Planning Policies and Development Plans in Wales—Change and Coexistence

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Introduction

On May 3, 2007, the people of Wales elected the Third National Assembly for Wales, and inaugurated the further development of the constitutional position of Wales within the United Kingdom, under the provisions of the Government of Wales Act 2006.

These developments will see the legal separation of the elected Assembly from the executive. The current unitary body corporate structure of the National Assembly was derived from a local government model with secondary legislative competence grafted on. This is to be replaced. The First Minister will now be appointed by the Queen on the recommendation of the National Assembly. The Welsh Ministers and the Counsel General will be appointed by the Queen on the First Minister’s recommendation. Collectively, the First Minister, the other Welsh Ministers and the Counsel General will constitute the Welsh Assembly Government.

The existing legislative powers of the National Assembly, being restricted to the making of secondary legislation by statutory instrument, will transfer to the Welsh Ministers who will thus make secondary legislation in a similar manner to their counterparts at Westminster. The National Assembly itself is to acquire enhanced law-making powers and for the first time these will assume the character of primary legislation albeit designated “Assembly Measures”, where legislative powers are given to the Assembly either by means of “framework powers” in Acts of Parliament or by Order in Council approved at Westminster on the request of the National Assembly. These may confer legislative competence in respect of particular matters within the devolved fields of competence of the National Assembly specified in the Government of Wales Act 2006.2 The 2006 Act also contains the machinery for the National Assembly to acquire full primary legislative powers over the devolved fields on the model of the Scottish Parliament, but only after a further referendum.

Now is therefore a timely moment to trace the development of planning law in Wales to date and the process by which a distinctive national system has emerged which, while still sharing much of the system in England is changing to meet the needs of Wales.

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2 The Government of Wales Act 2006, Sch 5 specifies 20 fields within which legislative powers may be conferred on the National Assembly. They are: Field 1—agriculture, fisheries, forestry and rural development; Field 2—ancient monuments and historic buildings; Field 3—culture; Field 4—economic development; Field 5—education and training; Field 6—environment; Field 7—fire and rescue services and promotion of fire safety; Field 8—food; Field 9—health and health services; Field 10—highways and transport; Field 11—housing; Field 12—local government; Field 13—National Assembly for Wales; Field 14—public administration; Field 15—social welfare; Field 16—sport and recreation; Field 17—tourism; Field 18—town and country planning; Field 19—water and flood defence; and Field 20—Welsh language. For examples of the formulation of “framework powers”, see s.7 of the NHS Redress Act 2006 and s.178 and 179 of the Education and Inspections Act 2006, which will be transposed into Sch 5 of the Government of Wales Act 2006 under the National Assembly for Wales (Conversion of Framework Powers) (Legislative Competence) Order 2007, due to be laid before Parliament to come into force on May 3, 2007.

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Planning under the Welsh Office

The responsibility for town and country planning was an early subject for administrative devolution to the newly established Welsh Office in 1964, as planning was within the responsibilities of the then Ministry of Housing and Local Government, whose functions relating to Wales were, along with education, the first to be transferred to the new department.

In very broad terms, planning legislation in the United Kingdom seeks to do two things:

— set out a system to make and approve plans which guide and regulate the use of land and its development; and
— make provision for individual proposals to be approved and provides the machinery for the enforcement of the system.

This article focuses on the first of these. The second currently remains more or less identical in Wales and in England, although the Government of Wales Act 2006 could now ultimately lead to Wales having entirely separate planning legislation of its own.

For many years after the creation of the Welsh Office, the administrative devolution of planning functions was a matter entirely of form rather than substance. Planning legislation—initially the Town and Country Planning Acts 1959 and 1971 and then the Planning Acts 1990—was identical in its form and substance in Wales and England. The main difference was that planning permissions granted as a result of appeals from the local planning authority or as a result of non-determination within the statutory time limit, as well as schemes of more than local significance called in for the ministerial decision, were, in Wales, decided by the Secretary of State for Wales.

It is one of the central characteristics of the planning system in England and Wales that both the statutory plans that guide local planning authorities in deciding whether or not to grant permission for development and the approach to be adopted in relation to specific issues are heavily, one might say decisively, influenced by policy statements issued by central government. These documents have been variously titled over the years—circulars, planning policy guidance notes, technical advisory notes, planning policy statements, ministerial guidance and statutory guidance are just some of the designations. These are “soft law” sources par excellence and the materiality of these and the consideration given to them in decision making is the stuff of legal challenges to planning decisions.

Notwithstanding the importance of policy in driving the planning system, the Welsh Office proved most reluctant in practice to embark on planning initiatives that took a different policy approach from that applying in England. The examples prior to the 1990s are slight—a circular letter on historic buildings in 1981, one on executive housing in 1986 and on planning and the Welsh Language in 1988.6

From the mid 1970s, Wales began for the first time to develop a distinctive approach to a significant policy area in the field of economic development, when a series of interventionist programmes to encourage inward investment and urban renewal relied upon a combination of government grants and government-funded agencies (notably the Welsh Development Agency, the Land Authority

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5 Circular 30/86: Housing for Senior Managers.

for Wales and, in Cardiff, the Cardiff Bay Development Corporation) to lever in private sector investment. However, establishing a special Welsh national planning policy framework to underpin these initiatives was not seen as a role for the Welsh Office. Also the climate of the time, epitomised by Circular 14/85 “Development and Employment”, emphasised the “presumption in favour of development” which central government then saw as the guiding principle of the planning system. Development projects were only to be refused if they caused “demonstrable harm to interests of acknowledged importance”. Development plans were thus relegated in status to a material consideration on a par with any other. The result was a planning system driven by the appeal process.

The high water mark of deregulated planning soon passed. The present policy imperative of sustainable development was first enshrined in policy in the United Kingdom in 1990 with the white paper “This Common Inheritance: Britain’s Environmental Strategy”; and the Planning and Compensation Act 1991 introduced the principle of the presumption that planning applications are to be determined in accordance with the development plan, unless material considerations justified a different approach.8

At the same time, signs of a more distinctive approach to some aspects of the planning system in Wales were about to emerge, with some unlikely drivers.

In the early 1990s, dissatisfaction with the structure of local authorities created in England and Wales under the Local Government Act 1972 led to a reform of local government boundaries. In England, the Local Government Act 1992 established a commission to make recommendations and which resulted in the present “patchwork quilt” of unitary (all-purpose) and two-tier (county and district) local authorities. In Wales, by contrast, the then Secretary of State, David Hunt, implemented a reform of local government in Wales that swept away the eight 1972 county councils and introduced the present system of 22 unitary local authorities.

This was done, for the first time, by an Act dealing only with the structure of local government in Wales—the Local Government (Wales) Act 1994. As a result, the development plan system in Wales was also reconfigured to replace the two-tier system of a strategic structure plan and a more detailed local plan, with a single tier of unitary development plans. The result was that the organisation of local government and the form of development plans in Wales henceforth followed different organisational principles from England. The resultant structure also created what Professor Richard Rawlings has described as the "institutional space"9 for a new form of territorial government for Wales, with the abolition of the county tier of government drawing the sting of the objections of over-government that had contributed to the rejection at a referendum of the Wales Act 1978.

The second driver was provided by the unlikely person of John Redwood, who succeeded David Hunt as Secretary of State. In the late 1980s, the then Department of the Environment and the Welsh Office had started to produce a series of detailed policy statements known as Planning Policy Guidance. The reversion to “plan led” planning decisions under the Planning and Compensation Act 1991 gave further impetus to the role of the PPGs in planning decisions. The PPGs were notable in most cases for their lengthy and detailed treatment of planning issues. In the Welsh context, it should be noted that these early PPGs applied to both England and Wales and lacked any distinctive Welsh policy dimension. John Redwood, as Secretary of State, recoiled from such

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8 Now s.70 of the Town and Country Planning Act 1990. See also s.38(6) of the Planning and Compulsory Purchase Act 2004.

a prescriptive approach and between 1993 and 1995 the Welsh Office refused to join with the Department of the Environment in England in issuing five new PPGs, including an important PPG on transport designed to encourage a more sustainable approach to transport planning. Instead, in July 1995 the Welsh Office issued two draft PPGs of its own on “Unitary Development Plans in Wales” and “Planning Guidance Wales”. The contents and format of these documents were radically different from the previous joint Wales/England planning guidance. In all, the Welsh Office replaced some 17 documents and a number of circulars and other government statements with two main policy documents, albeit that Planning Guidance Wales was supplemented by a number of detailed Technical Advice Notes (TAN). This is still the planning policy framework that applies in Wales, although the overarching policy document, reissued in 2002, is now designated “Planning Policy Wales”. There is also a separate suite of mineral planning policies.

Thus, by the eve of devolution and in a typically British accidental fashion, Wales already had a planning system that, in terms of the way that plans were formulated and policies laid down, looked nationally distinctive and provided a platform for Wales to develop its own planning policies.

Post-devolution: the Wales Spatial Plan

Following the election of the First National Assembly, planning policy has developed in ways that exemplify the strengths and weaknesses of the institutions created by the Government of Wales Act 1998.

The Assembly Government decided at an early stage to proceed with the implementation in Wales of the European Spatial Development Perspective (1999), an initiative by planning ministers of the European Union to integrate land-use planning and resource issues and to which the UK Government committed itself. In the event, the Assembly demonstrated commendable speed in drafting and consulting on a Wales Spatial Plan: People, Places, Futures (WSP) initially on a non-statutory basis, subsequently using the legislative opportunity provided by the Wales provisions of the Planning and Compulsory Purchase Act 2004 to assert the Assembly’s ownership of the plan and to vest the duty of approving the plan in the elected Assembly as a whole. The WSP was adopted by the National Assembly in plenary session on November 17, 2004 following consultation and a process of scrutiny by Assembly members in subject committee.

The WSP is an interesting and significant document. It represents a national statement of policy over a 20-year time horizon and forms one of a small number of strategic policy “building blocks” of the Assembly Government. The particular role of the WSP is described as:

“...making sure that decisions are taken with regard to their impact beyond the immediate sectoral or administrative boundaries; that there is co-ordination of investment and services through understanding the roles of and interactions between places; and, that we place the core values of sustainable development in everything we do.”

Its aim is thus to integrate the spatial aspects of national strategies, including social inclusion and economic development, health, transport and environmental policies.

12 WSP, p.2.
This is not the place to rehearse the concept of spatial planning, beyond observing the contrast between the approach to spatial planning on a national basis adopted in Wales and that in England. The Wales Spatial Plan is an avowedly aspirational document prepared under direct political influence. In contrast, the 2004 Act prescribes a regional spatial plan for each of England’s governmental regions adopted by the nominated Regional Planning Board and following a process of evidence gathering, consultation and public examination reminiscent of structure plan procedures.

**Post-devolution: Planning: Delivering for Wales**

The second development is the reform of the statutory planning process embodied in the Planning and Compulsory Purchase Act 2004.

This legislation originated in the summer of 2001. As a result of HM Treasury suggesting that research showed that planning delays were a factor holding back economic growth, the then Planning Minister for England, Lord Falconer, announced a fundamental review of the planning system in England, with legislation to follow. The Assembly Government had little notice of what was afoot and, it is fair to say, the comprehensive review of the whole system was not seen as a legislative priority for Wales at that time.

It should be borne in mind that the Assembly Government’s planning department has a small staff of professional planners and they are candid that in Wales choices have to be made as to matters on which Wales strikes out on its own and those where Wales adopts the same measures that apply in England.


**Development plans—a brief comparison**

It is not our purpose to make a detailed comparison of the development plan systems in Wales and England. However, the gist of the reforms in England was that the existing development plan system that had evolved gradually since the Town and Country Planning Act 1946 introduced the modern planning system was to be swept away and replaced by a system of Local Development Frameworks (LDF). These are to be more succinct plans than the ones they replace, with greater emphasis in the preparation stage on “community involvement”, seemingly in the hope that more public consultation at that stage will reduce opposition to planning applications in accordance with LDF policies later on. At the same time, England started to replace its Planning Policy Guidance with a series of shorter Planning Policy Statements, with much of the details relegated to technical appendices—a not dissimilar format to that adopted in Wales almost 10 years earlier. The detail of the reform in England is, of course, much more complex and the “root and branch” nature of the change cannot be over emphasised.

Wales, in contrast, used the opportunity to address what was perceived here as being the main weaknesses of the unitary development plan (UDP) system introduced in Wales after the reorganisation of local government. Progress on the new plans had been slow. The first UDP was not adopted until 2002 and only 10 of the 25 local planning authorities (22 local authorities and the three national park authorities) had adopted UDPs up to the middle of 2006. The proposals for Wales therefore concentrated on streamlining the system and moving to a system of more tightly...
programmed plan preparation cycles, with planning authorities working to timetables agreed with the government and with the aim of plans taking around four years to prepare. Wales has also chosen to encourage greater community involvement in plan preparation as in England.

The nature of the reform in Wales is much more evolutionary and builds on the previous system by retaining a single development plan document. This is a complete contrast to the approach in England and in general the responses to the parallel consultation exercises compared the approach being adopted in Wales favourably against the English proposals.

As a result, Pt 6 of the Planning and Compulsory Purchase Act 2004 is a completely separate code for development plan preparation for Wales. Whether it meets Wales’ needs better than the system being introduced in England over the coming years, only time will tell.

**Planning and Compulsory Purchase Act 2004, Part 6**

Part 6 encompasses s.60, which puts the Wales Spatial Plan on a statutory footing, and ss.61–78, which deal with the local development plan (LDP) system.

As already noted, the National Assembly was quick off the mark in deciding to implement the European Spatial Planning Perspective. Following the Government of Wales Act 2006, the responsibility for preparation of the Wales Spatial Plan will pass to the Welsh Ministers with its formal adoption still requiring a resolution of the National Assembly.

The remainder of Pt 6 is concerned with the LDP system and the hierarchy of statutory and “soft law” sources making up the system as a whole comprises:

- The Planning and Compulsory Purchase Act 2004 Part 6 (www.opsi.gov.uk/acts/acts2004/40005–g.htm#60);

The primary statutory provisions for the LDP system start with s.61 which sets out the survey obligations of local planning authorities in connection with plan preparation and broadens the scope of the survey obligation to require review of social and environmental characteristics, in addition to the physical and economic characteristics, thus capturing the main requirements of a sustainable development strategy.\(^\text{13}\)

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\(^\text{13}\) See s.39 of the 2004 Act, which places a duty on persons with functions related to the Wales Spatial Plan or a local development plan to exercise them with the objective of contributing to the achievement of sustainable development. The National Assembly also has a separate
Section 62 sets out the requirement for local planning authorities to prepare LDPs in terms of objectives for the development and use of land in their area and their general policies for implementing those objectives. In preparing the plan, a local planning authority must have regard to:

- current national planning policies;
- the Wales Spatial Plan;
- the English Regional Spatial Strategy for any region adjoining a Welsh local planning authority’s area (applicable along the Welsh border with England);
- the Community Strategy prepared by the authority or applying in the local planning authority’s area (applicable in the case of National Park Authority Local Development Plans).
- such other matters as the Assembly may prescribe.

In addition, the local planning authority must conduct a sustainability appraisal of the plan and prepare a report of the findings.

The LDP itself must be a single document comprising written policies and their reasoned justification. Policies and their justification must be clearly distinguished. The LDP must also contain a proposals map and may contain inset maps. The content of an LDP is developed further in “Local Development Plans Wales: Policy on Preparation of LDPs”. In order to assist local planning authorities in preparing succinct LDPs and to discourage the repetition of national planning policies in UDPs, the Assembly Government has produced a Planning Policy Wales Companion Guide (2006).

Section 63(1)–(4) addresses the two central objectives of the reforms in Wales, by requiring the adoption by the LPA, at the outset of the plan preparation process, of a community involvement scheme and a timetable for the preparation and adoption of the plan. Together, these will constitute the Delivery Agreement and the section requires the LPA and the Assembly Government to reach a consensus, but ultimately subs.(5) and (6) give the Assembly the final say. Subsection (7) contains the Assembly’s powers of direction in respect of the preparation and the components of the Delivery Agreement.

Section 64 provides for the independent examination of the plan. Every plan must be submitted to the Assembly (after May 2006 to the Welsh Ministers), once it has complied with the procedural requirements of Pt 6 and the LPA “thinks” it is ready for independent examination. The examination is carried out by an inspector appointed by the Assembly to determine if the plan has complied with the procedural requirements and is “sound”.

The concept of soundness is central to the way in which examinations should proceed and is a feature shared with the English system. The test is designed to focus the examination on the plan as a whole, rather than make the examination an inquiry to determine a succession of specific objections.

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14 Prepared under s.4 of the Local Government Act 2000.
15 Reg.13 of the Town and Country Planning (Local Development Plan) (Wales) Regulations 2005 specifies additional matters including the local transport plan, other plans under the Transport Act 2000, the appropriate separation of uses, the control of major accident hazards, the Waste Strategy for Wales, any regional waste plan and any local housing strategy.
16 See reg.11 and 12 of the Town and Country Planning (Local Development Plan) (Wales) Regulations 2005.
Soundness is not defined in the Act. In a classic example of the way UK planning law relies on “soft law” for the system’s key concepts, the meaning of soundness is found in the Planning Inspectorate Wales’s non-statutory “Guide to the Examination of Local Development Plans”, which states:

“LDPs must be sound in terms of their content and the process by which they are produced and must be founded on a robust and credible evidence base. The term sound is not defined in the 2004 Act. It may be considered in this context within its ordinary meaning of ‘showing good judgment’ and ‘able to be trusted’ and within the context of fulfilling the expectations of legislation.”

The importance of the role of the independent examination as a means of determining the overall acceptability of the plan rather than as a forum for determining objections is reinforced by the fact that every plan will be independently examined regardless of whether there are objections. The independent inspector is encouraged to adopt an inquisitorial approach to the examination, with formal hearings kept to a minimum. Following the examination, the Inspector will present reasoned recommendations to the local planning authority, which must publish them and which cannot adopt the plan other than in accordance with the terms of the recommendations.

Section 65 confers powers on the Assembly to intervene by way of direction that the plan be “called in” by the Assembly. If a plan is called in before examination, then the Assembly cannot adopt the plan until an examination has taken place, although the Assembly is not bound by the recommendations. The Assembly’s decision on a “called in” plan must be accompanied by reasons for the decision.

Section 66 deals with the withdrawal of plans. The local planning authority may withdraw a plan unilaterally at any point up to its submission for examination. If it has been submitted for examination, then only an independent inspector can recommend withdrawal or the Assembly can direct that a plan is withdrawn. Once an LDP has been adopted, it can only revoked by the Assembly acting at the request of the local planning authority under s.67. Presumably this power is available to deal with the situation where a local planning authority has decided to make a completely new plan rather than revise an existing plan.

An obligation to review their LDP is imposed on local planning authorities at such times as the Assembly prescribe, currently every four years, which is the plan-making cycle envisaged by the Assembly guidance and the LDP Regulations. The local planning authority may also revise its LDP at any time in accordance with the procedures in Pt 6.

Two important provisions are found at ss.75 and 76. Section 75 gives the Assembly power to issue statutory guidance, which is therefore a material consideration to be taken into account by the local planning authority in the plan-making process. Section 76 requires the submission of an annual monitoring report to the Assembly by a date to be specified in guidance issued under s.75. The LDP Regulations specify the requirements for the annual monitoring report and the contents are of interest. In addition to identifying policies that are not being implemented and the steps (if any) proposed to secure implementation and whether an amendment or a revision of the LDP is intended in consequence, the monitoring report must report on:

18 See para.6 of “Planning Inspectorate—Wales: Guide to the Examination of Local Development Plans”.
19 See ss.64(7) and (8) and s.67 of the 2004 Act.
20 See s.69 of the 2004 Act and reg.41 of the Town and Country Planning (Local Development Plan) (Wales) Regulations 2005.
21 See s.70 of the 2004 Act.
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— the housing land supply taken from the current Housing Land Availability Study; and
— the number (if any) of net additional affordable and general market dwellings built in the
local planning authority area,

both in the period covered by the report and the period since the LDP was first adopted.

Finally, for the sake of completeness, mention should be made of s.73, which allows the disregarding
of representations if they appear to the local planning authority or the Assembly to relate to a highway
proposal or a new town designation being undertaken under separate powers; and s.74, which allows
the Assembly to disapply Pt 6 to the area of an urban development corporation, of which there are
currently none in Wales since the Cardiff Bay Development Corporation was wound up in 2000.

A word on sustainability appraisal and SEA

The relationship between the requirement for a sustainability appraisal to be carried out under s.62(6)
and the process of Strategic Environmental Appraisal (SEA) is important.

SEA is a requirement of the European Union Directive 2001/42 on the assessment of the effects of
certain plans and programmes on the environment. The SEA Directive requires formal environmental
assessment during the production of plans and programmes likely to have a significant effect on the
environment. In Wales, the SEA Directive has been transposed by means of the Environmental

In relation to LDPs, “Local Development Plans Wales: Policy on Preparation of LDPs” makes clear
that the purpose of sustainability appraisal of plans required under s.62 of the 2004 Act is to appraise
the economic, environmental and social effects of the strategy and policies in an LDP at the outset of
the process to ensure that decisions are made that accord with sustainable development. Accordingly,
sustainability appraisal must include meeting the requirements of the SEA Regulations.

In Wales, the technical guidance on conducting sustainability appraisal and on the incorporation of
the requirements of SEA is to be found in the “Local Development Plan Manual”.

The cut-off date in the SEA Regulations for enabling plans to be adopted without going through a
SEA process was July 22, 2006.22 This provided a significant driver towards the adoption of UDPs
in Wales. The result was that five UDPs achieved adoption between May and July 2006.

Transitional arrangements

The transition from the UDP system to LDPs has been managed through the commencement orders
bringing Pt 6 of the 2004 Act into force. The commencement of Pt 6 is a matter for the Welsh
Assembly Government and to date four commencement orders have been made which have the
effect of commencing Pt 6 in relation to those authorities who wish to discontinue the making of
UDPs and commence the making of LDPs without the UDPs having been adopted.

The Planning and Compulsory Purchase Act 2004 (Commencement No.3 and Consequential and
Transitional Provisions) (Wales) Order 2005 allowed LDP preparation work to be commenced by
the following “early start” local planning authorities named in the Schedule to the Order: Caerphilly
County BC, the Council of the County and City of Cardiff, Conwy County BC, Denbighshire CC,

22 See reg.6.
Merthyr Tydfil County BC, Rhondda Cynon Taf County BC, Snowdonia National Park Authority, Torfaen County BC and Wrexham County BC.

The Planning and Compulsory Purchase Act 2004 (Commencement No.4 and Consequential, Transitional and Savings Provisions) (Wales) Order 2005 placed Bridgend County Borough Council and the Vale of Glamorgan Council under a duty to commence the preparation of LDPs under s.62 of the 2004 Act and allowed the following local planning authorities to continue with the preparation of their UDPs by excluding them from the duty to prepare LDPs: Blaenau Gwent County BC, Brecon Beacons National Park Authority, Carmarthenshire CC, Ceredigion CC, Flintshire CC, Gwynedd CC, Isle of Anglesey CC, Monmouthshire CC, Newport CC, Neath Port Talbot County BC, Pembrokeshire CC, Pembrokeshire Coast National Park Authority, Powys CC, the Council of the City and County of Swansea.

The Planning and Compulsory Purchase Act 2004 (Commencement No.4 and Consequential, Transitional and Savings Provisions) (Wales) (Amendment No.2) Order 2006 subsequently placed the Isle of Anglesey CC under a duty to begin work on an LDP.

The Planning and Compulsory Purchase Act 2004 (Commencement No.4 and Consequential, Transitional and Savings Provisions) (Wales) (Amendment No.3) Order 2006 subsequently placed the Pembrokeshire Coast National Park Authority and the Pembrokeshire County Council under a duty to prepare an LDP.

A summary of the state of development plans in Wales as at February 1, 2006 is set out in the annex to this article.

Policy framework

As already mentioned, the context for planning policy in Wales is contained within two main documents: “Planning Policy Wales 2002” (PPW) and “Mineral Policy Wales”. These are supplemented by a series of Technical Advice Notes (TAN) and minerals technical advice notes (MTAN) on various topics. Updates are provided for in Ministerial Interim Planning Policy Statements (MIPPS). Circulars also give guidance on procedural points.

PPW remains the principal and authoritative source of national planning policy in Wales and a significant step forward in the process of developing a planning system that is distinctly Welsh. PPW was issued following the first review of planning policy by the Welsh Assembly Government, and its aim is a more sustainable future for Wales. However, it follows the model previously adopted by the Welsh Office of a single national planning policy with subsidiary topic based advisory notes.

As already mentioned, the Wales Spatial Plan, People Places Futures 2005, sets a strategic framework to guide future development.

PPW identifies 18 policy objectives that should underpin all development, such as minimising the demand to travel, the protection of the environment and heritage and the provision of good housing for all. Specific topics such as green belts, the re-use of land and conserving the best agricultural land are also dealt with. Of course many of these policies bear similarities to those in force in other parts of the United Kingdom. However, it is not only the support of the Welsh language in para.2.10 which makes PPW distinctly Welsh.

23 As amended by the Planning and Compulsory Purchase Act 2004 (Commencement No.4 and Consequential, Transitional and Savings Provisions) (Wales) (Amendment) Order 2006 SI 2006/842 (W.77)
The Welsh context

It is noteworthy that between 1998 and the coming into force of the Government of Wales Act 2006 planning matters coming to the National Assembly for Wales for decision as a result of a “call in” were dealt with by a Planning Decision Committee under Standing Order 27, consisting of four members to reflect, as far as practicable, the balance of parties in the Assembly. It has been emphasised in the Assembly that decisions should not be taken on a party political basis, but on a “quasi-judicial” basis. There was no such balance in England. The implications of such a committee-based system in relation to potential bias on the part of the Minister who chairs Planning Decision Committees were recently considered in the case of National Assembly for Wales v Condron. Under the 2006 Act decision making will revert to the appropriate Welsh Minister.

Chapter 7 of PPW sets out the objectives for supporting the new economy of Wales and to raise Welsh GDP per capita, and recognises that in Wales there is a need for employment strategies with the capacity to accommodate rapid change whilst enhancing the environment. It recognises that a flexible and efficient agricultural industry is essential in Wales, and that the mineral working industry makes a significant contribution to the Welsh economy. Chapter 11 sets out objectives to maximise the economic and employment benefits of tourism in Wales.

Chapter 8 sets out the transport objectives in Wales and refers to the Assembly Government’s then current strategic plan, “Plan for Wales 2001”, which commits it to developing an integrated effective and accessible transport system that supports the Welsh economy. Similar objectives are set out for everyone in Wales to have the opportunity to live in good quality and affordable housing, and to have access to competitive retail provision.

These policies are being put into practice. For many years, for example, the weakness of transport links between the M4 corridor and Carmarthen to south Ceredigion has been recognised, as has the unrealised economic and tourism potential of that area. A strategic road link has now been brought forward in the development plan process and funded by the Welsh Assembly Government. Many improvements have already been made, and more are in the pipeline.

It is worth now turning to examples of how these policies may provide a distinctly Welsh outcome in practice.

Heritage

PPW, para.6.1 deals with conserving the historic environment. It refers to the historical and cultural identity of Wales. There is now a Register of Landscapes of Historic Interest in Wales, issued in two parts (1998 and 2001), covering 36 outstanding and 22 special historic landscapes. The user guide to the register makes it clear that all landscape areas identified are of national importance in the Welsh context.

Previously, policy references to national interests and concerns tended to be made in the UK context. This important change did not come without a fight. In Community Power Ltd v NAW and Neath and Port Talbot CBC, H.H.J. Rich Q.C. considered the West Glamorgan Structure Plan adopted on February 15, 1996, which strictly limited development which could adversely affect heritage features.
of national importance. It was argued on behalf of the claimant, a company who wanted to erect wind turbines on Mynydd Margam, that “national” in this context meant the UK context. This is now clearly not the case. The learned judge found that in the case of heritage, it was not the case then, either. This was because the bodies that were responsible for the preservation of Welsh heritage had already been established separately by statute. The judge stated:

“At the date when the structure plan was adopted, there was no National Assembly for Wales, and therefore no separate devolved national Welsh context such as emerged from the establishment of that Assembly. Nevertheless, I am satisfied that already long before the adoption of the West Glamorgan Structure Plan, the bodies charged with preservation of heritage within Wales were already established separately within the principality as compared with England. Heritage was already seen before formal devolution as a matter of national concern within Wales. I think that it was therefore entirely within the scope of construction of the Structure Plan Policy, open to the Inspector for him to conclude that national importance in respect of a heritage matter was satisfied by an identification of a feature as being of ‘national importance in the Welsh context’.

Flood risk

Development in flood plains is dealt with in England by Planning Policy Guidance (PPG) 25. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that if regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise. PPG25 is such a consideration.

The intention of PPG25 is that flood risk should be avoided wherever possible and it is only where it cannot be avoided that development should be permitted in the flood risk areas and the risk managed. A risk-based approach is laid down through a sequential test. Zones are set out according to risk, and when allocating land in development plans or deciding applications for development at any particular location, the decision maker is expected to demonstrate that there are no reasonable options available in the lower risk category.

In planning law, it is normally possible for the decision maker to depart from policy for good reason, as long as it is properly appreciated that it is a departure and adequate reasons for the departure are given (see *T-Mobile v First Secretary of State*).

The importance of the sequential system is demonstrated in *R. (on the application of the Environment Agency) v Tonbridge and Malling BC*. It was held that although nothing in PPG25 stipulates that the sequential test should be applied in a particular form, it would normally be necessary to explain how, on the application of the test, a conclusion had been arrived at that there was no reasonable alternative option in the lower risk category. Moreover, the test must be considered in respect of individual applications, as well as in formulating development plans. As the report to committee here contained no reference to the test, the decision was quashed.

In Wales, the matter is dealt with by Technical Advice Note 15: Development and Flood Risk. That is the material consideration in Wales. That too has the aim of avoiding flood risk areas and uses a

zoning map which directs new development away from zone C (the highest risk zone). It will be permitted where justified to assist in regeneration or to contribute to key employment policies. Even in those cases, it must also concur with PPW and the consequences of flooding must be acceptable.

So rather than going for a sequential test, the TAN lays down the criteria for justifying new development in the high risk zone. The reasoning may be found in para.6.1, which deals with justifying the location of development:

“Much urban development in Wales has taken place alongside rivers and in the coastal plain. It is therefore inevitable, despite the overall aim to avoid flood risk areas, that some existing development will be vulnerable to flooding and fall within zone C. Some flexibility is necessary to enable risk of flooding to be addressed whilst recognising the negative economic and social consequences if policy were to preclude investment in existing urban areas, and the benefits of reusing previously developed land.”

Waste management

Paragraph 12.5 of PPW deals with planning to reduce and manage waste. It sets out the UK Government’s policy which is based on a hierarchy of reduction, re-use, energy recovery and safe disposal. It provides that waste should be managed or disposed of as close to the point of its generation as possible, in line with the proximity principle. PPW requires local authorities to produce regional waste plans to provide Wales with an integrated and adequate network of facilities. This is now supplemented by TAN21 and the process is ongoing.

In relation to hazardous waste, there is an immediate short-term problem in that there are currently no facilities to manage such waste produced in Wales. There is a particular shortage of potential facility sites in North Wales. The Waste Plan of that region, currently under review, accepts that in reality the most sustainable and viable way forward may be an all-Wales facility in the south-east, where most of such waste is produced. If that proves to be the case, such waste from the north may be transported not to the nearest English regions, but to South Wales.

Use classes

Such differences also arise in Use Classes Orders which allow for a change of use within certain categories of class of use without the need for planning permission. Class B8 of the Town and Country Planning (Use Classes) Order 1987 allows change of use for storage or as a distribution centre. The Town and Country Planning (Use Classes) (Amendment) Wales Order 2002 excludes from that class in Wales the storage or distribution of radioactive material or waste.

The Administrative Court in Wales

This account would not be complete without mention of the development of the Administrative Court in Wales and the arrangements for the Court of Appeal to sit in Wales. These provide the facility for all administrative law and statutory challenges to planning decisions in Wales to be issued and heard within Wales.

The establishment of the Administrative Court in Wales is an expression of the principle that the organisation of the courts in Wales should meet that which Lord Bingham C.J. described as:
“... the need for the Principality of Wales to have its own indigenous institutions operating locally and meeting the needs of the citizens here.”

Prior to 1999, Crown Office List business could only be commenced, under the then Rules of the Supreme Court, in the Crown Office in London. Whilst there was no formal restriction on where judges could hear Crown Office List business, all such business (other than under exceptional circumstances such as applications of the utmost urgency) was disposed of by judges sitting in London.

On June 30, 1999, Lord Bingham C.J. issued a Practice Direction making provision for a number of matters arising out of, or associated with, the creation of the National Assembly for Wales under the Government of Wales Act 1998.

Paragraphs 14.1–14.4 of the Practice Direction modified the existing practice in relation to judicial review proceedings where those proceedings involved:

— a devolution issue arising out of the Government of Wales Act 1998; or
— any issue concerning the National Assembly, the Welsh executive or any Welsh public body (including a Welsh local authority).

On July 20, 2000, Lord Woolf C.J. issued a Practice Direction re-constituting the Crown Office List as the Administrative Court with effect from October 2, 2000.

The Practice Direction of June 30, 1999 has now been further superseded by Practice Direction 54 (Judicial Review) corresponding to Pt 54 of the Civil Procedure Rules 1998. This provides for judicial review proceedings to be brought in the Administrative Court in Wales rather than the Administrative Court in London under the same circumstances as those referred to in the 1999 Practice Direction (devolution issues or other issues concerning the National Assembly for Wales, the Welsh executive or any Welsh public body including a Welsh local authority).

Although the 1999 Practice Direction and PD54 relate specifically to judicial review proceedings and so do not relate directly to other Administrative Court business such as statutory challenges to planning decisions under ss.288 and 289 of the Town and Country Planning Act 1990, a practice has been adopted whereby documents relating, for example, to challenges to decisions made by the Assembly or its planning inspectors on appeal from local authorities may also be filed in the Administrative Court in Wales and hearings held in Wales.

The development of the work of the Administrative Court has not been as rapid as its supporters might have hoped. This seems to be due to the fact that the listing of cases and the deployment of Administrative Court judges to Wales has remained under the control of the Administrative Court Office in London, rather than being devolved to court staff and judges based in Wales. A further factor has been the absence of a procedural requirement for judicial review applications or statutory challenges against Welsh public bodies to be issued in Wales or for them to be heard in Wales.

However, there have recently been two significant developments that may prove to be milestones in the further development of the court.

First, May L.J. has recently (December 2006) reported on the deployment of judicial resources outside London, including arrangements for the hearing of Administrative Court business. A powerful case

29 Speech by Lord Bingham at the opening the Mercantile Court at Cardiff, May 2000.
for the strengthening of the Administrative Court in Wales was put forward in a joint paper by the Standing Committee on Legal Wales and the Wales Public Law and Human Rights Association presented to May L.J. during the course of his deliberations. This submission placed the need for the arrangements for Administrative Court business arising from Wales to reflect the constitutional position of Wales under devolution, in the context of the case in England for the Administrative Court to sit in major English trial centres outside London.

Secondly, in the case of *Condron*, 30 which concerned a statutory challenge to a the decision of a National Assembly Planning Decision Committee on an open-cast coal extraction project and which was heard in London both at first instance and on appeal, Richards L.J., delivering the leading judgement of the court, added the following postscript (with which Ward L.J. expressly concurred) on the question of venue:

"The final point I should mention concerns the venue for the hearing of this case both at first instance and on appeal. Both hearings took place in London. Yet there are procedures in place to enable Welsh judicial review cases and similar statutory challenges to be heard in the Administrative Court in Wales (see Supperstone, Goudie & Walker, *Judicial Review*, 3rd ed., paras 20.19.1–20.19.2 for the relevant references); and there are sittings of the Civil Division of the Court of Appeal from time to time in Wales. In my view the present case cried out to be heard in Wales both at first instance and on appeal, and it is a matter of considerable regret that efforts were not made to have it listed for hearing accordingly. Practitioners and listing officers alike need to be alert to this issue."

**Conclusion**

It was suggested earlier in this article that planning law was an excellent illustration of the strengths and weaknesses of the Government of Wales Act 1998. On the positive side it created the opportunity to move rapidly with the preparation of the Wales Spatial Plan—a true national plan. The authors suggest that this would not have occurred under the old Welsh Office for this reason; as a territorial department of state it would have been constrained by the perceived necessity of having a process of consultation and independent review before the Secretary of State moved to adopt such a plan. In post-devolution Wales, however, the democratic credentials of the National Assembly allowed it to take ownership of the process and drive the timetable and itself consult and scrutinise it so as to achieve an early success for the Assembly in the planning field.

By contrast, although the "Planning: Delivering for Wales" agenda has given Wales the opportunity to make worthwhile reforms to the development plan preparation system and to do so in a way that is thought to meet the needs of Wales, the agenda was brought forward as a result of a decision to reform the system in England and to create the necessary legislative time at Westminster for a bill on planning. Wales had no choice but to take the legislative opportunity that opened up, but it is questionable whether, in 2001, such a reform was perceived as a pressing legislative priority for Wales.

Further developments could well see a future Westminster planning bill giving Wales the “framework powers” to carry out future reforms to the planning system to a timetable that suits Wales’s needs best rather than Whitehall’s and could ultimately lead to a separate code of Welsh planning legislation made by National Assembly Measure. It is already envisaged that the forthcoming Marine Bill will be

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30 [2006] EWCA Civ 1573.
England-only legislation, with the planning of the marine environment in Welsh waters becoming a matter for National Assembly legislation.

In addition, the prospect of the Administrative Court in Wales acquiring its own listing capability will see the judicial oversight of the planning system in Wales firmly based within Wales.

Overall, the speed with which a distinct body of Welsh planning law and its associated infrastructure is emerging is remarkable. The recent constitutional changes can only promote this process.

Annex

Summary of Development Plans and Plan Preparation in Wales as at February 1, 2006

1. UDPs approved and approval dates:
   - Blaenau Gwent County BC July 2006
   - Bridgend County BC May 2005
   - Carmarthenshire CC July 2006
   - Denbighshire CC July 2002
   - Monmouthshire CC June 2006
   - Newport CC May 2006
   - Pembrokeshire CC/Pembrokeshire Coast NPA (Joint UDP) June 2006
   - Vale of Glamorgan County BC April 2005
   - Wrexham County BC February 2005

2. UDPs still in progress and target dates for adoption:
   - Brecon Beacons NPA March 2007
   - Flintshire County BC summer 2008
   - Gwynedd CC late 2007
   - Neath Port Talbot Bounty BC March 2007
   - Powys CC November 2007
   - Swansea CC spring 2008

3. LPAs who have orders allowing them to proceed with LDPs:
   - Isle of Anglesey CC
   - Pembrokeshire CC
   - Pembrokeshire Coast NPA
   - Blaenau Gwent County BC Order in progress
   - Ceredigion CC Order in progress

4. Planning Authorities with UDPs approved but without orders allowing them to proceed with LDPs:
   - Carmarthenshire CC
   - Monmouthshire CC
   - Newport CC

5. LPAs authorised to proceed with a LDP and with Delivery Agreements agreed by the Welsh Assembly Government with current target dates for LDP examinations and adoption:
   - Brecon Beacons NPA; Independent Examination (IE) August 2010; adoption—June 2011;
— Bridgend County BC; IE—October 2009; adoption—October 2010;
— Caerphilly County BC; IE—March 2010; adoption—February 2011;
— Cardiff CC; IE—January 2009; adoption—October 2011;
— Conwy County BC; IE—April 2008; adoption—June 2010;
— Denbighshire CC; IE—January 2010; adoption—November 2010;
— Isle of Anglesey CC; IE—June 2009; adoption—April 2011;
— Merthyr Tydfil County BC; IE—January 2009; adoption—October 2009;
— Rhondda Cynon Taf County BC; IE—August 2008; adoption—March 2009;
— Snowdonia NPA; IE—summer 2008; adoption—autumn 2009;
— Torfaen CC; IE—November 2009; adoption—January 2010;
— Vale of Glamorgan County BC; IE—October 2009; adoption—January 2011;
— Wrexham County BC; IE—March 2010; adoption—February 2011.