

PLANNING AND THE WELSH LANGUAGE – A LEGAL LOOK AT TAN 20

Paper for the RTPI seminar in the 2011 Wrexham Eisteddfod

*“Iaith Pawb notes how the Welsh Assembly Government intends to achieve its aim of reviving the Welsh language and creating a bilingual Wales” – PPW 4.12.1 (Edition 4 February 2011)*

The aim is to revive the Welsh language, that is to increase the number of people who are able to speak it, and who do so on a daily basis. The objective is the revitalisation of the language, rather than ensuring justice for those who want to speak Welsh – although there is an obvious connection between the two.

That is the criterion, therefore, when assessing the new TAN.

From a legal point of view, there are a number of things that need to be considered when looking at any Technical Advice Note.

Is the Note ambiguous?

Is the Note consistent throughout or are there tensions between different parts of it?

Is the Note consistent with current national policy?

Is the Note consistent with current local policy?

In the context of this TAN, one could ask with tongue in cheek – does the Note have any technical content?

When faced with any ambiguity lawyers will ask – does the Note achieve the objectives of the national policy? If it does not achieve the policy objectives, is it possible to interpret it in a way that means that those objectives are achieved?

## The Content of TAN 20

*“3.1.1 Where the use of the Welsh language is a significant part of the social fabric of a community, the needs and interests of the Welsh language should be taken into account in the formulation of the strategy, policies and site allocations set out in the LDP”*

Let us compare this with the relevant part of Planning Policy Wales

*“4.12.2 All local planning authorities should consider whether they have communities where the use of the Welsh language is part of the social fabric, and where this is so it is appropriate that this be taken into account in the formulation of land use policies.”*

It's slightly strange that there should be a difference in the language used in PPW and TAN 20. It seems that what they're saying is not very different, so why use different wording? If anything, the wording of TAN 20 is weaker – under PPW, the use of Welsh must be a part of the social fabric of the community; under TAN 20 the use of Welsh must be a **significant** part of the social fabric of the community.

This is an important part of the Note. No definition or measures are offered on how to decide whether the Welsh language is a significant part of a specific community's social fabric. For my part, I have some sympathy with the fact that the Note does not elaborate – an attempt to define this would be long-winded and specifying a certain percentage of speakers would be too prescriptive and inflexible. And yet, it probably could include more guidance on how to decide whether communities in a specific area come within the definition, and, indeed, how to describe what comprises a community, both geographically and in terms of population. For example, should we look at electoral ward level or at areas larger or smaller than that? It is possible to give guidance without preventing authorities from using their discretion in deciding whether or not the Welsh language is a significant part of a community's social fabric.

Aside from the lack of definition, the difference in the wording of the PPW and the TAN is unfortunate. Is it deliberate? If it is deliberate, it would be useful to know the

reason behind it because without an explanation, it could be construed as an attempt to revise the policy. That would not be my interpretation, and in most areas where the Welsh language is important in the context of planning, it will be obvious that the Welsh language is a significant part of the social fabric.

The lack of guidance as regards the type of community that comes within the scope of the policy will become important in a peripheral way. It is not obvious, for example, if an impact assessment should be conducted in an area that was once a Welsh speaking area, and where there are attempts to revive the language.

*“3.1.2 Welsh language impact assessment (WLIA) allows for the identification of possible impacts on the Welsh language that may result from development. WLIA should be an integral part of Sustainability Appraisal (SA) and site assessment processes that take place during plan preparation”*

This is also an important part of the Note. There is no technical guidance however on how to conduct a WLIA. What is a WLIA or a Welsh Language Impact Assessment? In a Technical Advice Note, there should be technical advice and guidance. There is no technical guidance in TAN 20. Perhaps one could say that planners who have worked for some time in West Wales or in the Welsh Heartlands will know how to conduct a language assessment. But that is not an adequate answer to the problem. There will be different experiences and views in the Welsh Heartlands, and more importantly, TAN 20 is there to advise inspectors who are appointed to evaluate whether or not a local development plan is sufficiently robust. It's likely that those inspectors won't have any experience in the field of language assessments. Therefore, the fact that no methodology is described or recommended in the Note is a very obvious weakness. This weakness is more significant than the questions that arise about communities' social fabric.

*“4.1.1 In determining individual planning applications and appeals where the needs and interests of the Welsh language may be a material consideration decisions must, as with all other planning applications, be based on planning grounds only and be reasonable. These planning grounds include adopted development plan policies, including those which have taken the needs and*

*interests of the Welsh language into account. **Planning applications should not be subject to Welsh language Impact Assessment.***”

This last sentence is very significant. It’s also rather unexpected, considering the genesis of the revised Note.

The revised Note is the fruit of a commitment made in the One Wales Partnership Agreement. The commitment is cited in the introduction to the Note:

One Wales, the Partnership Agreement between the Labour Party and Plaid Cymru, includes a commitment to:

“review and reissue Technical Advice Note (TAN) 20 with a view to allowing local authorities to use Language Impact Assessments for planning purposes in areas of housing pressure”.

One should note a numbers of things about this commitment. Firstly, there is the perception that there is some kind of prohibition on conducting language assessments in the planning context. Secondly, the focus is fairly narrow – assessments should be used in ‘areas of housing pressure’. Housing pressures are a hot topic in the Welsh Heartlands, but the housing markt is but one cause and/or symptom. The Note itself does not limit assessments to areas where there are housing pressures and that is to be welcomed. Thirdly, the main objective of the commitment is to overcome the perception that authorities are prevented from conducting, or asking developers to conduct language impact assessments.

The Note makes language impact assessments a mandatory part of preparing a local development plan where the language is a significant part of the social fabric of a community. But it also says in 4.1.1 – and the prohibition is more obvious in the English version than the Welsh – that a language impact assessment should not be requested in the context of an individual planning application.

(In my opinion, the correct translation of the Welsh sentence would be “It should not be necessary to conduct WLIA’s on planning applications’ but the English version

states “Planning applications should not be subject to Welsh Language Impact Assessment.” In theory, the Welsh version has the same status as the English version. In reality, it seems that the Welsh is merely a translation of the English and quite a shabby translation at that).

Bearing in mind the objectives of the commitment made in One Wales, one must ask – does the revised Note succeed in achieving that which it is meant to achieve? The answer is it enables, and indeed, makes it mandatory for language impact assessments to be conducted as part of the process of preparing a local development plan where the Welsh language is a significant part of the social fabric of a community. On the other hand, it prohibits assessments when deciding on planning applications (unless someone emphasizes the meaning conveyed in the Welsh version).

Undeniably, the Welsh Assembly Government’s perception is that the Note strengthens the status and the situation of the Welsh language in the planning field. On the basis of the current draft, however, it’s disputable whether this perception is correct.

We must first return to the perception in One Wales that there is a prohibition on language assessments under the policies that existed in 2007. Having looked at the 2000 Note, it does not contain anything that prohibits a local authority from adopting a language policy that would require a developer to conduct language impact assessments. If an authority adopted such a policy, the inspector would approve it and it would be a legal policy, as long as it was reasonable and practicable. Indeed, in the December 2005 Document “*Planning and the Welsh Language: The Way Forward*” there is a reference to Denbighshire’s Local Plan, which included a policy that required developers to provide linguistic evidence whenever there was likely to be significant damage to the Welsh language (page 13). This Plan was approved by the inspectorate back in 2001.

It seems, therefore, that the perception behind the commitment made in One Wales is inaccurate. That is unfortunate. If a problem is not properly diagnosed then it is unlikely that the medicine prescribed will solve it; indeed, the medicine could aggravate the problem.

In my opinion, the misdiagnosis in One Wales means that the Note, in its current form, has unintentional and unfortunate implications. These implications stem from the last sentence of 4.1.1., emphasised in this paper.

If the Note is adopted in its current form, it would cause legal problems and uncertainty for both developers and local authorities. These problems have the potential to undermine the position of the Welsh language, and to mean that the language would be safer under the provisions of TAN 20 (2000 version) than it would be under the provisions of the revised version. I shall now outline some of the circumstances where these problems could arise.

Local plan including a policy that calls for a language impact assessment under certain circumstances

The main consideration of course is the statutory local plan. But the Note would be a relevant consideration bearing in mind that the local plan was adopted before the Note came along. Under those circumstances, it's likely that some developers would claim that a language impact assessment was not necessary.

The authority could counter this argument in a number of ways. Firstly, the new Note does not address the situation where a statutory plan was drawn up under the old TAN 20 but the application was made after the new Note came into force. The new Note foresees that all language assessments are made during the preparation of the plan. The old Note did not require language assessments to be conducted as part of the plan. Consequently, a lacuna exists until a local plan that takes the new Note into consideration is adopted.

Secondly, the authority could say – the plan is the main consideration, and having looked at the Note, we have decided to stick to the plan thank you very much.

Undoubtedly, more arguments could be adduced and, usually, one would expect that the plan would take precedence. But one cannot deny that the Note causes problems

and gives developers a basis for trying to avoid conducting language assessments, contrary to the requirements of the statutory plan.

On appeal, an inspector could find himself in a very strange situation. When the focus of the appeal is the effect on the Welsh language, one would expect both sides to provide evidence of the effect the development would have on the language. Evidence that would, no doubt, look very similar to an impact assessment on the Welsh language! This demonstrates that the prohibition in the Note on asking for a language assessment is absurd.

A local plan that includes a Welsh language policy that enables the authority to deny permission where the development could jeopardize the prosperity of the Welsh language

Under these circumstances, the need for a language assessment manifests itself again. The developer would be in a stronger position because he could say – the plan says nothing about conducting a language assessment and the national policy, i.e. the Note says that an assessment should not be conducted.

But if the language is a relevant matter, it must be considered. And, according to the Note, it must be done in a reasonable way. In order to address it in a reasonable way, it must be analysed in some way, and an analysis is dependent upon evidence or specialist opinion. In other words, it would be necessary to conduct some kind of assessment of the impact on the language – regardless of the label attached to the evidence or analysis.

A local plan that notes the importance of the Welsh language in general terms where the authority has adopted Supplementary Planning Guidance that calls on developers to conduct a language assessment under certain circumstances

Here is another variation that falls between the two previous situations. Supplementary Guidance would be a relevant consideration but the Guidance should be consistent with local and national policy. Faced with this, it would be difficult for the authority to insist on compliance with the Guidance. As the local policy does not mention conducting language assessments, there are no inconsistencies between the local policy and the Note. In this situation, the developer would have a strong argument that they need not place too much importance on the Guidance. The authority's counter argument would be that there exists a lacuna until there is in force a local plan which was prepared with the new Note in mind and the fact that evidence must be given in a case where the Welsh language is a significant consideration. To me, these are all viable arguments. However, an inspector or court could decide that they are no more than a diplomatic way of saying that the Note is not very wise or sensible. For example, the authors of the Note should be aware that there is a period of a few years where local plans will be applicable which were adopted before the new Note came into being. If the Welsh Government considers that there is no need to include a policy which addresses that situation then the Note should be applied as it is. The position is much the same with the argument that evidence must be presented, i.e. an assessment of the impact on the language conducted, in order to decide whether a development that is likely to have an effect on the language is acceptable or not. The inspector or the court could say "Yes, yes, very interesting, and there may be some substance to the point, but it is a point that was more than likely raised during the consultation stage and the Welsh Government decided to stick to the draft policy, and so the inspector's job is to apply the policy".

Analysed in this way, the Note is a very definite threat to the policies and arrangements of authorities who use such Guidance. Perhaps the best way to alleviate these problems would be for the authority to speed up the process of drawing up the new local development plan, including a policy that incorporates the Guidance and emphasise they weight to be attached to the emerging plan.

Local plans to be adopted in future

Once again, the Note is unfortunate. It's likely, however, that it would be possible to overcome the prohibition in 4.1.1. Contrary to the situation in England, a local plan does not need to conform with national policy in order to be robust. As long as there is reasonable justification for deviating from the national policy, it's likely that it would be possible to persuade an inspector to approve a local plan that rejects the prohibition in the Note.

There are two obvious weaknesses in this part of the Note, and an inspector should appreciate those weaknesses. Firstly, there is no need for the prohibition to be in absolute terms: the objective of not placing too many costs and obstacles on developers could be achieved by a sentence stating that 'language assessments would only be necessary in extreme cases when considering a planning application or appeal'. Secondly, the whole point of a local development plan is that it is simpler and less detailed than some past plans. Bearing this in mind, one must recognise that applications for windfall sites, some of which might be on a significant scale, are likely to come up occasionally during a plan's lifespan. The plan will not address these kinds of applications in a detailed way, and therefore, general policies must be applied to assess and evaluate them. When the language is a significant factor, these policies should allow for a duty to be placed on developers to adduce evidence and an analysis of the effects the development will have on the language. In other words, insofar as applications for windfall sites are concerned, there must be a basis in local policy for enabling a local planning authority to require a developer to adduce an assessment of the effects of the development on the language where appropriate.

### Conclusion

The Note in its current form is disappointing. It doesn't offer much in the form of guidance on technical matters. Without national approval of the methodology that should be used, there is more scope for casting doubt on the robustness of local policies and decisions which relate to the Welsh language. The Note displays a lack of ambition and a lack of research. This is not, however, its main weakness.

The main weakness is that it undermines the good practice that already exists and that could continue to co-exist quite happily with the current national policy. Specifically,

it unnecessarily prohibits language impact assessments, and in doing so, creates the exact problem that One Wales was hoping to solve – a problem that, in reality, did not exist in the first place.

One of the unique aspects of the language in the context of the planning field is that it is not relevant to a large number of the planning authorities in Wales. Indeed, it's probably irrelevant to most of them.

In the face of this and the Welsh Assembly Government's lack of ambition, it would be preferable if the Note refrained from offering overly prescriptive guidance and instead left those authorities where there are a number of Welsh speaking communities to form their own specific and practical policies without being fettered by national policy. That would at least avoid the unintentional harm caused to the language by the draft version of paragraph 4.1.1.

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4th August 2011