THE DRAFT WALES BILL

Submission to the Welsh Affairs Select Committee of Parliament and the Constitutional and Legal Affairs Committee of the National Assembly for Wales

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Introduction

1. The majority of the submissions to both your committees have focussed on the proposed amendments to the Government of Wales Act 2006 to establish a reserved powers model of devolution. A number of them have noted the need to explore further the details of the reservations contained in the new schedule 7A[2]. This submission considers the provisions of the Bill from the point of view of a practicing lawyer in the field of planning law and related subjects and one who has been engaged since 2011 in the reform of planning law in Wales. The centrepiece of this reform (but far from the only element) is the Planning (Wales) Act 2015.

2. In this submission I will highlight:

2.1 How restrictions in the conferred powers model of devolution under GOWA 2006 has hampered the planning reform process in Wales to date and how these restrictions will be perpetuated under the reserved powers model.

2.2 Ways in which the conversion of "silent subjects" into reservations could restrict the ability of the Welsh Government to develop its policies in a coherent and comprehensive way and to legislate for them, with particular reference to the reservation of compulsory purchase of land.

2.3 Observations in relation to some cognate subjects to planning.

2.4 Some general observations focussed on the planning system that illustrate the consequences of the Draft Bill as it stands in relation to the reservation and the drawing of the boundaries of the reserved matters generally, particularly with reference to the "subject matter of" approach to some of the reservations.

The Planning (Wales) Bill

3. The Planning (Wales) Act 2015 is the result of an evidence-based process of policy development. In very broad summary it:

3.1 Links the planning system in Wales to the furthering the land use elements of sustainable development and the well-being goals of the Well-being of Future Generations (Wales) Act 2015.

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[2] See the Submissions of Professor Thomas Glyn Watkin, paragraph 41 and Elisabeth Jones (Director of Legal Services of the National Assembly at page 14 of the Presiding Officer's submission.

3.2 Introduces a National Development Framework, which will be examined by the National Assembly and will development plan status, unlike its predecessor the Wales Spatial Plan.

3.3 Makes provision for cross boundary planning. Firstly, by updating the arrangements for joint planning boards. Secondly, by making provision where regional circumstances require it for Strategic Development Plans across local authority boundaries to make strategic allocations in fields such as housing.

3.4 Introducing a category of Welsh Developments of National Significance, enabling planning applications and ancillary consents to be determined by the Welsh Ministers within a statutory time limit of 36 weeks.

3.5 Makes provision for enabling the applications to be made direct to the Ministers where a local planning authority is failing.

3.6 Greater emphasis on pre-application consultations and enhanced duties on statutory consultees to make timely and substantive responses when consulted.

3.7 Detailed changes to the arrangements for determining planning applications, appeals and enforcement, for example;

3.8 A quick appeal process on paper to resolve disputes between applicants and planning authorities about the validation of applications.

3.9 A new format for the planning permission certificate, which can be updated as reserved matters and consents are issued or discharged, which will make it much easier to for local planning authorities, neighbours and buyers to ascertain if a development conforms to the permission.

3.10 Uniform national protocols for planning committees, their size and delegation arrangements.

3.11 Reforms to the registration of new town and village greens where planning permission has been given.

4. The Planning (Wales) Act is part of a linked programme of environmental legislation approaching its completion in the Fourth National Assembly. The programme also includes the Well-being of Future Generations (Wales) Act, the Environment (Wales) Bill and the Historic Environment (Wales) Bill.[3]

Planning Reform and the Conferred Powers Model – the CIL Problem

5. Members of both your committees with some familiarity with planning will be aware of the use of planning obligations, commonly known as “section 106 agreements”. This is a form of statutory agreement that binds the land and future owners. Their main use is to deal with matters that would otherwise prevent planning permission being granted.

6. A section 106 agreement or undertaking can:

[3] A Welsh Government note explaining the interrelationship between these pieces of legislation can be found at http://gov.wales/docs/desh/publications/150223-three-bills-diagram-en.pdf

6.1 Restrict the development of use of the land in any specified way;

6.2 Require specified operations or activities to be carried out in, on, or under the land;

6.3 Require the land to be used in any specified way; or

6.4 Require a sum or sums to be paid to the authority on specified dates or periodically.

7. In order to create a lawful obligation a section 106 agreement or undertaking must fulfil a number of tests that derive originally from case law but are now given statutory form under the Community Infrastructure Levy Regulations ("CIL") 2010, regulation 122 and require an obligation to be:

7.1 Necessary to make the development acceptable in planning terms;

7.2 Directly related to the development; and

7.3 Fairly and reasonably related in scale and kind to the development.

8. With effect from April 2015 the CIL regulations also restrict the number of Section 106 contributions that can be pooled by way to pay for new infrastructure to five.[4]

9. As part of the process of developing the evidence base for the Planning (Wales) Act 2015, the Welsh Government set up an Independent Advisory Group[5] to examine the delivery of the development management system. The IAG's report "Towards a Welsh Planning Act: Ensuring the Planning System Delivers" [6] made a total of 97 recommendations, which included a series of recommendations regarding the operation of section 106. The relevant discussion of the issues and recommendations are attached at Annex A.

10. In the event, the Welsh Government concluded that due to the fact that the use of section 106 agreements had now been made subject to the CIL Regulations and the fact that CIL, being a financial levy, was outside the conferred legislative powers of the National Assembly, the Assembly therefore lacked the legislative competence to amend section 106 in any way at all.

11. As the discussion of the uses of section 106 and the recommendations for reform put forward by the IAG indicate, there is continuing role for section 106 agreements notwithstanding the advent of CIL and not only in those authorities that decide not to adopt it. However, there is no legislative competence to change or adapt section 106 in the context of the reform of the

[4] For further information of the operation of CIL in Wales see a guide published by the National Assembly Research Service at http://www.assembly.wales/research%20documents/qg15-community%20infrastructure%20levy/qg15-006.pdf

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

[6] The full report can be found at http://gov.wales/topics/planning/planningresearch/publishedresearch/towardsawelshplanningact/?lang=en

Welsh planning system due to section 106 obligations being brought within the ambit of CIL.

12. The Silk Commission Stage 1 Report "Empowerment and Responsibility; Financial Powers to Strengthen Wales"[7] discussed (at recommendation 11) the devolution of levies including CIL to Wales on a case by case basis. Subsequently the UK [8]Government in its response to Stage 2 of the Silk Commission stated:

> "If take up of CIL remains low in Wales nearer to 2014, there may be a case for devolving responsibility for determining CIL requirements in Wales, as local authorities would otherwise be constrained in their ability to raise funds from development when the 2014 restrictions on the use of Section 106 contributions kick in. Alternatively, there may be ways to increase take up of CIL in Wales under current arrangements. The Commission may wish to consider this issue."[9]

13. The Welsh Government also made submissions to the Silk Commission seeking the devolution of CIL.

14. In the event and for reasons that are unclear, the Second Report of the Silk Commission "Empowerment and responsibility: Legislative Powers to Strengthen Wales" did not take up the invitation to give further consideration to CIL.

15. The current position in relation to the take-up of CIL in Wales is that four local planning authorities have CIL charging schemes in place[10], eight are not progressing CIL at present[11] and the remaining 7 local planning authorities are at various stages of preparation.[12]

16. The Welsh Government's submission to your Committees under cover of the First Minister's letter of 11th November 2011, at paragraph 27 seeks the removal of CIL from the list of reserved matters; and that the Annexe to the First Minister's letter of 22nd September 2015 sets out in detail the case for the devolution of CIL[13].

17. As the brief account of the Planning (Wales) Act indicates, the planning system in Wales is set on its own distinctive path. Strategic Development Plans, the National Development Framework and the Welsh approach to place planning have no equivalents in the English planning system for which CIL was designed.

18. Logic surely dictates that the National Assembly should have legislative competence over the whole of town and country planning system. As far as

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[7] http://webarchive.nationalarchives.gov.uk/20140605075122/http://commissionondevolutioninwales.independent.gov.uk/files/2013/01/English-WEB-main-report1.pdf

[8] See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/187130/Silk_II_-_UK_Government_Evidence.pdf

[9] At paragraph 21.22

[10] Caerphilly, Denbighshire, Merthyr Tydfil and Rhondda, Cynon Taf.

[11] Brecon Beacons National Park Authority, Pembrokeshire Coast NPA, Snowdonia NPA, Anglesey, Ceredigion, Gwynedd, Neath Port Talbot and Pembrokeshire

[12] Source: Barton Wilmore http://www.bartonwillmore.co.uk/resources/wales-local-development-plans-2015/

[13] See pages 6.7 and 8.

could be ascertained in preparing this submission no arguments have been advanced as to why CIL should be retained as a reserved matter and under the control of the Secretary of State for Communities and Local Government (i.e. the Minister for planning in England), subject to Treasury approval.

19. In addition to the Welsh Government's arguments for the devolution of CIL, which this submission supports, the paralysing effect of the reservation of CIL of any modifications of section 106 as it currently stands and explained in this submission lends further support to the arguments for removing this reservation.

20. The parallels with the devolution under the Wales Bill 2014[14] of landfill tax are self-evident. Provision should be made in the Wales Bill for legislative competence to create a planning levy.[15]

21. The present unsatisfactory position and the England focussed nature of CIL has further highlighted in recent days by the announcement earlier this month by the DCLG of a review of CIL to be conducted by a panel chaired by Liz Pearce CBE. Neither the composition of the review panel or the questionnaire just issued[16] shows any awareness of or intention to consider, the operation of CIL in Wales and under the Welsh planning system.

Reserving a "silent subject" – compulsory purchase

22. Compulsory purchase of land[17] is wholly reserved under the Draft Bill. This is a rolling back of the current position and, if implemented, will cause unnecessary difficulties across a range of devolved activities which are underpinned by powers of compulsory acquisition of land (or their availability in the background).

23. To fully understand the effect of this reservation, it is necessary to appreciate that the law on compulsory purchase ("CPO") (which is entirely statutory) falls into three distinct categories:

23.1 Provisions that confer powers of CPO on the Welsh Ministers[18], local authorities[19], NHS bodies[20] and statutory undertakers.

23.2 Legislation that sets out the procedure for making a CPO, making and determining objections, dealing with special categories of land (e.g. open space land) and statutory challenges to the lawfulness of a CPO[21].

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[14] Sections 18 and 19
[15] The Planning Act 2008 section 205(2) sets out the purpose of CIL as "to ensure that costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land a way that does not make development of the area economically unviable".
[16] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/476681/151027_CIL_TOR_FINAL.pdf and https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190882/Consultation_on_Community_Infrastructure_Levy_further_reforms.pdf
[17] New Schedule 7A, section M4 Buildings and development, paragraph 200
[18] See, for example the Welsh Development Agency Act 1975 or the Highways Act 1980
[19] See, for example, section 121 Local Government Act 1972 or section 226 of the Town and Country Planning Act 1990
[20] See, for example, section 159 of the National Health Service (Wales) Act 2006

23.3 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.[22]

24. While CPO was a "silent subject" it appears to have been assumed that the National Assembly certainly had a degree legislative competence when it came to powers of compulsory purchase. The Welsh Ministers also exercise executive powers to make secondary legislation relating to compulsory purchase, where the Welsh Ministers themselves have CPO powers or are the confirming authority for CPO's made by other devolved bodies and Welsh local authorities[23].

25. The IAG in their report made a number of recommendations in relation to the exercise of "planning" CPO functions. These are set out at Annex 2. It will be noted that while the IAG argued for maintaining a coherent system throughout England and Wales, it recommended certain reforms in relation to the CPO powers available for the promotion of regeneration projects with a view to creating a single set of land development and regeneration CPO powers for both local authorities and the Welsh Ministers.

26. When the Environment and Sustainability Committee of the National Assembly conducted a pre-legislative inquiry into the Planning (Wales) Bill, they stated, in their letter to the Minister of 10th April 2014 setting out their conclusions[24]:

> *3.3 We also ask the Welsh Government to look again at the IAG recommendations about Compulsory Purchase. From the evidence we heard the greatest concern is about retaining coherence with the rules that apply in England, given the common system of land law that applies throughout England and Wales. However bringing together compulsory purchase powers from different legislation into a single set of powers for Welsh Ministers and local planning authorities also seems a sensible proposal that should be taken forward.*

27. It is clear that the National Assembly (presumably advised by their legal services) took the view that such a legislative initiative to bring together CPO powers for development and regeneration was within the legislative competence of the National Assembly.

28. Reserving the whole subject of compulsory purchase of land would risk rolling back (or at least creating uncertainty about) powers over a range of legislative competences – highways, education, health, planning, local government functions and economic development. Reform proposals across all these areas which may require adjustments to land acquisition powers will be likely to run into concerns about whether such powers are "ancillary" and

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[21] The principal statutes here are the Acquisition of Land Act 1981 and the Compulsory Purchase (Vesting Declarations) Act 1981

[22] The principal statutes here are the Land Compensation Act 1961, the Compulsory Purchase Act 1965, the Land Compensation Act 1973, the Planning and Compulsory Purchase Act 2004 and the Land Tribunal Act 1946, although for certain purposes it may be necessary to refer to older statutes such as the Lands Clauses Act 1845.

[23] See, for example, Compulsory Purchase of Land (Prescribed Forms) (National Assembly for Wales) Regulations 2004/2732

[24] See http://www.senedd.assembly.wales/documents/s26347/Letter%20to%20the%20Minister%20for%20Housing%20and%20Regeneration.pdf

"necessary", the problems around which concepts have been extensively commented upon by others. In practical terms a "chilling" effect on legislative initiative seems inevitable, the more so because of the Human Rights aspect of CPO, which engages the rights in relation to property and (on occasion) family life.[25]

29. The key element of CPO legislation that requires coherence across England and Wales is the part of the legislation relating to land compensation, overriding of rights over land and the compulsory transfer of title through statutory vesting. This sits logically with the reservation of land law.

30. However, legislative competence on the extent of powers of CPO and CPO procedure, however, should be within the legislative competence of the Assembly, without the need to test the ancillary or necessary character of the provision. For example, why shouldn't the Assembly be able to decide that in Wales it should no longer be necessary to advertise a CPO in the press for two successive weeks and replace it with a single advert and a requirement for electronic posting on a website?

31. It is the view of this submission is that the reservation of compulsory purchase of land should be replaced with a restricted reservation in respect of the land compensation and the statutory vesting of land, to avoid and undesirable and quite possibly unintended restriction on otherwise devolved competencies.

Observations on reservations relating to cognate and other subjects

Opencast Coal

32. The reservation at Section D3, 104 (c) of deep and opencast coal raises issues about the relationship between this reservation and the planning system. Making provision in planning legislation for opencast planning permission[26] will now have to negotiate the ancillary and necessity tests.

33. It is well known that there has been pressure for the alleged health effects of opencast coal mining to be subject to enhanced requirements when applications are made for planning permission for opencast coal. Will the ability to legislate for such provision - if it was thought desirable - now be found outside competence as falling within this all-encompassing reservation?

34. If the underlying intention is to reserve matters around the granting of compulsory rights to extract coal due to the role of the (non-devolved) Coal Authority in such application, then that would be a clear and logical reservation, but there is no information available as to the reasoning that lies behind the road terms of the reservation currently proposed.

Registration of land and land charges

35. It is difficult to understand the need to make this reservation at M1 paragraph 197 by reference to the subject matter of the current statutes relating the land registration, land charges and commonhold. While legislation in this area is relatively stable and its relationship to private law makes it a clear subject for

[25] Article 8 Right to respect of personal and family life and Article 1 of the First Protocol protection of property, ECHR.
[26] A defined term in the Opencast Coal Act 1958, which allows the granting of compulsory rights for extracting opencast coal.

reservation, it would surely be more straightforward and preferable to the "subject matter of" formulation to simply reserve "the registration and guaranteeing of title to land and charges over land"?

Building regulations

36. There is no explanation as to why primary legislative powers over building regulations remains reserved under Section M4 paragraph 200. As building control fulfils purposes connected with public health and planning, which are devolved, the continuing reservation of this subject surely requires explanation.

Concluding remarks

37. While much of the focus of debate on the Draft Wales Bill has been on the proposed section 108A and Schedule 7B, the main focus for practitioners will be on the reserved subjects themselves. Others have already drawn attention to the fact that the list of reservations still bears the imprint of the "opportunistic" accretion of powers by the Welsh Office up to 1998.[27]

38. In the "St David's Day" Command Paper, the UK Government states:

> "There are no easy answers to the issue of "silent subjects" in the current model of devolution, but the ambiguity and uncertainty inherent in the current model is clear".

39. The UK Government's solution seems to have involved identifying the "silent subjects" and converting them into reservations, but without any supporting analysis of the consequences of this approach. Surely the boundaries within each "silent subject" should be drawn along logical lines that will achieve the "clear and lasting" settlement that the Secretary of State has referred to in his foreword to the Draft Wales Bill. Only a thorough analysis of the reservations will address the lingering effects of the "opportunistic" accretion of powers by the old Welsh Office.

40. The Explanatory Notes to the Draft Bill at paragraph 26 seems to confirm that the extent of the movement in legislative competence has been drawn solely along the lines delineated by Silk Part 2 and the subsequent political consensus of "St David's Day agreement". Neither of these processes undertook (and perhaps were not well suited to) the detailed but necessary work of analysing a full list of potential reservations as is now before us to establish whether they create unnecessary, confusing or unintended constraints on the ability of the Welsh institutions to develop policy and to legislate in way that makes reference to Ministers of the Crown for consent or to the Supreme Court, a wholly exceptional event.

41. It is hoped that this paper with its narrow focus on the field on planning and some related topics indicates why this work why is important and necessary to do this work if the UK Government's professed aims are to be achieved.

19th November 2015

[27] See the submission by Keith Bush QC at paragraph 22.

Annex A

Section 106 Obligations

5.32 Agreements under s.106 of the Town and Country Planning Act 1990 (otherwise known as planning obligations) are an essential feature of the planning system, particularly in relation to the approval and control of major developments. S.106 agreements are entered into between the local planning authority and all the persons with legal interests in an application site. The purpose of the agreement is to deal with points that, as matters of law, cannot be covered by planning conditions, but which would otherwise be impediments to the granting of permission.

5.33 S.106 agreements have also become an important mechanism for delivering affordable housing in accordance with both national planning policy and local planning authorities' statutory plans. Other important policy objectives that are secured through S. 106 agreements include:

- Securing the provision and management of on-site infrastructure ranging from open space and play areas to community buildings and new schools.
- Provision for the construction and maintenance of sustainable urban drainage works
- Securing the implementation of management schemes for environmentally sensitive areas within a development or the provision and management of mitigation works.

5.34 Where a developer is prepared to offer a S.106 agreement then the local planning authority's resolution to grant permission is made subject to such an agreement being completed. The planning permission is then issued when the agreement is executed. It is also possible for a landowner to offer a unilateral undertaking to the local planning authority giving binding undertakings in the event that permission is granted.

5.35 The tests governing the circumstances in which a local planning authority can ask for a S.106 agreement or accept a unilateral undertaking as a material consideration in a decision to grant planning permission are derived from case law, planning policy and legislation. The tests for the validity of a planning obligation are:

- As a matter of law it must be for planning purposes and must be reasonable. This test is derived from the well-known case of *Tesco Stores Ltd v Secretary of State for the Environment (1995)*.
- As a matter of policy, it must be:
    i. Necessary to make the development acceptable in planning terms;
    ii. Directly related to the development; and
    iii. Fairly and reasonably related in scale and kind to the development;
    iv. Reasonable in all other respects.
- If relied upon as a reason for granting planning permission the tests in the Community Infrastructure Levy Regulations 2010 apply, namely that it is:
    i. Necessary to make the development acceptable in planning terms;

ii. Directly related to the development; and

iii. Fairly and reasonably related in scale and kind to the development.

5.36 In its present form, S.106 dates from the Planning and Compensation Act 1991 and specifies the matters which can be dealt with in a planning obligation as:

- restricting the development or use of the land in any specified way;
- requiring specified operations or activities to be carried out in, on, under or over the land;
- requiring the land to be used in any specified way; or
- requiring a sum or sums to be paid to the authority on a specified date or dates or periodically.

5.37 The obligations in a S.106 agreement bind the landowners who enter into the obligations and also those who acquire title from them subsequently.

5.38 The matters that are expected to be covered by planning obligations in order to give effect to planning policy have become more extensive. However, it is noteworthy that S.106 in its present form is actually more restrictive than the wording originally found in the Town and Country Planning Act 1990 (and which itself derived from earlier legislation), which was couched in the broader terms of

"restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement; and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the local planning authority to be necessary or expedient.."

5.39 We received evidence, particularly from the Law Society[102] and from Community Housing Cymru when we met them, of a number of problems that have been encountered with the operation of S.106 and where improvements could be made to remove uncertainty about the scope and application of the powers.

5.40 The problems drawn to our attention by the Law Society were:

- The lack of powers to include an obligation that requires the transfer of land to the local planning authority or a third party. The need for a transfer is implicit in many obligations, such as those involving affordable housing; new community or education buildings; open space and playing fields; and environmental management and mitigation works. Currently a drafting device of restricting development, for example by reference to the number of housing units that can be occupied, has to be used to frame an obligation that is within the powers of S.106.
- The absence of powers to require developers to enforce or apply obligations to third parties. Examples were given to us of requirements for lorries to use a specified route along the public highway when entering or leaving a site and the ability to enforce green travel plans.

[102] Submission by the Law Society (No. 109)

- The absence of powers allowing obligations to require the payment of sums of money to third parties such as community councils or housing associations.
- It is not unusual in the case of major regeneration schemes for the local planning authority to be a landowner within the proposed development. The authority is unable to contract with itself to create a planning obligation thus precluding the obligations binding the authority's successors in title. This can give rise to problems in a number of situations:
    i. Where the local authority as landowner wishes to ensure that planning permission has been issued and makes this a condition precedent of the disposal of the authority's land.
    ii. Where a local planning authority and a developer have entered into a development agreement that requires the local authority, subject to complying with its statutory duties, to make a compulsory purchase order (CPO) to assemble the development site and planning permission needs to be available to enable the CPO to be confirmed by the Welsh Ministers.

  Various contractual devices are used to overcome this problem at present but none is completely satisfactory. A provision allowing an authority in its capacity as landowner to contract with itself in its capacity as local planning authority under S.106 would resolve this issue.
- It is relatively common to see s.106 agreements which state that the agreement is not enforceable against certain successors to the original parties, for example owner occupiers of housing units or the owners of parts of a site on which no obligations are to be carried out. However, there is legal opinion which holds that such restrictions are an unlawful fetter on the power of the local planning authority to enforce the agreement which by statute binds successors. It would be desirable for such doubts to be resolved and for there to be an express power for the local planning authority to agree that certain categories of successor will not be bound by some or all of the obligations.
- There are potential difficulties in a local planning authority being satisfied that a planning obligation has been duly executed by the other parties because the statutory presumptions, that avoid the need to obtain evidence of identity or of resolutions authorising corporations to execute documents, will not always apply to S.106 agreements. This is because of the difficulty of characterising a local planning authority entering into a S.106 agreement as a "purchaser" within the statutory definition of "a purchaser in good faith for valuable consideration", which is a requirement for the statutory presumption of due execution to apply. The arguments for an extended definition of "purchaser" are unattractive due to the principle that planning permissions can neither be bought nor sold. This difficulty could be resolved by extending the relevant provisions in the Law

of Property Act 1925 section 74(1) and the Companies Act 2006 section 44(5) to S.106 planning obligations.

5.41 In addition, the Law Society proposed that arrangements for discharging or modifying planning applications should be reviewed in the light of current economic conditions affecting viability and that consideration is given to:

- Enabling the parties to agree a term after which a modification application can be made, subject to the current maximum of five years.
- That the effect of obligations on the financial viability of a scheme and thus the prospect of a commencement of development should also be a reason for applying to modify a planning obligation.

5.42 Issues drawn to our attention by other parties were:

- The need to introduce greater standardisation in S.106 agreements and the endorsement by the Department of Communities and Local Government in England of the Law Society's standard form.
- Differences in the approach of local planning authorities to the policy that affordable dwellings should be retained "in perpetuity" and unwillingness of LPAs to consent to provisions that would allow commercial lenders to housing associations to realise their security over affordable dwellings, in the event of insolvency, free of the affordability restriction.
- A further problem with the "in perpetuity" requirement arises when housing association tenants acquire their properties through a "shared equity" scheme.

5.43 We have concluded that statutory planning agreements must continue to have an important role in the planning system but the present arrangements embodied in S.106 could be improved to make the provisions more flexible and to address a number of technical legal issues. We favour a return to the more flexible provisions that existed prior to 1993 and we note the more flexible terms in which the equivalent provisions are drafted in Scottish legislation. To the extent that the present powers in S.106 are a reflection of concern that "planning gain" should be related to planning considerations, we consider that this has now been met by the policy and case-law based tests, and the tests now embodied in statutory provision in the CIL regulations.

5.44 Allied to this we believe that the Welsh Government should be able to take steps to ensure that local planning authorities adopt supplementary planning guidance on S.106 agreements, which reflects a consistent national approach to the drafting of obligations subject only to necessary and justified variation to reflect particular circumstances. We think that affordable housing SPG would fall into this category given its importance nationally.

5.45 We consider that given the size and population of Wales a consistent approach would increase the confidence of developers in this aspect of the planning system as well as increasing the transparency for other interested parties of what can otherwise be an opaque aspect of the system. (See Chapter 4: Recommendation 22.)

Recommendations 84 - 86

84. The Welsh Government reviews the powers under s.106 with the aim of introducing greater flexibility to make provision for matters that are connected with the development of the land which is the subject of the development, its use, or the development or use of other land that reasonably and properly relates to the development for which permission is being granted and, in particular, to allow provision to be made requiring the transfer of land.

85. Section 106 makes provision as to:

    a. The due execution of s.106 agreements in a similar manner to documents executed under property legislation and the Companies Act.
    b. Making clear the powers to specify in a S.106 agreement that the obligations do not bind specified successors in title.
    c. The ability of the local authority as landowner to bind itself under a S.106 obligation for the purpose of ensuring that the local authority's successors are bound by the obligations.

86. The arrangements for the discharge or modification of planning obligations should enable a planning obligation to be modified if the extent of that obligation makes the development no longer viable.

Annex B

Planning and Compulsory Purchase

6.28 It is frequently overlooked that the Town and Country Planning Act 1990 is a code containing powers to both control and bring about development. This reflects one of the main policies behind the 1947 Act, which was to facilitate the post war reconstruction of our towns and cities

6.29 Part IX of the Town and Country Planning Act 1990 contains the powers of local planning authorities to carry out the compulsory acquisition and appropriation of land for planning purposes.

6.30 This is an important section because it contains the LPA's "positive planning" powers to make land available for purposes that promote economic, social and environmental well-being. This part of the Act is a largely self-contained code and also deals with consequential issues such as overriding rights and easements.

6.31 We have had representations from the Compulsory Purchase Association (CPA), suggesting that all the CPO powers which fall under the Welsh Ministers are consolidated into a single Welsh CPO Powers Act or that the regeneration powers should be consolidated into a Regeneration Powers Act.

6.32 The use of powers of compulsory acquisition under the 1990 Act or their availability has been an important tool in assembling sites to realise development proposals for the regeneration of our town and cities. A relatively recent example is the CPO promoted by Newport City Council to facilitate the redevelopment of John Frost Square.

6.33 The CPA drew our attention to recent judicial pronouncements on compulsory purchase, such as that of Lord Nicholls in Waters v. Welsh Development Agency ; *"…[C]ompulsory purchase is an essential tool in modern democratic society. It facilitates planned and orderly development. Hand in hand with the power to acquire land without the owner's consent is an obligation to pay full and fair compensation… Unhappily the law in this country on this important subject is fraught with complexity and obscurity*".

6.34 The Law Commission published proposals for a modernised compulsory purchase code between 2003 and 2004[113]. However, the UK Government declined to find legislative time, declaring it "*..more important to maintain a stable legislative framework providing certainty for acquiring authorities and for those whose properties need to be acquired*".[114]

6.35 The law of compulsory purchase and compensation is closely linked to the wider system of land law, which is not a devolved function and there is thus a

[113] See Towards a Compulsory Purchase Code: (1) Compensation, Law Com. No.286 (2003); and Towards a Compulsory Purchase Code: (2) Procedure, Law Com. No.291 (2004)
[114] See written statement by Yvette Cooper M.P., Minister of State for Housing and Planning, December 15, 2005.

strong argument that the law in Wales on compulsory purchase should remain the same as in England. However, since 2004 there have been piecemeal changes which have yet to be applied in Wales with the result that gaps are opening up between the law in Wales and England, with potentially unpredictable consequences:

i. Section 226 of the Town and Country Planning Act 1990 was amended in England and Wales by the Planning and Compulsory Purchase Act 2004 by making the powers of compulsory purchase for development and planning exercisable where the local authority think that it will contribute to achieving economic, social or environmental well-being. Much of the detail of compulsory purchase procedure is set out in circular guidance. The relevant English circular was reissued in 2006[115]. However, although the Welsh Government also consulted on a new circular in 2006[116] as part of its "Planning for Wales" strategy it has never been issued and both acquiring authorities and Inspectors in Wales are turning to the guidance in the English circular when orders under s.226 are promoted.

ii. The important ancillary power in s.237 of the Town and Country Planning Act 1990 to override covenants and rights affecting property where land has been acquired using, or under threat of, compulsory purchase powers, was amended by the Planning Act 2008 to clarify the scope of the powers to override covenants restricting the use of land that had arisen due to a court decision. The amendment came into force in England shortly after the 2008 Act was enacted. The Welsh Government was given the power to apply the amendment in Wales.[117] However, a Welsh consultation did not take place until late 2010 and the amendment has not been applied in Wales. This means there is a technical but significant difference affecting disposals of development sites in Wales that have been acquired by compulsory purchase.

6.36 In the interests of maintaining the coherence of the system of compulsory acquisition and compensation we recommend that the Welsh Government revises its circular on compulsory purchase and brings s.237 of the 1990 Act into line with England as soon as practicable.

6.37 With regard to the proposal of the CPA that there should be a Welsh Act which gathers together all the powers of compulsory purchase available to the Ministers and local authorities, we consider that this would be a major legislative undertaking. If it were to be carried out then we consider that it should be done as part of the broader development of a Welsh statute book and that it should be the subject of separate proposals and consultation.

6.38 However, we agree with the CPA that there is a significant overlap between the powers of compulsory purchase now exercisable by the Welsh Ministers as the

[115] DCLG Circular 06/04 Compulsory Purchase and the Critchel Down Rules
[116] To replace Circular NAFWC 14/2004
[117] See section 203(2)

successors to the Welsh Development Agency and the powers available to local authorities under s.226 of the 1990 Act. Indeed the powers are used for very similar purposes. For example, while the major redevelopment of Newport City Centre referred to above is being facilitated by a s.226 compulsory purchase order, the 'St Davids 2' shopping centre development in Cardiff was facilitated by a compulsory purchase order made by the Ministers under section 22 of the Welsh Development Agency Act 1975.

6.39 We believe that there may be a case for a single set of compulsory purchase powers for the development and regeneration of land exercisable by Welsh Ministers and by local planning authorities and contained in a separate Development and Regeneration Powers Act.

Recommendation 97

With regard to CPO provisions:

a. **The Welsh Government proceeds with the revision of its circular guidance on compulsory purchase to take account of the amendments to section 226 of the Town and Country Planning Act 1990 by the Planning and Compulsory Purchase Act 2004.**

b. **In view of the common system of land law throughout the jurisdiction of England and Wales, the law of compulsory purchase and compensation in Wales should maintain its coherence with the rules applying in England unless there are powerful reasons related to Welsh circumstances that require different provision to be made.**

c. **In order to maintain coherence the powers to override easements and other rights under s.237 of the Town and Country Planning Act 1990 should be brought in line with England through applying the powers under section 203(2) of the Planning Act 2008.**

d. **Consideration is given to bringing together the compulsory purchase powers of the former Welsh Development Agency, now vested in the Welsh Ministers, and the powers of local authorities under s.226 of the Town and Country Planning act 1990 into a single set of powers of compulsory purchase of land for development and regeneration purposes exercisable by both the Welsh Ministers and local authorities.**