Written evidence submitted by Huw Williams (DWB 12)

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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. 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.

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 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.

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:

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.iv

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 Groupv to examine the delivery of the development management system. The IAG’s report “Towards a Welsh Planning Act: Ensuring the Planning System Delivers”vi 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 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”vii discussed (at recommendation 11) the devolution of levies including CIL to Wales on a case by case basis. Subsequently the UK viiiGovernment 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.”ix

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, eight are not progressing CIL at present and the remaining 7 local planning authorities are at various stages of preparation.

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.

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 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 of landfill tax are self-evident. Provision should be made in the Wales Bill for legislative competence to create a planning levy.

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 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 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\textsuperscript{viii}, local authorities\textsuperscript{ix}, NHS bodies\textsuperscript{x} 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\textsuperscript{xii}.

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.\textsuperscript{xiii}

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\textsuperscript{xiii}.

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 10\textsuperscript{th} April 2014 setting out their conclusions\textsuperscript{xxv}: 

\begin{quote}
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.
\end{quote}

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 “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.xxv

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 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. 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 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.

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

Link to the Annex relating to this evidence

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1 Lead Partner – Public Law and Vice-chairman of Geldards LLP, a member of the Planning and Environment Law Committee of the Law Society of England and Wales, Chair of Public Law wales (Wales Public Law and Human Rights Association) and a member of the Welsh Government’s Independent Advisory Group on Planning 2012-13.
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.

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


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)

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


At paragraph 21.22

Caerphilly, Denbighshire, Merthyr Tydfil and Rhondda, Cynon Taf.

Brecon Beacons National Park Authority, Pembrokeshire Coast NPA, Snowdonia NPA, Anglesey, Ceredigion, Gwynedd, Merthyr Tydfil and Pembrokeshire

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

See pages 6.7 and 8.

Sections 18 and 19

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”.


New Schedule 7A, section M4 Buildings and development, paragraph 200

See, for example the Welsh Development Agency Act 1975 or the Highways Act 1980

See, for example, section 121 Local Government Act 1972 or section 226 of the Town and Country Planning Act 1990

See, for example, section 159 of the National Health Service (Wales) Act 2006

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

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.

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


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

See the submission by Keith Bush QC at paragraph 22.