Cymdeithas y Cyfreithwyr
The Law Society

General Principles of the Planning (Wales) Bill

Supplemental submission to the Environment and Sustainability Committee of the National Assembly for Wales on Town and Village Greens

December 2014

Introduction

1. The Law Society is the representative body for solicitors in England and Wales. The Law Society negotiates on behalf of the profession and lobbies regulators, governments and others.

2. This submission has been prepared by the Law Society's Planning & Environmental Law Committee ('PELC'). The PELC comprises nineteen practitioners specialising in planning and environmental law, drawn from a cross-section of the profession, public and private sectors and covering both England and Wales.

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3. This submission supplements the Law Society's submission (PB 55) to the Environment and Sustainability Committee ('the Committee') on the principles of the Planning (Wales) Bill. It addresses the points made by the Open Spaces Society ('OSS') in its submission to the Committee (PB 15). The Law Society offered to make this further submission during the evidence session on 3 December 2014.

4. The Law Society disagrees with the OSS's view that there is no evidence that the town and village green ('TVG') process is undermining the planning system. The PELC has nineteen members, seventeen of whom are either in private practice in England and Wales, or lawyers in local government. Attempts to register a TVG in order to render sites effectively immune from development are an experience common to all of those members.

5. The frontloading and public engagement requirements of the Local Development Plan ('LDP') system have been criticised. Those criticisms are being addressed through the LDP refinement process that forms part of the Welsh Government's programme of planning reform and the current consulation on Local Development Plans Process Review. Furthermore, these criticisms are an argument for further examination of the LDP process and the arrangements for public engagement, not reasons for allowing the present disruptive effects that can flow from TVG applications to continue.

6. The Law Society was represented on the Independent Advisory Group ('IAG'). The OSS interpretation of paragraph 5.8 of the IAG report is, in our view, inaccurate. Paragraph 5.8 was directed towards those parallel applications that, as a matter of law (for, example applications to stop-up highways or rights of way) or well-established administrative practice, cannot be started until planning permission is in place. Such applications are under the control of the party applying for planning permission. A TVG application is completely different; it is made by third parties and can be made at any time before or after planning permission is granted, or even once development has started.

7. The Law Society's evidence to the Committee explained that, although applicants may put significant effort - in their own time and (possibly) at their own cost - into assembling the evidence for a TVG application, the cost of holding a non-statutory inquiry[1] then falls on the registration authority. This cost can be significant as senior barristers or Queen's Counsel are usually appointed to conduct the inquiry and to report. The landowner is left with little option but to resist the claim due to their

[1] While there are no statutory rules for such inquiries, the practice of holding them on a non-statutory basis has been repeatedly endorsed by the Courts.

investment in the planning application to date and are obliged to instruct lawyers and experts accordingly to prepare their case. There are no powers to award costs against unreasonable or vexatious applicants. The absence of statutory rules means that cases can take months, or longer, before the registration authority makes its decision.

8. The Law Society considers that the OSS places too much emphasis on the Penfold Report in England.[2] That report was concerned primarily with non-planning consents that are required before development can begin. A TVG application is not a 'consent'; its effect is to stop development in its tracks. Penfold was concerned to ensure that TVG applications should not disrupt development once everything else is in place.

9. The OSS refers to the consent rate for planning permissions in Wales. The Committee will be aware that the vast majority of these permissions are householder or small commercial applications. In the experience of the PELC, TVG applications are resorted to in order to stop larger schemes which, while small in number, command a disproportionate share of the resources of the planning system. By the time a developer achieves permission for a major development, they will have made an investment of tens or even hundreds of thousands of pounds. In the Law Society's view, the potential for a TVG application to emerge through a separate legal process to jeopardise such an investment is a threat to the balance and fairness of the planning system.

10. The Law Society strongly supports the principles of the proposed reform, namely:

    a) That landowners can maintain public access to land, while protecting themselves against a future TVG application, by depositing a declaration of non-dedication; and

    b) That there is immunity from TVG registration once land has entered the planning system, with the immunity coming to an end if an allocation of the land by a statutory plan is not accepted when the plan is adopted or planning permission is refused, but continuing while a statutory plan allocation and/or planning permission remains in place.

11. When the Law Society gave evidence to the Committee, it was suggested that immunity should only be given once planning permission was granted. This would perpetuate the present situation where a developer is “at risk” throughout the period when costs are being incurred in progressing the application.

12. The Law Society invites the Committee to reflect on the historic development of the present statutory protection of common land and TVGs. The Victorian legislation[3] protecting commons and TVG from development was part of the same movement that saw the foundation of the OSS and was aimed at preserving open land for public access for the benefit of the populations of the expanding towns and cities. It pre-dates the modern and comprehensive system of town and country planning, which is able to ensure that development is carried out in the public interest generally, and in a manner that makes appropriate provision for publicly accessible open space.

13. Providing certainty through the public registration of land ownership and rights over land has long been an aim of government. The modern system of land registration in

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[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31621/10-1027-penfold-review-final-report.pdf.

[3] Principally, in relation to TVG, the Inclosure Act 1857 (section 12) and the Commons Act 1876 (section 29).

England and Wales dates from 1925. In the case of TVGs and common land, registration gives certainty to landowners, the owners of common rights and members of the public. This was recognised by the Royal Commission, whose recommendations led to the Commons Registration Act 1965, the policy intent of which was to create certainty about the extent of commons, commoners' rights and TVG, with finality of registration resolving arguments over their nature and extent.

14. However, the development of the law on prescriptive rights in relation to TVG and the use of registration applications as a type of "satellite litigation" has created a new and surely unintended, area of uncertainty. The degree of uncertainty is exemplified by the fact that in the last fifteen years TVG registrations have come before the House of Lords or the Supreme Court on no fewer than five separate occasions.[4]

15. The proposed reforms in Wales (and the prior reforms in England) go some way to re-establishing certainty about the position in relation to the existence of TVGs when applications enter the planning system. The reforms would permit public access to be allowed without landowners being at risk of TVG claims arising in future. They also preserve the right of local inhabitants, where there is no declaration or land is not within the planning system, to assert that 'new' TVGs have arisen through use by local inhabitants for over twenty years "*nec vi, nec clam, nec precario*: not by force, nor stealth, nor the licence of the owner,"[5] and to seek registration on that basis.

16. Finally, the Law Society notes that the OSS submission also proposes some procedural changes to the handling of TVG applications. The Law Society believes that there is a good case for establishing statutory rules for TVG inquiries, which are currently held on a non-statutory basis with no framework of rules for timetabling the case or any basis for awarding costs. One possibility might be for TVG applications to be handled by the Planning Inspectorate and allocated to legally-qualified inspectors to report to the registration authority on a binding basis. However, any such further reform should be subject to a full, public consultation on the options prior to any further legislation.

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[4] *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [2000] 1 AC 335 ('Sunningwell'); *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 ('Beresford') and *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 ('Oxfordshire'); *Regina (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11 ('Cleveland') and, most recently *Regina (Barkas) v North Yorkshire County Council* [2014] UKSC 31 (which ruled that *Beresford* was no longer to be relied upon - a rare instance of the highest tribunal overruling its own prior decision).

[5] See speech of Lord Hoffman in *Sunningwell*.