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Dear Sir/Madam

PLANNING LAW IN WALES

The Mineral Products Association (MPA) is the trade association for the aggregates, asphalt, cement, concrete, dimension stone, lime, mortar and silica sand industries. With the affiliation of British Precast, the British Association of Reinforcement (BAR), Eurobitume, QPA Northern Ireland, MPA Scotland and the British Calcium Carbonate Federation, it has a growing membership of 480 companies and is the sectoral voice for mineral products. MPA membership is made up of the vast majority of independent SME quarrying companies throughout the UK, as well as the 9 major international and global companies. It covers 100% of UK cement production, 90% of GB aggregates production, 95% of asphalt and over 70% of ready-mixed concrete and precast concrete production. Each year the industry supplies £20 billion worth of materials and services to the Economy and is the largest supplier to the construction industry, which had annual output valued at £151 billion in 2016. Industry production represents the largest materials flow in the UK economy and is also one of the largest manufacturing sectors. For more information visit: www.mineralproducts.org

Thank you for allowing us the opportunity to comment on the proposed review of planning legislation in Wales. We applaud the recognition of the need to review the system and feel this is long overdue, however, whilst planning law is undoubtedly overly complex, we do not feel that the measures proposed in the consultation will improve the effectiveness and efficiency of the system. We are somewhat concerned that the scope of the review may have been overly restrictive and those consulted on the scope somewhat limited.

The foundation for planning legislation was largely developed at a time when the structure of local government was markedly different. This was particularly the case for the provision of minerals when County Councils, as mineral planning authorities, had the knowledge, expertise and strategic overview to deal with matters which were of local, regional, national and cross boundary importance.

The abolition of the two-tier system to a unitary approach has resulted in more parochial decision making and loss of experience and understanding of the need for minerals in society. Pending changes to local government, with shared services providing a more strategic overview for certain local government services, are under consideration, although details of any reform have yet to be finalised. Whilst the Regional Aggregate Working Parties continue to function, the level of mineral planning knowledge within the Local Planning Authorities has undoubtedly been undermined over recent years.

MPA Wales/Cymru is part of the Mineral Products Association, the trade association for the aggregates, asphalt, cement, concrete, dimension stone, lime, mortar and silica sand industries

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The explosion in both primary and secondary planning legislation over the past two decades has focussed principally on housing delivery and minerals planning is now very much an after-thought, shoe-horned in to this system. This is evident from the small section dealing with minerals in the Law Commission’s review. Half a dozen pages in a 500+ page document. The consequential effects of minor changes to deliver built development in the spatial context continue to have a marked and often ill-considered impact on the minerals planning process and upon developments themselves. Minerals developments are already constrained by location, by the fact that minerals can only be worked where they are found. There is increasing evidence that the land use planning system is not fit for purpose in ensuring the demand for minerals is met as landbank replenishment rates continue to fall.

Demand for sand and gravel continues to outstrip the amount of new reserves being permitted, with the 10-year average replenishment rate for land won sand and gravel remaining low at 60%. During 2016, newly consented sand and gravel reserves only represented 20% of annual sales. In the case of crushed rock, whilst the 10-year average replenishment rate remains above 100% (largely as a result of one site granted consent in Scotland within the past 10 years), the new reserves permitted in 2016 were less than the annual sales for the fourth consecutive year. This signals that the long-term reserve base upon which the aggregates sector is, so dependant continues to remain under pressure. The number of planning applications for new mineral submitted by the industry remains low. Lack of plan coverage, creating investment uncertainty, the continuing impact of the recession and the cumulative costs of obtaining permissions and permits are likely to be contributory factors.

Further evidence of the long-term stress that is being placed on these important mineral reserves can be found in the latest British Geological Survey Aggregate Monitoring survey for England and Wales (AM14) which shows that total land won aggregate reserves have reduced by 44% over the period 2001 to 2014.

On a 10 year average the time taken to determine a mineral planning application (excluding pre-application discussion) is 17 months for sand and gravel and 16.2 months for crushed rock. Including pre-application discussions, the time extends to 31 and 30 months respectively, although the overall time taken in application preparation through to implementing a consent can be significantly longer. Typically, it takes between 5 to 15 years to convert sites from exploration into active operational sites.

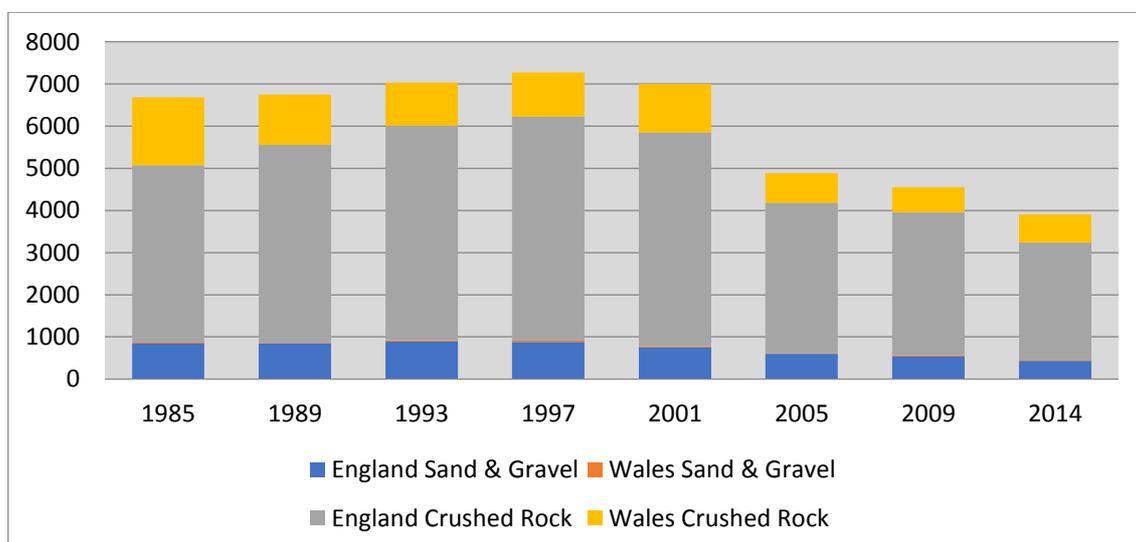


Figure 1: Primary aggregate permitted reserves in England & Wales (Million tonnes), 1985-2014 (taken from Aggregates Minerals Survey 2014 (BGS, 2016))

We, feel therefore, that the current review may have been somewhat hamstrung by the scope of the project and that a more fundamental review of the process to deliver mineral planning consents and deliver new reserves, is necessary to consider why the current system is failing. We note that a Scoping Paper was produced in 2016 and it is indicated that a wide range of stakeholders were notified. It is disappointing that the Mineral Products Association which is principal trade association for one of the key stakeholders involved in the land use planning process, the Minerals Sector, was not consulted on this scope. Whilst we agree with the key benefits identified such as the need to provide clarity, make better use of resources and provide greater understanding, the failure to consult with key organisations such as the MPA is an opportunity missed. As such, the review may just provide a sticking plaster to the fundamental concerns of this sector. Indeed, we would agree with the comments of the CLA, that the success of the review can only be truly considered in the unintended consequences of a streamlined process. The Residential Landlords Association has raised concern over the “tear it up and start again” approach, however, for certain sectors, a root and branch review of the process may well be the correct approach, looking at whether or not the consenting process is indeed fit for purpose.

The consultation document references special problems in Wales: which Westminster legislation applies (paragraph 1.57). Similar “special problems” apply to specific sectors where the land-use planning system and the mechanism for delivering consents, is now clearly inappropriate.

As referenced under Section 3, we believe a development consent should be all encompassing. The grant of planning permission to undertake a development should facilitate other consents and permits required to undertake that development including where these matters may be subject to the local authority’s consent. These include matters (not exclusively) such as orders under the T&CP legislation (listed buildings, conservation areas footpath orders, etc.), Highways Act consents, EH permits, CROW legislation, Commons legislation, Hedgerow regulations, etc., where these issues are addressed within the main application and where appropriate, the accompanying ES. Notably CROW legislation may present a health and safety issue to members of the public if not considered at the time of the granting of consent.

We support the proposals in Question 5-1, noting the comments under paragraph 5.27 in relation to having regard to the Development Plan. Unfortunately, however, the process of delivery and review to provide up-to-date Development Plans remains a tortuous journey for local authorities, communities and developers alike. Unless coupled with a review of the contents of the plan and statutory requirements on deliver, this process will remain problematic. The clarity and simplification sought after, within the review of legislation needs also to look at the Development Plan process.

The reference to the use of “relevant considerations” as opposed to “material considerations” as cited in Question 5-2 is far from helpful. We believe the term “material consideration” remains the preferred term here and elsewhere in the document, as this term is well established and applies to planning legislation elsewhere within the British Isles. Making such a change has no effect other than change for changes sake. However, whichever term is applied, simply to suggest that any attempt to define the term would fall in to the “too difficult box” is shirking the purpose of the review and this point should be re-examined. We would however, agree that the requirements should apply to any public body exercising the function.

With reference to paragraph 5.52 the term “historic asset” should clearly be defined. There is a danger that the level of protection afforded to a local “historic asset” could be the same as a world heritage site if this matter is not properly considered.

In relation to Question 5-4, as referred to above, it is unacceptable to allow the term “and other such categories of land as Welsh Ministers may prescribe” to be enacted in the code. The definition must be clear and concise and not left open to wanton abuse. Similarly, “setting” is subjective and needs to be defined following open and informed consultation.

Question 5-6 references “relevant considerations” and we refer to our comment above at 5-2. However, it may be worth including clarity on the weight to be given to Welsh Government Policy in the absence of an up-to-date Development Plan.

Question 5-11; we would suggest retention of the title “Inspector”.

With reference to question 5-13, we have concern over the changes in terminology, in advance of agreement in the review of specific services proposed in Wales. If overview collectives of authorities are to be involved in such matters as minerals, this may have an impact upon some of these terms, depending upon their powers.

With reference to paragraph 6.7, should this list not include PPW? Further the absence of comments in response to the scoping, may reflect the limited range of consultees on the scoping document itself.

Paragraph 7.31 refers to the term “mining operations” and indicates that this will replace the term “winning and working of minerals”. As referred to below, a definition of mining operations is needed and this should be carried out in consultation with the mining industry. Further, and with reference to the use of land a review of the concept of each individual shovel full being an individual act of development should be considered. If minerals are to remain part of the land use planning system, their development should be regarded as a “use of the land”.

Question 7-11, we agree that the time limits and associated certificates of lawfulness should be included in the new planning bill.

Question 7-12, we agree that the CLOPUD and CLEUD should be included.

Question 8-1, proposals for the abolition of outline planning applications need to be handled very carefully. If this is to take place, better integration with the Development Plan process must be considered. Specific site allocations, notably for minerals developments, in a Development Plan routinely require levels of information tantamount to outline applications. Whilst outline applications are not applicable to minerals, this submission of level of detail should effectively establish “an approval in principle” to avoid the need to resubmit information. We note paragraph 8.28 does not support the approval in principle process, however, we feel that the proper and thorough examination of site allocations in the Development Plan should alleviate duplication in the submission of details. This can readily be incorporated in to one planning permission approach referred to in paragraph 8.76, but this would provide an element of surety for the applicant.

Question 8-2, the validation of planning applications represents a marked retrograde step in the planning process, adding further and significant delays and costs to the process. A clear definition of what is required in an application should be enshrined in the legislation in order to standardise the approach from authority to authority. This will ensure that the “nice to have” is not confused with the

“necessary to make a decision”. This can still accord with the procedures referenced in paragraph 8.58.

Again, we must disagree with the proposals in Question 8-7. Such a requirement, specifying the details of any pre-application community consultation should be specified in legislation to ensure consistency across authorities. Simply requiring an authority to produce such a document will facilitate the further fragmentation of the planning process.

Question 8-8. No, we must disagree with this approach. If the legislation requires consultation responses to be submitted within 21 days, this period should be adhered to. Allowing consultation responses to be considered right up until the date of determination is a tactic used of delay the determination process. By all means consider a 28-day consultation process, but there must be a cut-off, after which time the authority does not need to consider the representation, including representations from statutory consultees.

Question 8-9, we would support proposals to alleviate the distinction between conditions and limitations.

Question 8-10, we agree with the review of the test for planning conditions which would require conditions to be

1. Necessary to make the development acceptable in planning terms
2. Relevant to the development and planning conditions generally
3. Sufficiently precise to make it capable of being complied with and enforced, and
4. Reasonable in all other respects.

Question 8-11, we feel the basis for the powers to impose the conditions could be incorporated in regulation.

At paragraph 8.101 and with regard to pre-commencement conditions, we would like to see a similar approach to that now in force in England.

Question 8-13, if pre-commencement conditions which go to the heart of the permission are to be identified, this should be applied to all consents across the board and not simply left for the authority to choose. This would alleviate the need for point 2). We agree that the applicant should have the right to appeal against such identification, without putting the substance of the condition in jeopardy.

Question 8-14, experience would suggest that the period of 5 years within which a development must be commenced, is appropriate, particularly for major developments. Delays by authorities in determining pre-commencement conditions often extending to years are not unheard of. There is no need to reduce the period below 5 years.

Question 8-15, whilst we are not opposed to conditions being applied to land within the applicant’s control, the scope of these conditions should be defined in the legislation as per the example cited in the consultation. Again, conditions which require the applicant to provide something that is “nice to have” must be resisted.

Whilst time limited conditions are routinely applied to minerals development, the greatest abuser of the time-limited conditions are the local authorities themselves, particularly where this involves temporary offices and classrooms. As local authorities

will not enforce against themselves, we would seek clarification of the powers available to ensure this abuse does not continue.

The sharing of draft conditions by the planning authority with the applicant should become part of the statutory process. Relying solely on “guidance” will inevitably lead to delays and frustrations. This should alleviate the need for developers to apply to vary conditions. The cost of varying or appealing conditions is often high and an applicant chooses not to appeal or vary, but live with the consequences.

Question 8-20 proposes enabling a planning authority the powers to decline to determine an application for the approval of one detailed matter without at the same time having details of another specified matter. We oppose this, in that it is clearly open to abuse. If an application is valid, the authority has a duty to determine it. There will be occasions where an applicant needs the surety of specific details in order to make further submissions. Whilst we would hope that this short-sighted proposal is not carried through, if it is, the legislation must provide firm details of the limited scope when a planning authority may decline to determine an application.

Question 8-22, we would agree to the imposition of a time limit within which a planning authority must respond to a notification of a proposal to carry out development.

Paragraph 8.159, makes reference to an existing permission that....is “not fully implemented”. We would question where and how this is defined. For a minerals consent, with every shovelful being an individual act of development, logic would suggest that the development is not “fully implemented” until the final piece of restoration has been carried out and the after-care completed. Yet quite clearly, the development will have commenced long before that time. It may be beneficial to consider defining words such as implementation, commencement and completion in order to provide clarity in this area. We would however support bringing together the procedures currently under Sections 73 and 96A as indicated under Question 8-23. However, we feel that any decision made by the authority should be done in agreement with the applicant.

Under Question 8-25, we would agree with the expedited procedure to vary a permission, but do not agree that this should be subject to an enhanced fee.

Question 8-27, we agree with the duty for Welsh Ministers to notify the applicant when they decide to call in an application. We would, however, suggest that a time limit is placed upon this call-in process, i.e. an application must be called in by Welsh Ministers within 6 weeks of the date an application is validated by the planning authority. This will enable the planning authority to undertake consultations and ensure that the applicant is not left with the prospect of a call in up to the date of determination by committee.

Question 8-28 refers to the requirements of Section 71ZB requiring an applicant to display a copy of the decision notice (not the permission as referred to in the consultation document) at all times. This in brief is quite simply nonsensical. Minerals consents are not unknown to have multiple paged decision notices. Minerals developments themselves last for many years. Minerals consents routinely are subject to applications to vary conditions as by their very nature they have to deal with changing circumstances throughout their life. It is wholly unreasonable to expect a developer to keep multi paged notices displayed throughout the life of an operation. This section of the legislation should be deleted.

Question 10-4, we would agree provision is made to include provisions whereby a planning agreement under S106 could include provisions under S278 of the Highways Act, thereby avoiding duplication and the requirement for both acts to be satisfied separately.

Under Question 10-6 the fact that no regulations have been made does not appear to cause any problem.

Question 10-7, we support the use of standard clauses in Welsh Government Guidance, as it applies to planning obligations. Similarly, pre-application engagement is welcomed. There may also be benefits to allowing an applicant to prepare a draft planning obligation to accompany an application or at any time during the determination process. Whilst ultimately it should be the planning authority's responsibility to prepare a draft obligation, it is evident that some authorities have difficulty doing this.

Question 10-8, we support proposals to introduce a procedure to resolve disputes associated with obligations. The procedure should however, be quick and transparent. The matter could readily be resolved by written procedure.

Question 10-9, we must reserve judgement on proposed procedures for Welsh Ministers to impose restrictions or conditions on the enforceability of planning obligations until further details of the scope of these are available.

Question 10-10 with respect to planning authorities binding their own land, we would again raise the question of enforceability as we have raised above with temporary permissions.

Under paragraph 10.77 we believe that the issue of "double dipping" is wholly inappropriate and measures to alleviate this will be supported.

Paragraph 11.29 makes reference to the payment of fees for appeals. Whilst we acknowledge that Ministers have powers to introduce these but have yet to make regulations to this end, we believe that, with the exception of enforcement appeals, this should be withdrawn from the legislation and not included in the Bill. Planning fees accompanying planning applications, do more than simply recover the costs of the application. Significant increases in planning fees over the past decade have failed to deliver improvements in the planning service upon which the increase in fees were routinely sold. The right of appeal should be part of the overall determination process and should not attract further fees from an applicant. Further, costs associated with a determination by members against officer recommendation, should attract mandatory fee recovery for the appellant.

Question 11-7 we agree that it would not be appropriate to the powers currently in Section 247,248,253 and 257 of the TCPA 1990 and those in Sections 116,118 and 119 of the Highways Act 1990.

Question 12-4, we support the proposals to ensure breaches of planning control are not extended indefinitely and support option (1).

Question 12-8, we would suggest the inclusion of a right of appeal against a breach of condition notice for specific developments. Some developments may last for many years and circumstance may change. Conditions may therefore become out of date. Indeed, this has been the subject of many changes to legislation associated with mineral developments.

Question 13-1, we support proposals to unify the consenting process associated with listed buildings and conservation areas with that of granting planning permission. We recognise the need for a sympathetic approach to be adopted to safeguard these specific issues but consider that a consensus could be achieved. There are those who are better placed than ourselves to add specific detail to the most beneficial route to delivering a unified consenting process.

Question 13-9, we consider that the schedule monument consent process should be included within the planning permission. Consultation on any proposed development which does affect and SM is part and parcel of the consenting process and there is no reason why the proposed approach for listed buildings and conservation areas could not stretch to include SMCs.

Question 18-1, proposes to provide clarification and rationalisation on the role and definition of statutory undertaker and operational land. With regards Question 18-2 we reserve judgement on the proposals to separate the provisions in the GPDO applying to those listed (including mineral operators) from those relating to development in general. There are those which apply to development generally which may apply equally to mineral operators and other similar bodies.

In relation to paragraph 18.39, we have highlighted above, our concerns of local authority developments, particularly where breaches of planning control occur, notably for temporary buildings.

Minerals

We note the proposed changes to simplify terminology associated with minerals development such as winning and working, mining operations, etc. Some of this terminology has supposedly been clarified in case law and it is unclear how the reforms will address this or what the status of that case law will be post any reform. We do however support changes which clarify and simplify the terminology, subject to detailed consultation with the minerals industry. If “mining operations” is to be the preferred term, it is important that this capture the full scope of a minerals development from start to finish, inclusive of beneficiation and other activities which may take place on a site.

Paragraph 18.57 makes reference to the term mineral planning authority and, as mentioned above, pending changes to local government through shared services, must be captured by any amendments to this.

In response to Question 18-5, the scope of the term mining operations should be widened to include the wider activities which take place on site, including the beneficiation (washing, crushing, screening, etc, or other activities required to make the mineral saleable)

Paragraph 18.58 recognises that mineral working is different from other forms of development. This statement alone should flag the concerns the minerals industry has over the delivery of a steady and adequate supply of minerals within the current land-use planning system. A more fundamental review of the system should consider whether or not the land-use planning system is the correct place to determine consents for mineral development.

Unfortunately, the 7 points identified in paragraph 18.58 typically represent a negative aspect by the ill-informed, failing to recognise their importance to society, which ultimately creates the demand for the mineral products. Houses, schools, hospital, roads and other infrastructure are wholly reliant on mineral products. Further, the

minerals sector routinely presents and delivers opportunities for largescale biodiversity and net gain.

In response to Question 18-6, we would agree that the IDO legislation no longer serves a useful purpose.

In response to Question 18-7, the position with regard the 15-year review period should have a default that the review is only undertaken “where necessary”, i.e. where it is clearly established that the conditions pertaining to a development are out dated and therefore need to be the subject of a formal mineral review. Legislation changed in England some time ago to reflect this approach.

In response to Question 18-8, this section is clearly at odds with the approach taken to minerals development. Case law has established that the winning and working of minerals is not a use of the land, yet consents are determined within the land use planning system. As referenced above, a more open review of the approach to minerals consents may be warranted. One questions how the term “use” can therefore be applied to discontinuance notices specifically to impose the cessation of an operation. We support the inclusion of the compensation provisions under Section 107 within the Bill.

In response to Question 18-9, the approach to fees is considered outdated and an applicant should only pay for the service received from the local planning authority. Recent fee rates proposed by NRW are not competitive or at commercial rates based upon the level of experience and efficiency of the service, particularly as this is a captive market. In marine dredging licensing, the applicant only pays for the service delivered and we would welcome the opportunity to explore this approach further with Welsh Government for land-based minerals development. Minerals applications should not be used to fund other services. We must also raise concerns over the abuse by local authorities to use fees in a revenue raising capacity, notably inspection or monitoring fees applicable to minerals developments. The planning bill should be accompanied by regulations that set clearly the scope of monitoring fees and defining appropriate criteria for when an increase in the number of visits may be acceptable.

In response to Question 18-12, we have above made reference to costs associated with planning appeals. Under point (1) it would be beneficial to identify which circumstances could be considered “unreasonable” and this should include decisions made against officer recommendation. This would ensure spurious or political decisions are eliminated. Whilst we recognise the planning process is democratic, applicants for controversial development will routinely avoid periods leading up to local elections.

In response to Question 18-13, we note the proposal to incorporate the provision of Section 276 of the Public Health Act 1936, but we would seek to ensure that the powers of the planning authority to sell materials removed in executing works are subject to the same level of environmental controls as non-public bodies.

We note subsequent proposals to clarify and simplify such definitions as dwelling house. Further terms which need clarification and could usefully be included in a definition of terms are

‘Mineral resource’: Natural concentrations of minerals, deposits or bodies of rock that are, or may become, of potential economic interest due to their inherent

properties. The mineral will also be present in sufficient quantity to make it of intrinsic economic interest.

'Mineral reserve': Mineral resources with the benefit of planning permission for extraction.

Appendix A. We note the absence of any pre-consultation discussions with the minerals sector in determining the scope of the consultation. This is reflected in the level of detail in the consultation document itself and the proposals relating to minerals application. The consequential effects on the mineral permitting process arising from changes to primary legislation have been far reaching which have led us to believe a root and branch review of the permitting process as it applies to minerals developments is long overdue. Unfortunately, the consultation document only proposes tinkering with the system as it affect the minerals permitting process and will do little to improve the effectiveness or efficiency ensuring significant frustrations remain.

We would be happy to discuss our concerns directly with the Law Commission to help provide a better understanding of them.

We trust the above comments are useful and would be happy to provide clarification on any of the points raised.

Yours faithfully



Mr Nick Horsley
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