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Y Gweinidog Cyfoeth Naturiol
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Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref LF/CS/1240/14

David Melding AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Ty Hywel
Cardiff Bay
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Dear David

Planning (Wales) Bill

Thank you for inviting me to the Constitutional and Legislative Affairs Committee on 10 November 2014 to give evidence on the Planning (Wales) Bill.

As noted in your letter of 21 November, I committed to provide the Committee with further information on a number of issues. The information is provided below with some further details to clarify certain points raised by Members of the Committee. Dealing with each of the points in turn:

1. **The overlap between the Planning, Well-being of Future Generations and the Environment Bills**

   Please find attached at Annex 1 the document which I referred to during the Committee session outlining the links between the Planning Bill, Well-being Bill of Future Generations Bill and the Environment Bill.

2. **Whether pre-application advice would be subject to the provisions of the Freedom of Information Act 2000?**

   The subordinate legislation in connection with the pre-application services will make provision for and in connection with when the pre-application services are required to be provided, the nature of the service and the requirements for the documents and information to be published. This will require local planning authorities and the Welsh Ministers to retain records of pre-application services and to publish information on

the type of pre-applications services provided. This will ensure that the process is open and transparent.

Any Freedom of Information request received by the Welsh Government or a local planning authority in relation to information held on pre-application services would be subject to disclosure. However, deciding whether information is to be released would depend on whether the public body are bound to protect that information. In disclosing information a public body has to follow the law relating to handling information. There are three main pieces of legislation governing handling of requests for information:

- Data Protection Act (DPA) 1998.
- Freedom of Information Act (FOIA) 2000.
- Environmental Information Regulations (EIR) 2004.

I mentioned in scrutiny that I would need to seek advice on whether there is competence in relation to FOI requests. This was in relation to seeking advice in relation to human rights implications of disclosing information. I am reassured that there are no issues of competence in relation to the disclosure of information.

3. The meaning of Developments of National Significance; (DNS).

In Positive Planning, I consulted on the proposal that the Welsh Ministers would in future determine applications defined as Developments of National Significance. Positive Planning described DNS as:

> "few in number but of greatest significance to Wales because of their potential benefits and impacts. They may raise complex technical issues... Ultimately, many of these applications already fall to the Welsh Ministers to decide, either as a result of being called in, or, on appeal."

The proposed categories and thresholds for DNS were published in Annex B which, I have reproduced as Annex 2 to this paper. Almost 70% of respondents agreed with the categories in Annex B, some respondents commented that the LPAs do not have the required expertise in relation to some of the issues. Respondents also noted that the criteria for DNS should be flexible enough to allow for amendment and extension.

Positive Planning also consulted on the process for considering these applications, including the need for mandatory pre-application consultation, with 97% of respondents agreeing with this proposal. Similarly, there was widespread support for charging of fees for pre-application advice on DNS applications.

In relation to connected consents, the majority of respondents, 81% agreed with the proposal for handling connected consents and believed it would bring benefits in terms of a more comprehensive consideration of an application and that a single decision making body would speed-up the process. Comments also noted that the process would benefit the public and consultees as they would be able to fully consider the impacts of a scheme as a whole at the start of the engagement process.

DNS will also be specified by the Welsh Minsters in the National Development Framework (NDF) document, which is subject to a 12 week public consultation

process followed by Ministerial consideration. The final draft NDF will then be laid before the Assembly for approval for a period of 60 days. It is only these developments and those that meet the criteria set out in the regulations that will be DNS. The NDF can be reviewed and revised at any time subject to further scrutiny. Guidance will be produced outlining this process.

4. **The reasons for the use of the negative and affirmative procedures in respect of new sections inserted into the Town and Country Planning Act 1990 by sections 44 and 45 of the Bill. In particular, why when both section 44 and paragraph 18 of Schedule 4 to the Bill impose financial burdens on the public, you have chosen the affirmative procedure for paragraph 18 of Schedule 4 (inserting section 303(1B)) and the negative procedure for section 44 (inserting section 322C).**

   Paragraph 18 of Schedule 4 applies to fees charged by the Welsh Ministers in relation to the performance of functions undertaken where an application is submitted to them. Those fees are charged in advance of the making of an application and may place some financial burden on the applicant. The amendment inserts provisions into section 303 of the Town and Country Planning Act 1990, regulations under which are already subject to affirmative procedure.

   Section 322C, by contrast, applies to costs actually incurred by the Welsh Ministers or parties to an application, appeal or reference to the Welsh Ministers. The Welsh Ministers will be able to direct that all or part of their costs are paid by the applicant, appellant, person making the reference, local planning authority or other party. The Welsh Ministers may also make orders as to the costs of the applicant, appellant or other party. The intention of this section is to ensure that where a party has acted unreasonably, an award may be made to other parties to reimburse them of the additional cost incurred as a result of that unreasonable behaviour. The Welsh Ministers may prescribe a standard daily amount to reflect their costs. The prescribed standard daily amount is intended to reflect the amount spent by the Welsh Ministers, which may change regularly, based on economic and staffing factors. These costs are intended to reflect costs at the time of dealing with a case, and as such, flexibility is required.

   The key difference between this section and section 303, is as follows. Under section 303 fees for planning applications and other matters have to be paid, irrespective of any other circumstances. Fees set under this section in effect set the level of income local planning authorities receive from the exercise of their development management functions, subject only to variability in the number of applications they receive. In contrast, under section 322C a costs order can only relate to costs which have actually been incurred (and will need to be reasonable in the case of the Welsh Ministers, applying public law principles). These costs are due to the behaviour of the applicant, appellant or other person against whom an order is made. In a sense the "burden" can be avoided by not behaving unreasonably.

   Current provisions relating to costs are contained at section 42 of the Housing and Planning Act 1986 and section 250 of the Local Government Act 1972. The provision

at section 322C, amongst other things, consolidates the costs regime into one place in relation to planning decisions. There is already provision at section 42 of the Housing and Planning Act 1986, which enables the Welsh Ministers to prescribe a standard daily rate, which follow the negative procedure.

In addition to the information that I agreed to provide at Committee, in your letter you asked for more detail in relation to a number of questions. I have provided detailed responses to those questions below:

1. **Why under Schedule 4D, paragraph 1(2) of the Town and Country Planning Act 1990 (as inserted by Schedule 3, paragraph 1) is a "specified function" to be set out in regulations rather than including definition on the face of the Bill?**

   It is anticipated that the Planning Inspectorate will be appointed to exercise certain functions in relation to optional direct applications, such as the receipt of applications, identification of consultees, consideration of responses and the determination of the application. For DNS applications, the Planning Inspectorate, are expected to undertake administrative functions and consideration of the DNS application, with the function of determination reserved to the Welsh Ministers. Where it is more efficient for the local planning authority to undertake certain actions (such as to erect the site notice), provision is included in the Bill that enables the Welsh Minsters to direct LPAs to undertake certain functions.

   The Town and Country Planning Act 1990 contain powers, at Schedule 6, to appoint and/or revoke or alter the appointed persons at any time. Schedule 4D also allows this to occur in relation to optional direct applications and DNS. Secondary legislation is required to prescribe specific functions to be undertaken by appointed persons as routine, rather than appointments being made on a case-by-case basis. This also allows the flexibility for the Welsh Ministers to undertake certain tasks should they consider it necessary.

   It may also be considered appropriate to review this legislation regularly, as the procedures for DNS and optional direct applications are monitored, and updated.

   The negative procedure is considered appropriate as this is a matter of relatively minor detail in an overall legislative scheme, which prescribes the functions that are to be undertaken by an Inspector, rather than the Welsh Ministers. In addition, the provisions do not give enabling power that would change primary legislation; confer significant powers on the Welsh Ministers; increase or impose significant financial burdens on the public; or create or confer unusual powers. Similar powers exist in relation to appeals and call-ins at Schedule 6 to the Town and Country Planning Act 1990. These are subject to negative procedure.

2. **Would the regulation-making power under Schedule 4D, paragraph (1)(3) of the Town and Country Planning Act 1990 (as inserted by Schedule 3,**

paragraph 1) include the power to amend primary legislation and if so, why is the negative procedure appropriate?

The power in question is constrained in so far as it may be used to give effect to the provision in articles 1(1) and 1(2). It does not enable the Welsh Ministers to amend primary legislation. There is nothing on the face of the Bill which suggests that paragraph 1(3) includes a power to amend primary legislation, and if it were the case that the provision was intended to confer such a power, you would expect to see that explicitly referred to in the wording of the section.

3. **What is the rationale for using negative procedure in the making of an order under section 75A(1) of the Town and Country Planning Act 1990 (as inserted by Schedule 4 paragraph 7) given the scope for such an order to amend primary legislation?**

Schedule 4 (7) inserts Section 75A into the TCPA 1990. The purpose of section 75A is to allow a development order to apply (or disapply) other legislation which might otherwise hinder the Welsh Ministers from making determinations of applications for DNS, optional direct applications or connected applications.

It is likely that the procedures for both types of applications will mirror, as far as possible, the process and requirements that usually apply when an application is submitted to a local planning authority. This is in order to maintain a consistent and familiar approach for stakeholders, including the applicant, the local community and statutory consultees. In order to achieve as similar a process as possible, Section 75A(1) enables provisions within existing planning legislation to be applied, with or without modification to applications made directly to them, including 'connected' applications.

The power would be used to apply existing processes and requirements that relate to applications made to local planning authorities to those made directly to the Welsh Ministers. For example by applying:

- The existing requirements associated with the making of a valid application, such as the form and manner in which it is to made, as well as the information to accompany the application.
- The publicity and consultation requirements.
- The form and content of the decisions notice.

The negative procedure is considered appropriate as the provision prescribes operational matters relating to the process of making and determining these applications. Some of these matters will include establishing arrangements relating to the validation of applications, the publicity to be undertaken and the issuing of the decision notice.

Flexibility is also required to enable the application procedures to be amended from time to time in order to respond to changing circumstances. For example, with the procedures for both types of applications likely to mirror as far as

possible existing ones, any changes made to the existing procedures under current subordinate legislation, that are already subject to the negative procedure, may also need to be reflected for applications submitted directly to the Welsh Ministers. This is to maintain a consistent approach for stakeholders, including applicants, the local community and statutory consultees.

Section 75A does not in any circumstances enable the Welsh Ministers to amend primary legislation. The power contained in that section is one which enables the Welsh Ministers to provide, in a development order, for an applicable enactment or requirement (as defined in section 75A(2)) to apply, with or without modifications, or not to apply, in the narrow context of applications made to the Welsh Minsters, in order to ensure the effectiveness of the relevant provisions.

4. **In light of the Supreme Court cases about the importance of Assembly proceedings and documents generated by the Assembly or Welsh Government when considering competence, would the Welsh Government be prepared to share with the Committee any human rights assessment that has been carried out in preparing this Bill?**

   Human rights issues in respect of the Bill have been considered as part of the overall legal advice provided to Ministers. All legal advice to Ministers is protected by Legal Professional Privilege.

   The Welsh Government considers the proposals contained in the Bill are compatible with the Convention Rights given that the planning system by its very nature balances the rights of the individual and the interests of the wider community.

5. **Are the amendments made by the Bill to the existing town and country legislation which already binds the crown, also intended to bind the Crown? If so, would it be clearer to state this expressly?**

   The Planning and Compulsory Purchase Act 2004 and the Town and Country Planning Act 1990 bind the Crown and as such the amendments to those Acts made by this Bill will also bind the Crown. It is therefore not necessary to state this.

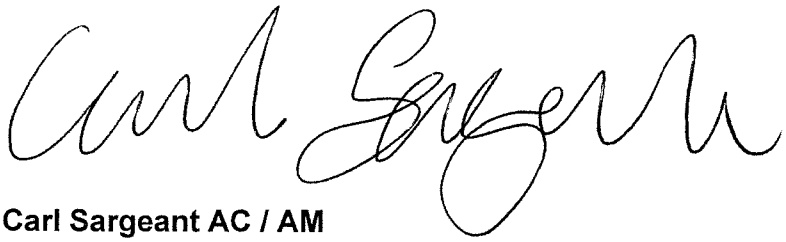
6. **Do the Welsh Government consider that Queen and/or Prince's consent needs to be obtained in respect of the changes made to the town and country planning legislation by the Bill, and if not , for what reason?**

   I consider, at this time, that Queen's or Prince's consent is not required in respect of the Bill. The earlier consent given in respect of the Planning and Compulsory Purchase Act 2004 is sufficient because the changes in the Bill affecting interests of the Crown are not substantive. This issue will be kept under review as the Bill progresses through the Assembly.

I trust that my response to the Committee's request and the additional information I have supplied will assist Members in their scrutiny of the Planning (Wales) Bill. Should you or any Member have any further queries or require more information on any aspect, please do not hesitate to contact me.

I am copying this letter to the Chair of the Environment and Sustainability Committee.

Yours sincerely



Carl Sargeant AC / AM
Y Gweinidog Cyfoeth Naturiol
Minister for Natural Resources

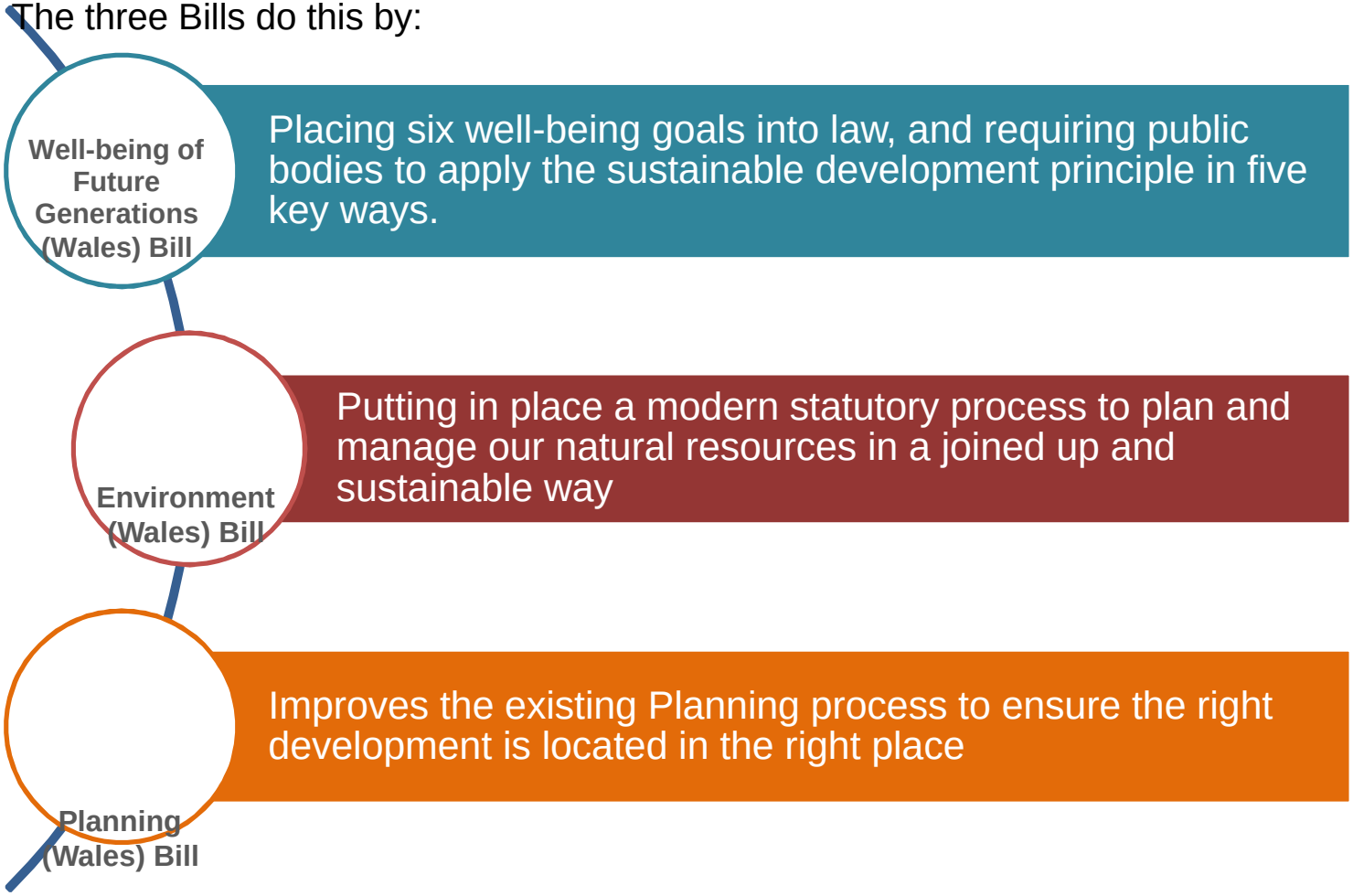
Cc Chair of the Environment and Sustainability Committee

Legislating for sustainable development to secure the long term well-being of Wales

For Wales to develop sustainably, we need to change the law to put in place the key elements that will enable it to happen:

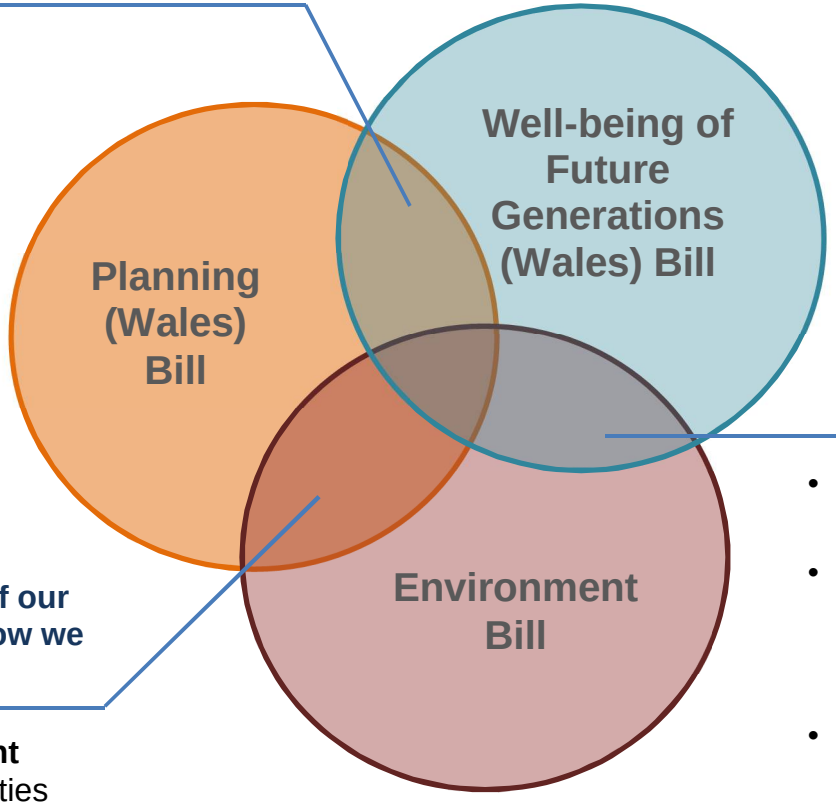
A clear idea of what we are aiming for and an understanding of the key principles that will guide us;
A clear picture of the natural resources we have, the risks they face and the opportunities they provide; and,
An efficient process that ensures the right development is located in the right place to make it happen.

The three Bills do this by:



To help achieve the goals we need to plan how we use our land, and how our cities, towns and communities change over time

- A **plan-led system** means that Local Planning Authorities need to understand what their communities need. Local Planning Authorities will be under a duty to have regard to the 'local well-being plan' published by the Public Service Board (PSB)
- Greater development engagement at the **pre-application stage** will ensure local communities are able to engage early on in the planning process to influence development proposals.
- **Strategic Development Plans** will focus planning for areas with matters of greater than local significance. The key is to focus on areas where development is of a strategic nature.
- The **National Development Framework** will set out the Welsh Government's land use priorities.



Linking how we manage the use of our land must be done in alongside how we manage our natural resources

- **Natural resource management** informs priorities and opportunities through area-based evidence.
- More consistent, proactive and prioritised **evidence base** for natural resource use aligned to national and local goals.
- Prioritised opportunities to inform and underpin investment decisions and ensure the **right development**, supporting positive planning.

Our natural resources are essential for us to achieve the well-being of a sustainable Wales:

- The use and resilience of natural resources is reflected in the 6 well-being **goals**
- Natural Resources Wales are one of the 44 identified **public bodies** subject to the sustainable development duty and a member of the Future Generations Commissioner for Wales' **Advisory Panel**.
- **State of Natural Resources Report (SoNaRR)** will provide the evidence base for our natural resources which will inform Public Services Boards' assessments of well-being.
- Natural Resources Wales will be a statutory member of all **Public Services Boards**, supporting partnership working across the public sector to maximise their contribution to the well-being goals.
- **Area statements** will identify local needs, opportunities and challenges within the context of both natural resource management and local well-being plans.

Planning Application Classifications – Thresholds and Criteria

Developments of National Significance (DNS)

Proposed categories and thresholds are listed below.

Application Type	Threshold
Underground Gas Storage Facilities not constructed by a gas transporter, for the storage of gas underground in cavities or non porous strata	Working capacity at least 43 million standard cubic metres or maximum flow rate at least 4.5 million standard cubic metres per day.
Alteration of any type of underground gas storage facility	Working capacity at least 43 million standard cubic metres or maximum flow rate at least 4.5 million standard cubic metres per day.
LNG Facilities	Storage capacity at least 43 million standard cubic metres, or maximum flow rate at least 4.5 million standard cubic metres per day.
Gas Reception Facilities	Where the maximum flow rate is expected to exceed 4.5 million standard cubic metres per day.
Pipe-lines constructed by a Gas Transporter	Pipelines constructed by a Gas Transporter that: are more than 800 millimetres in diameter and more than 40 kilometres in length or would be likely to have a significant effect on the environment; and have a design operating pressure of more than 7 bar gauge; and convey gas for supply (directly or indirectly) to at least 50,000 customers, or potential customers, of one or more gas suppliers.
Airport related development and construction	Increase capacity by 10 million passengers per annum, or over 10,000 air transport movement of freight per annum.
Harbour facilities	In the case of facilities for container ships: anything below 500,000 TEU;

	In the case of ro-ro ships: anything below 250,000 units; In the case of facilities for cargo ships of any other description, anything below 5 million tonnes. In the case of mixed thresholds, the cumulative effects falling within the above but not greater (anything greater is determined under the NSIP regime in Wales). The above apply unless 'permitted development' under Classes B & D of Part 17 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995.
Railways	Works to the national rail network not covered by permitted development rights (as contained within Article 3 of the Town and Country Planning (General Permitted Development) Order 1995); work that is a continuous length of more than 2 kilometres, is not on land that was either operational land of a railway undertaker immediately before the works began or is on land that was acquired at an earlier date for the purpose of the works. This does not include works that take place on the operational land of a railway undertaker unless that land was acquired for the purpose of those works.
Rail freight interchanges	Interchanges covering at least 60 hectares and handling at least 4 goods trains per day.
Dams and reservoirs	Capable of holding back or storing in excess of 10 million cubic metres of water.

Transfer of water resources	Capable of transferring in excess of 100 million cubic metres of water per annum.
Waste water treatment plant	Has a capacity exceeding that which is capable of dealing with a population equivalent of 500,000.
Hazardous waste facilities	Land-fills or deep stores able to handle more than 100,000 tonnes per annum; In any other case, facilities able to handle more than 30,000 tonnes per annum.
Pipe-lines not constructed by a gas transporter	A pipe-line below 16.093 km in length wholly or partly in Wales.
Generating stations (onshore)	Anything 25 megawatts to 49 megawatts inclusive.

Major Developments

Current thresholds and criteria for major development are listed under Article 2 of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012/801 for Wales. These thresholds and criteria are listed below.

Thresholds and Criteria for Major Development
(a) the winning and working of minerals or the use of land for mineral-working deposits (for the definition of *"mineral-working deposit"* see section 336 of the Town and Country Planning Act (c.8))
(b) waste development
(c) the provision of dwellinghouses where— (i) the number of dwellinghouses to be provided is 10 or more; or (ii) the development is to be carried out on a site having an area of 0.5 hectares or more and it is not known whether the development falls within sub-paragraph (c) (i).
(d) the provision of a building or buildings where the floor space to be created by the development is 1,000 square metres or more

(e) development carried out on a site having an area of 1 hectare or more

Local Developments

A local development is any development proposal that falls below the categories for developments of national significance and major development, unless it is defined as permitted development. The types of development that comprise of permitted development are defined in the Town and Country Planning (General Permitted Development) Order 1995/418 for Wales (as amended) (link to legislation is as follows: http://www.legislation.gov.uk/uksi/1995/418/contents/made).