particular the Wales Act 2017.²

The Implementation of the Planning (Wales) Act 2015

The Planning Act is a classic piece of framework of legislation in the tradition of UK planning legislation. As such, it will require significant further work to implement its provisions, not least through secondary legislation.³ To aid the process of implementation the Welsh Government has published an Implementation Plan which aims to pull together the various items of supporting secondary legislation, improvement projects and programmes being delivered by the Government in pursuing its “Positive Planning” reform agenda. It also sets out the Welsh Government’s priorities and timescales for delivery for the remaining Assembly term, a timetable to 2019 and beyond.⁴ Attached to this paper is the time line diagram from the Plan. In this section we consider the provisions already in force, consultations to date and the timetable for bringing the remaining provisions into force.

Progress to April 2016

Statutory Purpose of Planning

The Planning Act set out a new statutory purpose for the planning system. Section 2 states that anyone carrying out functions related to land use planning must exercise them 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 of Future Generations (Wales) Act 2015.⁵ This

¹ Williams, H. & Jenkins, V., ‘The Planning (Wales) Act 2015: a Case Study in Evidence-Based Planning Reform under Devolution’, J P L 2016 7, p. 637 - 652; Williams H and Jenkins V The Planning (Wales) Act 2015: Part 2 Lessons in Law Making under Devolution J P L 2016 9, 860-875.

² This article refers to the position as at 8th March 2017.

³ Ibid.

⁴ Positive Planning Implementation Plan (Welsh Government, 2015) available at <http://gov.wales/topics/planning/legislation/planning-wales-act-2015/positive-planning-implementation-plan/?lang=en>

⁵ Section 2(2) Planning (Wales) Act 2015. See further n.1.

section came into force on the 1st April 2016 to coincide with the commencement of the Well-being Act.

Yr. Iaith Gymraeg/The Welsh Language

The Planning Act added a requirement to consider the Welsh Language when preparing all development plans and a provision clarifying that decision makers may take account of the Welsh language where it is a material consideration when deciding planning applications. These provisions came into force on 4th January 2016.

Developments of National Significance

The Planning Act also provided for the Welsh Government itself to take decisions on certain categories of development identified as Developments of National Significance (DNS). These provisions commenced on 1st March 2016 and a number of statutory instruments were made setting out the procedural arrangements for such applications, as follows.

First, to apply a number of key provisions in Part III of the Town and Country Planning Act 1990 to enable the Ministers' to receive and process applications in place of the local planning authorities.⁶

Secondly, to set the criteria for applications to be subject to this procedure.⁷ These can include: generating stations, on-shore wind farms, underground gas storage facilities, LNG facilities, gas reception facilities, airports, railways, rail freight interchanges, dams and reservoirs, transfer of water resources, waste water treatment plants and hazardous waste facilities. The national significance of these projects is identified by threshold.⁸

Thirdly, to prescribe the other consents related to the DNS that may also be considered at the same time by the Ministers. Broadly these cover consents for works to listed buildings or ancient monuments, hazardous substances consents, related planning applications, highways and rights of way stopping up, extinguishment and diversion orders and applications and common land deregistration and exchange applications.⁹

Fourthly, to make provision for the procedure to be followed in dealing with DNS applications. This covers the manner in which applications are to be made to the Ministers, including specified forms; notification of the development and acceptance by the Ministers; pre-application publicity and consultation; publicity for the application; registration of the application with the LPA; local impact

⁶ The Developments of National Significance (Application of Enactments) (Wales) Order 2016/54.

⁷ The Developments of National Significance (Specified Criteria and Prescribed Secondary Consents)(Wales) Regulations 2016/53.

⁸ This reflects the approach to the identification of nationally significant infrastructure projects under the Planning Act 2008 as originally enacted.

⁹ This is also covered by the The Developments of National Significance (Specified Criteria and Prescribed Secondary Consents)(Wales) Regulations 2016.

reports; variations; notification of decisions; and, initiation of development and notices.¹⁰

Finally, there are a number of consequential issues and the matter of fees that are also set out in regulations.¹¹

¹⁰ The Developments of National Significance (Procedure) (Wales) Regulations 2016/55.

¹¹ These deal with various further matters covering the provision of pre-application services and advice by the LPA and the Ministers, the carrying out of functions relating to secondary consents by officials, the procedure for the examination of applications and the handling of secondary consents and prescribing section 73 applications (applications to develop without complying with conditions previously attached) to be treated as nationally significant. The Developments of National Significance (Wales) Regulations 2016/56. Fees are covered by the Developments of National Significance (Fees) (Wales) Regulations 2016/57.

Joint Planning Boards

The updated powers to establish Joint Planning Boards were commenced on the 16th March 2016 and 1st April 2016.¹² However, the implementation of these powers will depend on the arrangements for the future of local government in Wales discussed below.¹³

Development Management Procedure

A number of changes to development management procedure also commenced on 16th March 2016.¹⁴ These include:

A revised list of statutory consultees¹⁵

A new duty on statutory consultees to respond to consultation; to ensure that this is a “substantive response”; to respond within 21 days; and, to report annually to the Ministers on their consultation performance.

Restricting the categories of development that have to be accompanied by a design and access statement.

Consultation on applications to develop land without compliance with conditions attached to an earlier permission (“Section 73 Applications”).

Extending the time for determining applications where amendments are submitted after submission of an application.

Provision for notice to be given to a local planning authority before major development begins and for the notice to be displayed when major development is carried out.

Provision for an expedited written appeal to PINS against a decision of a local planning authority that an application is invalid (validation appeals).

Local development orders permitted to include the grant of planning permission for development which is Schedule 2 development for the purposes of the Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2016.

Powers of Ministers to make a development order specifying the form of planning permission notice and for a revised notice to be issued whenever consent to a reserved matter or approval pursuant to a condition is given

¹² Planning (Wales) Act 2015 (Commencement No. 2 and Transitional and Saving Provisions) Order 2015/1987

¹³ See below.

¹⁴ Town and Country Planning (Development Management Procedure) (Wales) (Amendment) Order 2016/59 and as a result of the Planning (Wales) Act 2015 (Commencement No. 3 and Transitional Provisions) Order 2016/52

¹⁵ By the creation of a new Schedule 4 to the Town and Country Planning (Development Management Procedure) (Wales) Order 2012/801 (“the 2012 Order”).

(the “living document” recommended by the independent Advisory Group in their Report to the Welsh Ministers).

Longer Term Reforms

National Development Framework

The Planning Act provided for a system of national development planning in the form of a National Development Framework (NDF). This will see a staged commencement between 16th March 2016 and Autumn 2019. An initial consultation on a draft Statement of Public Participation concluded on 25th April 2016. This was intended to lead to:

Publication and consultation on the delivery timetable and issue of the statement of public participation in the Summer of 2016¹⁶.

Consultation on the main issues, options and preferred option, supported by strategic environmental assessment and habitats assessments in the Autumn of 2017.

Statutory consultation on the draft NDF in the summer of 2018.

Publication of a draft NDF by the Welsh Ministers for scrutiny by the National Assembly for Wales in the Spring of 2019.

Adoption of the NDF by the Welsh Ministers in the Autumn of 2019.

Between December 2016 and March 2017 the Welsh Ministers called for evidence that to inform the development of NDF policies and details of projects that can help Wales meet its national goals.¹⁷

Strategic Planning

The Welsh Ministers have also paved the way for the introduction of Strategic Development Plans (SDP) by passing regulations related to the Strategic Planning Panels (SPP) which came into force on the 16th March 2016.¹⁸ The next stage will be the submission of proposals by local authorities (envisaged as being the areas around Cardiff, Swansea and the A55 Corridor) to establish Strategic Planning Areas (SPA). However, it remains to be seen whether this timetable is adhered to given the recent developments on local government reform outlined below.

If the timetable is followed, then regulations establishing the SPA and specifying the form and content of each SDP will be subject to consultation in the Spring of 2017 and come into force in the Winter of 2017. Once the SPAs are established

¹⁶ Published in November 2016, see

<http://gov.wales/docs/desh/publications/161206statement-of-public-participation-en.pdf>

¹⁷ See: Call for Evidence and Projects National Development Framework

https://consultations.gov.wales/sites/default/files/consultation_doc_files/161206call-for-evidence-and-projects-en.pdf

¹⁸ Strategic Planning (Composition of Panels and Qualifying Expenditure) (Wales) Regulations 2016/18,

it is envisaged that the preparation, consultation stages, examination and adoption of the SDPs will be accomplished by 2021/22.

Local Development Plans

An “LDP Refinement Exercise” (conducted by the Welsh Government in parallel with the work of the IAG) largely came into force on 28th August 2015.¹⁹ However, some matters had to await primary legislation in the Planning (Wales) Act 2015: sections 12 (End date for LDP’s), 13 (Requirement to provide prior notification of LDP withdrawal to enable Welsh Ministers to intervene) and 14 (Power to require LDP’s to prepare joint LDP’s). These sections were commenced on 4th January 2016 and regulations to support them were due in the Summer of 2016.

Direct Planning Applications to Welsh Ministers

Initial consultations were planned for Summer 2016 leading to the commencement of the provisions in the Spring of 2017 and of Welsh Government monitoring of LPA performance against designated criteria.

Appeals

There is a two stage programme for implementing reforms to the appeals system.

The first stage used existing legislative powers and comprised:

- Enabling the Welsh Ministers or an appointed person to determine the method by which an appeal is to be conducted, which was commenced on 11th November 2014.

- Commencing section 50 of the Planning and Compulsory Purchase Act 2004 to allow appeals to be referred back to the LPA, as noted above.

- Removal of the time limit restricting the right to appeal on the grounds of non-determination in force from 22nd June 2015.

The second stage will involve the commencement of section 47 and 49 and 51 (already in force in part in relation to DNS) and the making of regulations²⁰ covering:

- Preventing the variation or amendment of a planning application after an appeal has been made, except in specified circumstances.

- Only allow new matters to be raised during an appeal in exceptional circumstances.

¹⁹ Town and Country Planning (Local Development Plan)(Wales)(Amendment) Regulations 2015/1598.

²⁰ Commencement was originally programmed for November 2016 with regulation in January 2017.

Consolidation of the costs regime to allow the Welsh Ministers' or an appointed person's (Inspector's) costs to be recovered for written representation appeals.

Allow the procedure for oral examination methods to be written by the Welsh Ministers.

Require a full appeal statement to be submitted with the appeal.

Planning committee structure and national delegation scheme

The Welsh Government issued consultation papers on the composition of planning committees and a national scheme of delegation to officers at the same time as the Planning (Wales) Bill was introduced in the National Assembly and the Welsh Government proposes to commence the relevant powers in the Spring of 2017.

Regulations on the structure of planning committees are also proposed for Spring 2017

The national scheme of delegation will then come into effect in the spring of 2018 after a programme of focused stakeholder engagement and a further consultation paper.

Wider Use Classes Review

Following on from the recently introduced changes to the treatment of houses in multiple occupation a wider review of the Use Classes Order is in progress. Publication of a research study was to be followed by a consultation in the Autumn of 2016 and by subordinate legislation in the Summer of 2017. However, this timetable appears to have slipped.

Town and Village Greens

A consultation on subordinate legislation regarding Town and Village Greens was held, in November 2016, with Regulations and Orders proposed by May 2017.

Policy Developments to Complement Legislative Reforms

The legislative programme has required complementary policy developments which are continuing:

Planning Policy Wales

Edition 8 of Planning Policy Wales (PPW) was issued in January 2016, incorporating a new Chapter 4 on "Planning for Sustainability" which incorporates information on the Well-being of Future Generations (Wales) Act.

Edition 9 was issued in November 2016 and is the edition currently in force. It takes account of the commencement of the system of Nationally Significant Development; updates Chapter 10 on Retailing and Town Centres and the

issuing of the Development Management Manual.²¹ It has also been fully revised in conjunction with Cadw²² following Royal Assent of the Historic Environment (Wales) Act 2016.

A full revision of PPW to take account of the statutory well-being goals set by the Well-being Act is to be undertaken with a view to issuing a fully revised Edition 10 in 2017.

TAN 20 Planning and the Welsh Language

Consultation on a revised TAN 20 to take account of the provisions of the Planning Act in relation to LDP's and development management concluded on the 30th March 2016. At the time of writing the revised TAN has yet to be published.

PPW Chapter 6 – The Historic Environment and draft TAN 24

Consultation on a revised Chapter 6 ran from 21st March 2016 until 13th June 2016. The Welsh Government published a summary of responses in November 2016. The consultation reflects the feedback received on a draft Chapter 6 published at the same time as the Historic Environment Bill. A draft TAN 24 was also issued and consultation on this, together with a suite of guidance notes, ended on 3rd October 2016. Once issued the TAN will supersede the venerable Welsh Office Circulars 60/96 Planning and the Historic Environment: Archaeology; 61/96 Planning and the Historic Environment: Historic Buildings Conservation Areas; and 1/98 Planning and the Historic Environment: Directions by the Secretary of State for Wales.

Law Commission's Twelfth Programme – A Welsh Planning Act

The Law Commission's Twelfth Programme of Law Reform includes a project on planning and development control in Wales.²³ This project fulfils the Programme for Government's commitment to pursue the consolidation of Welsh planning law.²⁴ As outlined in our first article, the Planning (Wales) Act 2015 will be enacted largely by amendment to the Planning and Compulsory Purchase Act 2004 and the Town and Country Planning Act 1990.²⁵ These Acts have subsequently become very cumbersome and it is difficult to now know whether a provision applies to England only, to England and Wales or to Wales only. There is therefore, much that could be achieved by a simple restatement of Welsh Planning Law in a single statute. The Commission published a scoping paper, in June 2016, on which it consulted until 31st October.²⁶ Pending the results of this

²¹ Which has resulted in slimming down chapter 3. For the DM Manual see

<http://gov.wales/topics/planning/policy/development-management-manual/?lang=en>

²² Cadw is the Welsh Government's Historic Environment Department.

²³ The Twelfth Programme of Law Reform Law Com No 354 (Law Commission, 2014)

²⁴ Programme for Government (Welsh Government, 2011) available at <http://gov.wales/docs/strategies/110929fullen.pdf>

²⁵ See n. 1 above.

²⁶ Planning Law in Wales: A Scoping Paper LCCP228 (Law Commission, 2016)

consultation a final report will be published in early 2017 or thereafter. The paper suggests the creation of a Planning Code to simplify and consolidate the existing law. It is suggested that the scope of the Code should focus on:

- (1) The purpose of the planning system.
- (2) The administration of the planning system.
- (3) The nature of development.
- (4) The plan making process.
- (5) The process of seeking planning-permission.
- (6) Remedies.
- (7) Enforcement.²⁷

In addition, the paper suggests moving beyond consolidation to include some improvements referred to as 'technical reforms'. For example, it refers to the possibility of unifying consent regimes, particularly heritage and planning consents.

The Law Commission's Twelfth Programme of Law Reform also contained a project on The Form and Accessibility of the Law Applicable to Wales, which resulted in a report published on 13th October 2016.²⁸ This recommended that the Welsh Government pursue a policy of codification that will involve bringing together legislation whose subject matter is within the legislative competence of the National Assembly for Wales; and reforming that legislation from time to time as appropriate. This would involve the creation of new Codes. It suggests that the areas most in need of codification should be identified and a flexible, streamlined procedure for bringing the new Codes into force should be provided for by the Assembly.

The Law Commission's report on the Form and Accessibility of the Law in Wales is, therefore, of significance to the Welsh Government's ultimate goal of a body of consolidated or restated planning law applying to Wales. This report looked most closely at the planning in Wales project as a model for the procedures that it is recommending. The full response of the Welsh Government to this is awaited, but on the 13th December 2016 the Mick Antoni AM, Counsel General for Wales, announced the Welsh Government's support for and intention to embark on a programme of legislative codification.²⁹ It is unclear at present as to whether the project on Welsh Planning legislation will be a traditional consolidation or the pilot for a new style of codified legislation.

²⁷ Although the Commission seeks views on other issues that should or should not be included.

²⁸ The Form and Accessibility of the Law Applicable to Wales Law Comm No 366 (Law Commission, 2016)

²⁹ See <http://gov.wales/newsroom/firstminister/2016/58795099/?lang=en>

Local Government Reform

The prospect of local government reform in Wales has significant consequences for land use planning, particularly, as noted above, the development of Joint Planning Boards and SPPs. There are currently 22 local authorities which is, arguably, excessive for a country of around 3 million people. There were a number of developments during and immediately after the evolution and enactment of the Planning (Wales) Act in relation to the future structure of local government in Wales.

A Commission on Public Service Governance and Delivery (the Williams Commission) recommended mergers between adjoining authorities to reduce the number of local authorities from 22 to 11.³⁰ This was followed by the publication of an extensive White paper on future of local government³¹ which recommended reducing the number of authorities to 12 (the preferred option in the Williams Commission report). The Local Government (Wales) Act 2015 was then passed to allow for certain preparatory work to enable a programme of local government mergers and reform. This included provisions to facilitate the voluntary early merger of two or more Principal Local Authorities by April 2018.

The Minister for Public Services announced subsequently that in the absence of viable proposals from local authorities for voluntary mergers, he favoured a configuration of between as few as eight or nine local authorities, depending on the arrangements for North Wales.³² Following consideration of the White Paper consultation responses, a Draft Local Government (Wales) Bill was published for consultation between November 2015 and February 2016. This gave effect to this configuration and brought together the other reforms proposed in the White Paper, with the intention that the Bill would be introduced following the election of the Fifth National Assembly.

The Welsh General Election in May 2016 resulted in a minority Labour government taking office. In June 2016, Mark Drakeford, Cabinet Secretary for Finance and Local Government, announced that in order to gain consensus in the Assembly on local government reform he would publish a new plan in Autumn 2016.³³ Subsequently, on 4th October 2016 he made a statement to the Assembly in which he stated his intention to maintain local authorities as the 'front door' for access to services, but introduce a mandatory, systematic system of regional working in delivering services. Two models were suggested, one around Health Boards (including education, social services and public protection) and the other around transport, planning and economic development. The focus

³⁰ Commission on Public Service Governance and Delivery (Welsh Government, 2014)

³¹ Devolution, Democracy and Delivery White Paper - Reforming Local Government: Power to Local People (Welsh Government, 2015).

³² Leighton Andrews AM for Rhondda available at <http://gov.wales/newsroom/localgovernment/2015/options-published-future-configuration-local-government/?lang=en>

³³ Council Reform Plans to be Rewritten BBC News 12 June 2016.

in terms of land use planning would be the system of Strategic Development Planning. Voluntary mergers between local authorities would also, however, continue to be encouraged.³⁴

A further substantial White Paper followed- “Reforming local government: Resilient and renewed”.³⁵ This was published on the 31st January 2017 and is currently out to consultation. It discusses the options for joint working and shared delivery of local authority services. Planning is one of the services identified for delivery, at least in part, on a regional basis. As part of the rationale for this, the White Paper notes: “Between 2009/10 and 2016/17 resources devoted to the planning function declined by 53%, the largest reduction of any Local Authority service area.”³⁶

The Welsh Infrastructure Planning Commission

The proposal for a Welsh National Infrastructure Commission (“Welsh NIC”) is significant as the Commission will have an important role as a stakeholder in the National Development Framework. It appears to derive from a combination of two factors. Firstly, the Welsh Labour Party manifesto for the 2016 National Assembly general election ‘Together for Wales 2016–21’ made a commitment to work with the UK Infrastructure Commission to deliver the infrastructure needs of Wales. Secondly, Plaid Cymru/The Party of Wales also supported an Infrastructure Commission, albeit on a grander scale. As the Welsh Labour Government did not at the time have a reliable working majority in the Assembly, promoting the notion of a Welsh NIC should be seen as part of an informal ‘confidence and supply’ understanding between Welsh Labour and Plaid Cymru, as well as a policy response to the need to work with the UK NIC. Consequently, a proposal for a Welsh NIC has been included in the Welsh Government’s current Programme for Government ‘Taking Wales Forward 2016–21’.

The Welsh Government published a consultation paper on its proposals for a Welsh NIC on 17 October 2016 and expressed the intention that this should be up and running within twelve months.³⁷ An independent non-statutory expert advisory body is proposed. The Government sought views on whether it should offer analysis, advice and make recommendations to the Welsh Ministers. The proposed remit would cover ‘all sectors of economic and environmental infrastructure, including energy, transport, water and sewerage, drainage solutions, waste, digital communications, flood and coastal erosion management’. Social infrastructure such as schools and hospitals would not form part of the remit as the Welsh Government considers the current strategic planning arrangements to be sufficient. The consultation also sought views on whether its remit should include non-devolved infrastructure, reflecting the devolution settlement and the cross-border

³⁴ Assembly News Release: Working Together to Reform Local Government: Cabinet Secretary sets out Building Blocks for more Resilient Local Authorities. The Minister also stated an intention to carry out an independent review of community councils.

³⁵ <https://consultations.gov.wales/consultations/reforming-local-government-resilient-and-renewed>

³⁶ See para. 2.3.8 *et seq.*

³⁷ See:

https://consultations.gov.wales/sites/default/files/consultation_doc_files/161017-national-infrastructure-commission-for-wales-consultation-document-en.pdf

nature of some infrastructure, for example the railway network. The Government published its response to the consultation on 8th March 2017.³⁸

The Welsh NIC will at least initially adopt the same model as the UK National Infrastructure Commission (UK NIC) in being a non-statutory body, but there is a commitment to review its structure and functions towards the end of the current National Assembly, including options for a statutory body. This appears to be a concession to Plaid Cymru, which has published ambitious proposals for an NIC that would act as a funding and owning body for infrastructure assets, developing and utilising arms-length funding models which would be off the public sector balance sheet, enabling private capital to be deployed for Welsh infrastructure projects.

The UK NIC, chaired by Lord Adonis, covers non-devolved infrastructure schemes in Wales, e.g. very large electricity generating plants (over 350MW) in addition to infrastructure in England. The extent to which the remit of the UK NIC expressly requires engagement with equivalent bodies in the devolved administrations will be a critical feature of the new regime. Neither the “Charter of the National Infrastructure Commission”³⁹ (published by HM Treasury on 12 October 2016), nor the Commission’s formal remit (dated 23 November 2016) make any mention of relations with the devolved administrations. One of the essential differences between the Welsh NIC and the UK NIC is that the former is currently being sponsored by the Cabinet Secretary (Minister) for the Economy and Infrastructure, while the UK Commission is an executive agency of HM Treasury.

Wales Act 2017

The UK Government published a Draft Wales Bill on 20th October 2015 to give effect to the “St David’s Day Agreement” on the recommendations of the Silk Commission on Welsh Devolution. The main recommendation was to move from the present “conferred powers” model of legislative competence to a “reserved powers” model.⁴⁰ The draft Bill received extensive scrutiny on aspects of the underlying machinery for reserving powers and the extent of the reserved powers when compared to Scotland and Northern Ireland. The draft Bill was widely criticised both at Westminster and in the National Assembly.⁴¹ The Wales Bill as

³⁸ See:

https://consultations.gov.wales/sites/default/files/consultation_doc_files/national-infrastructure-commission-responses-en-a.pdf The National Assembly’s Economy, Infrastructure and Skills Committee also reported on 24th January 2017, see: <http://www.assembly.wales/laid%20documents/cr-ld10901/cr-ld10901-e.pdf>

³⁹ See

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/559269/NIC_charter_6_final.pdf and https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/571097/Fiscal_Re_mit_2016.pdf

⁴⁰ The Silk commission published two reports the second considering an extension of the powers of the National Assembly for Wales Empowerment and Responsibility: Legislative Powers to Strengthen Wales (Commission on Devolution in Wales, 2014). On the “St David’s Day Agreement” see further: Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales (HM Government, 2015).

⁴¹ See further, for example, *Report on the UK Government’s Draft Wales Bill* National Assembly for Wales Constitutional and Welsh Affairs Committee, December 2015.

introduced on the 7th June 2016 differed in significant respects from the draft in response to these criticisms.⁴² The extent of the reservations was also reduced somewhat and further amendments were made during the Bill's passage through Parliament including a number that relate to land use and planning.

The proceedings on the Bill in relation to planning and land use matters merit further mention. As the Wales Bill amended the power of the National Assembly for Wales and the Welsh Government the "Sewel convention" applied. Therefore, the UK Government made it clear that it would not proceed with the Bill unless the legislative consent of the National Assembly was given to the Bill. On the 20th October 2016, the First Minister of Wales wrote to the Secretary of State for Wales setting out the Welsh Government's programme for consideration of the Bill by the National Assembly, in advance of the start of the Wales Bill's progress through the House of Lords. The First Minister set out a number of matters on which the Welsh Government expected progress to be made in the House of Lords. He stated that the attitude of the UK Government towards these issues would heavily influence the Welsh Government's recommendation to the National Assembly on the question of legislative consent. Among the issues identified was:

*The number and breadth of reservations. I specifically mentioned those on CIL, on Teachers' Pay and Conditions, and on Alcohol licensing, sale and supply, all of which I wanted to see removed. And I also urged that other reservations should be narrowed in scope, mentioning as examples Compulsory Purchase and Buildings as ones either for removal or considerable narrowing.*⁴³

In the event, amendments were proposed in the House of Lords in relation to CIL, building control and compulsory purchase as noted below. The Wales Bill received the Legislative Consent of the National Assembly for Wales on 17th January and following a Third Reading in the Lords, received Royal Assent on 31st January 2017.

Community Infrastructure Levy⁴⁴

House of Commons Welsh Affairs Committee Pre-Legislative Scrutiny of the Draft Wales Bill First Report of Session 2015-2016 HC 449. House of Commons Welsh Affairs Committee Pre-Legislative Scrutiny of the Draft Wales Bill Government's Response to the First Report of Session 2015-2016 HC 280.

⁴² The Wales Bill 2016. Available http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0005/cbill_2016-20170005_en_1.htm. For criticisms see further *Report on the UK Government's Wales Bill* National Assembly for Wales Constitutional and Welsh Affairs Committee, October 2016.

⁴³ See the full letter at: <http://gov.wales/docs/caecd/publications/161020-wales-bill-letter-en.pdf> .

⁴⁴ Schedule 1 (inserting Schedule 7A into the Government of Wales Act 2006) Section M3 Development and Buildings.

In its submission to the Silk Commission, the UK Government stated that responsibility for the Community Infrastructure Levy (CIL) might be devolved. However, the final report of the Silk Commission was silent on the question and the Commission appeared to have lost sight of the issue between its first and second reports.⁴⁵ Consequently, the Draft Wales Bill, as first published for consultation, proposed that the CIL remain a “reserved matter” over which the National Assembly would not have legislative competence. The Bill, as introduced in Parliament, in June 2016 maintained this position, but at a very late stage in Bill’s passage the UK Government dropped the CIL reservation.

This was a welcome concession. At one level CIL could be viewed as a financial levy and its reservation is consistent with the currently limited devolution of revenue and taxation powers; albeit that the Wales Act 2017 itself increases the devolved powers in relation to taxation, including income tax. However, the architecture of the CIL regulations place restrictions on the use of planning obligations under section 106 of the Town and Country Planning Act 1990 and also introduce a statutory test for the validity of planning obligations.⁴⁶ Therefore, the competence of the National Assembly to legislate around the subject of planning agreements (and, indeed, planning conditions) was questionable while control of CIL was reserved.

The concession now clears the way for the reforms of section 106 agreements recommended by the IAG and supported by the Law Society to be considered. Other reforms might also have been construed as impinging on the reserved powers around CIL. For example, it has already been suggested to the Law Commission that one way of removing the delays that negotiating and drafting s.106 obligations are perceived to cause would be to revisit the rule that a planning condition cannot require a payment of money to the LPA.⁴⁷

Compulsory Purchase⁴⁸

Compulsory purchase powers are an essential element of the positive powers of local planning authorities to bring about development or redevelopment.⁴⁹ Compulsory purchase of land was originally proposed to be wholly reserved under the Wales Bill. In this regard it was an example of the way in which the reservations have been drafted in many cases to avoid the National Assembly claiming legislative competence over the so-called “silent-subjects” in the conferred model of devolution.⁵⁰

⁴⁵ Empowerment and Responsibility: Legislative Powers to Strengthen Wales (Commission on Devolution in Wales, 2014).

⁴⁶ Community Infrastructure Levy Regulations 2010, Regulations 122 and 123.

⁴⁷ It may also make such a condition lawful if the applicant expressly consents to it.

⁴⁸ Schedule 1 Section M3 Development and Buildings

⁴⁹ Town and Country Planning Act 1990 Part IX

⁵⁰ See: *Agricultural Sector (Wales) Bill Reference by the Attorney General for England and Wales* [2014] UKSC 43

This was seen by the Welsh Government and commentators as a rolling back of the position as currently understood and, had it been implemented, would have caused unnecessary difficulties across a range of devolved activities which are underpinned by powers of compulsory acquisition of land (or their availability in the background).⁵¹ However, it was argued that while there were some elements of compulsory purchase that could sit with the reservation of land law, it did not follow that this should apply to all aspects of compulsory purchase, such as legislation that confers CPO powers or sets out the procedure for making a CPO.⁵² These arguments prevailed and an amendment in the House of Lords Committee Stage restricted the extent of reservation to the rules for determining compensation for compulsory purchase.⁵³

Building Regulations

Legislative competence over the regulation of the design, construction, demolition, services, fittings and equipment of buildings is now devolved with the exception of buildings belonging to the Crown and those of specified undertakers.⁵⁴

Other specific conferrals of powers

In addition, the Wales Act 2017 devolves a number of specific executive functions directly to the Welsh Ministers, with respect to national infrastructure and energy development.

Petroleum licencing

Measures on on-shore petroleum licensing to give Welsh Government effective control over licencing for fracking.⁵⁵

Ports and Harbours

Executive functions in relation to Welsh ports and harbours;⁵⁶ and development consent for the construction or alteration of harbour facilities are devolved except

⁵¹ For example, the rules for vesting title to land, overriding existing rights and determining the compensation to be paid for the compulsory acquisition of land or for the depreciation in the value of land due to the carrying out of public works.

⁵² See the submission on CPO powers by Huw Williams to the Welsh Affairs Committee's scrutiny of the Draft Wales Bill

<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Welsh%20Affairs/Prelegislative%20scrutiny%20of%20the%20draft%20Wales%20Bill/written/26391.html>

⁵³ Schedule 7A Section M3 Development and Buildings, para. 185 "Compensation in respect of—
(a) the interference with rights in land by exercise of a statutory power;
(b) depreciation in the value of land as a result of works or land provided or used in the exercise of a statutory power."

⁵⁴ See Sch 1 para. 186. The specified undertaking are electricity, gas, nuclear, railways, reserved trust ports not wholly in Wales and aviation.

⁵⁵ Sections 23-25.

⁵⁶ Sections 29-33.

in respect of reserved port trusts.⁵⁷ Provision is also made in respect of cross-border harbours and pilotage functions.⁵⁸ Worthy of note is that where powers of compulsory purchase are used in relation to port and harbour undertakings determination as to whether the acquisition can proceed without serious detriment to the statutory undertaking will transfer from the Secretary of State for Transport to the Welsh Ministers.⁵⁹

Electricity generation

Perhaps most significantly for land use planning, the power to approve development consent for onshore wind farms and for other generating stations, including off-shore wind farms, of less than 350MW is now to be devolved.⁶⁰ Associated development of overhead lines for generating stations is also included.⁶¹

The position in Wales is that the requirement for development consent under the Planning Act 2008 from the Secretary of State for Business, Energy and Industrial Strategy in relation to onshore and offshore generating stations⁶² up to 350 MW capacity has been dis-applied, as has the requirement for consent under the s.36 of the Electricity Act 1989. The immediate result of these provisions is that such projects will require planning permission under the Town and Country Planning Act 1990. In the longer term it will be for the Welsh Ministers to decide how these projects are given permission in Wales and it is most probable that schemes will be identified as Developments Of National Significance and fall to be determined by the Welsh Ministers.

The Welsh Government has already provided for all onshore wind farms of over 10MW to be considered as Developments Of National Significance following the removal of onshore wind powered generating stations from the requirement for development consent under the 2008 Act.⁶³

The Act also aligns the granting of associated consents with the devolution of powers over energy generating schemes.⁶⁴ Thus, associated consent for schemes over 350 MW which will be determined by the Secretary of State, will now also be granted by the Secretary of State rather than by the local planning authority. This corrects an anomaly in the current system. The determination of associated consents for projects under 350MW will be a devolved matter.

⁵⁷ Section 32. A reserved trust port is defined by reference to turnover in accordance with section 11 of the Ports Act 1990. Only the Port of Milford Haven falls within this definition in Wales.

⁵⁸ Sections 34-38.

⁵⁹ See the Acquisition of Land Act 1981, section 16.

⁶⁰ Sections 39 – 41.

⁶¹ Section 42.

⁶² Within Welsh territorial water and the wider “Welsh Zone” defined under section 158(1) Government of Wales Act 2006.

⁶³ See the Infrastructure Planning (Onshore Wind Generating Stations) Order 2016/306.

⁶⁴ Section 43.

*Coal Mining*⁶⁵

The Wales Act 2017 also reserves coal from the legislative competence of the National Assembly, with the exception of land restoration. The Explanatory Notes to this section⁶⁶ refer to the exception as covering the subject matter of both sections 53 and 54 of the Coal Industry Act 1994. These concern the duties on local planning authorities and applicants for planning permission for coal mining proposals to consider “the desirability of the preservation of natural beauty, of the conservation of flora and fauna and geological or physiographical features of special interest and of the protection of sites, buildings, structures and objects of architectural, historic or archaeological interest” (section 53); and the powers to impose land restoration conditions (section 54). The terms of the reservation do not as a matter of interpretation encompass the whole subject matter of those sections and it seems plain, therefore, that this reservation would, for example, prevent the National Assembly legislating to require specific regard to be had to the alleged health effects of opencast coal mining in determining planning applications.

Commencement

The provisions of the Wales Act 2017 relevant to planning will come into force by commencement order made by the Secretary of State for Wales in due course, with the exception of section 43 (which aligns associated consents for energy schemes) which come into force two months after Royal Assent.

Future Prospects

The term of the present Welsh Government and National Assembly extending to 2021, seems set to be a period of implementation and embedding of the reforms that culminated in the Planning (Wales) Act 2015, possibly with some further reforms as a result of the Wales Act 2017 completing the devolution of the remaining aspects of the planning system. There is the prospect of further distinctive progress as a result of full LDP coverage, progress with consolidated or codified Welsh planning legislation and the refinement of the relationship between planning and the wider statutory sustainability agenda in Wales under the Well-being of Future Generations (Wales) Acts. The authors’ view is that, notwithstanding some reservations expressed in these articles on Welsh planning law, the system is now fit to deliver sustainable development management and economic development.

However, the successful regeneration of local authority planning services to implement and operate the reformed system effectively and consistently across

⁶⁵ Schedule 1 Section D3 Coal.

⁶⁶ See <http://www.legislation.gov.uk/ukpga/2017/4/notes/contents> paragraphs 211 - 214.

Wales represents a significant challenge following the reductions in the resources devoted to the local authority planning service.

In the medium term, the withdrawal of the United Kingdom from the European Union will present the opportunity for the planning system to re-evaluate the elements that derive from EU law, especially environmental assessment and to perhaps adapt and integrate them more flexibly in line with the UK tradition of land use planning legislation. Meanwhile, there will be ample opportunity for the comparative study of planning law developments in the UK's four national planning systems.⁶⁷

⁶⁷ See for example: *Housing delivery and development plans across the UK: England and the framework; Wales and PPW; Scotland and SPP2; Northern Ireland and SPPS* - Morag Ellis QC, Caroline Daly and James Findlay QC J P L 2017 2, 146 – 162.