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Senedd Cymru | Welsh Parliament

Y Pwyllgor Deddfwriaeth Cyfiawnder a'r Cyfansoddiad | Legislation, Justice and Constitution Committee

Gwaith craffu ar Filiau Cydgrynhoi Llywodraeth Cymru ym maes cynllunio | Scrutiny of the Welsh Government's planning Consolidation Bills

Ymateb gan: Charles Felgate, Geldards LLP | Evidence from: Charles Felgate, Geldards LLP

I write in reference to your consultation on the Planning (Wales) Bill.

To introduce myself I am a specialist planning solicitor based in Cardiff and practising largely in Wales. I qualified in 1999 in New Zealand before moving to the UK in 2000 and specialising in Planning Law from 2002 onward. As such I have over 20 years specialist experience in planning law. My work over this time has been varied and I work for both the private and public sector. My current clients include large infrastructure providers with projects in Wales.

I do not however write on behalf of any particular client, although many are interested in the content of the Bill.

I agree with the central theme of this legislation that that accessible law is essential to the achievement of an efficient, effective and simple planning system that reflects the specific needs of Wales.

I also agree that simplifying and modernising planning legislation into a consolidated and bilingual Act will produce real practical benefits to all stakeholders in the planning system – from those who operate and use it to those who wish to access the law to engage in the system, that in turn will continue to contribute to the well-being of Wales and its people. I think that is a long term aspiration that can be realised.

I am not a Welsh speaker, but many of my friends and colleagues are and I recognise bi-lingualism as an important element currently missing from much of our planning law.

I also recognise that as planning law becomes more accessible and clearer, it will enhance public participation and confidence in the system – the current

legislation is not easy to grapple with. Consolidaton is therefore a good thing in general terms.

In that context I offer my overall support of the Bill in that it is designed to achieve those things. I do however wish to comments to make as follows:

1. I note the intention to use the term relevant consideration instead of material consideration in s66 (which is the equivalent of s 38(6) of the Planning and Compulsory Purchase Act 2004). I doubt this will achieve the simplification that is intended. I can appreciate that it may be a more accurate and accessible description intended to mean the same thing. However I have concerns that non-technical people will be able to access the whole body of case law that exists on material considerations without very technical knowledge that the two things are one and the same. On balance by making this suggested change it has the counter intuitive effect of making law less accessible.

2. There are however other places where a change of language is used that I am supportive of. By way of example I have always thought that the description of a Planning Contravention Notice is not clear enough in that it does not really explain that an investigation is taking place. I therefore support the change in description to Enforcement Investigation Notices, which I think is less judgemental description in a process that is generally carried out at an early stage of any enforcement investigation without final decisions having been made.

3. Similarly the change in description of Section 215 Notices to Maintenance of Land Notices makes good sense.

4. Of interest to me is a requirement in s408(3) to have regard to national policies (which I see from the explanatory notes is meant to include Planning Policy Wales (PPW) and Technical Advice Notes (TANs). That change resolves some confusion about what status PPW and TANs actually have in law. I support the way in which this is done so as not to determine, statutorily, what weight should be given to them. My concern with the change however is its location – it is buried deep within the interpretation section of the Bill, and would be far more accessible if it were moved into the main body of the provisions that deal with matters to be taken into account in determining planning applications, such as the current s66(1). It needs to be made clear that “having regard” to PPW and TANs is a statutory requirement.

5. Section 7 of the Act which makes it clear that the planning authority for a National Park will be the National Park authority. However I think it is remiss to not give a hint in this section that the planning authority could well be the Welsh Miniters in certain circumstances. Examples include when the power to grant permission by way of Order under section 44 is exercised; when applications are referred to the Welsh Miniters under section 72 and when applications are dealt with on appeal under section 73. In all of these cases the planning authority will be the Welsh Ministers and it would help lay people if that were made clear.

6. I am pleased to see that no steps are being taken to prevent use of applications to develop without compliance with conditions (what were known as s73 applications but which will now become section 50) to deal with time limit conditions – as is the case in England. It is sensible to retain the current law in Wales, which allows such an application, provided that the permission has not already expired. To do so is firmly within the intent of Standing Order 26C.2.

7. I disagree with the continuation of the current law in Wales that prevents variation of an application that has been appealed. At present, article 26C of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 provides that an application may only be varied in order to ensure consistency in the information contained in the application and the supporting documents. In other circumstances, the most minor of changes which may render an application acceptable on appeal are prevented from being considered. This has a very real impact in practice and can slow down the consenting process, with economic consequences. It essentially requires re applications, before any matters of substance that may also be outstanding are considered on appeal and that seems un-necessarily time consuming and expensive. I do agree that applications should not be amended in a substantial way in the context of an appeal, but the law currently goes too far in preventing all changes and I would suggest some flexibility is introduced with PEDW inspectors being given a discretion to consider whether applications can be amended, (in accordance with principles set out in well-established case law). This is a suggestion for legislative change which is perhaps not one for consolidation given the content of Standing Order 26C.2 but it is worthy of consideration as it is often a surprise to very experienced planning practitioners. It is worth referring to this in the Bill so that it is clear that the law exists and is different in Wales. I would prefer to see it be

deleted from the statute books altogether, but if it cannot go for whatever reason, it should at least be clear.

8. I do agree with the published impact statements that there will be a direct cost associated with this Bill as lawyers will need to familiarise themselves with it in order correctly inform their work for their clients. This is anticipated to be undertaken as part of existing internal briefing and updates which would take a junior officer around 3 hours to prepare the briefing with support from the guidance to be published by the Welsh Government. However, it is not accurate to suggest that there are no ongoing costs beyond that and it is an oversimplification of a system that takes many years of experience to grapple with. By way of example I am very familiar with the TCPA and its taken almost 25 years of practice to know where to find things but I still have to look them up and finding things is not always quick. I will be almost constantly trying to find the equivalent of the old section in the Bill assuming it is enacted – and there are time costs associated with that. Generally speaking these will be handed on to clients, but that is not always the case. I do not suggest this is a reason not to proceed – but it is a reality that ought to be factored into any decision to proceed with the Bill.

9. Lastly any exercise in improved accessibility to law requires publication of reference materials. There are many excellent text books on planning law but very few (if any) are focussed on Wales. There is a section on Wales in the excellent Encyclopaedia of Planning Law and Practice published by Sweet and Maxwell, which is an updated service which was prominent on any sensible practitioners bookshelves (when we had such things). The Welsh Ministers need to ensure that the Bill (if enacted) receives some sensible academic discussion as to how it differs from English law and that this is reflected in appropriate reference material. I am not sure how that is best achieved but Wales is a small country and it will not necessarily be financially viable to depend on private organisations to achieve this. It is however a necessary to achieve the aim of accessibility of the law.

Overall my view of the Bill is that:

a. the scope of the consolidation proposed is largely appropriate;

b. all relevant enactments have largely been included within the Bill;

c. the Bill largely correctly consolidate the law or changes its substantive legal effect only to the extent allowed by Standing Order 26C.2; and

d. the Bill largely consolidates the law clearly and consistently.

However, I would request that some thought be given to my comments above in your scrutiny of the Bill.

If you have any queries or if it would help for me to give evidence to the Committee please do not hesitate to contact me.

Regards

Charles

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Partner
For and on behalf of Geldards LLP