

**Explanatory Memorandum to:**

- 1. The Town and Country Planning (Development Management Procedure) (Wales) (Amendment) Order 2015**
- 2. Planning (Listed Building and Conservation Areas) (Wales) (Amendment) Regulations 2015**
- 3. The Town and Country Planning (Referrals and Appeals) (Written Representation Procedure) (Wales) Regulations 2015**

**This Explanatory Memorandum and Regulatory Impact Assessment has been prepared by the Department for Natural Resources, and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1**

**Minister's declaration**

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of:

1. The Town and Country Planning (Development Management Procedure) (Wales) (Amendment) Order 2015;
2. Planning (Listed Building and Conservation Areas) (Wales)(Amendment) Regulations 2015
3. The Town and Country Planning (Referrals and Appeals) (Written Representation Procedure) (Wales) Regulations 2015

I am satisfied that the benefits outweigh any costs.

Carl Sargeant AM  
Minister for Natural Resources

20 May 2015

## **APPEALS**

### **Description**

#### **Non-determination appeals**

- 1.1 Appeals can be made against the refusal, the approval subject to conditions or the non-determination of a planning (or related) application. This section of the explanatory memorandum addresses changes to the system for making appeals against the non-determination of a planning or listed building consent application (herein referred to as “applications”, for the sake of brevity).
- 1.2 An efficient appeals system should ensure fairness, transparency and proportionality in decision-making. At present, where an appeal is submitted against the LPA’s failure to decide an application, the case goes through the full appeal procedure and LPAs are unable to issue a decision after an appeal against its failure to do so have been made, even where it wishes to grant permission.
- 1.3 Two statutory instruments make provision to enable a period of dual jurisdiction within which an LPA may still determine an appeal against the non-determination of an application and to remove the 6 month time limit within which such appeals must be made.

#### **Householder, Minor Commercial and Advertisement Consent Appeals**

- 1.4 Two statutory instruments; the Town and Country Planning (Development Management Procedure) (Wales) (Amendment) Order 2015 and the Town and Country Planning (Referrals and Appeals) (Written Representation Procedure) (Wales) Regulations 2015 make provision for the formalisation of an expedited appeal process for prescribed types of householder, minor commercial and advertisement consent appeals.
- 1.5 The Town and Country Planning (Referrals and Appeals) (Written Representations Procedure) (Wales) Regulations 2015 revoke and replace with some changes, the Town and Country Planning (Referrals and Appeals) (Written Representations Procedure Wales) 2003. In addition to the formalisation of an expedited appeal process for prescribed types of householder, minor commercial and advertisement consent appeals, these regulations also set out the procedure and time limits to be followed where prescribed applications (other than householder, minor commercial and advertisement consent appeals) are to be considered on the basis of written representations. They also reflect the insertion of S.319B into the Town and Country Planning Act 1990 and S88E into the Planning (Listed Buildings and Conservation Areas) Act 1990.

### **Matters of special interest to the Constitutional and Legislative Affairs Committee**

1.6 The “Appeals“ section of this explanatory memorandum covers three statutory instruments, all of which are subject to negative procedure. For clarity, these are identified below:

- The Town and Country Planning (Development Management Procedure) (Wales) (Amendment) Order 2015;
- The Planning (Listed Building and Conservation Areas) (Wales) (Amendment) Regulations 2015; and
- The Town and Country Planning (Referrals and Appeals) (Written Representation Procedure) (Wales) Regulations 2015.

1.7 As all of the above statutory instruments are interlinked, a composite explanatory memorandum has been prepared to describe these.

## **Legislative background**

### Non-determination Appeals

1.8 Section 50 of the Planning and Compulsory Purchase Act 2004 inserts Section 78A into the 1990 Act and Section 20A into the Planning (Listed Buildings and Conservation Areas) Act 1990. This is to be commenced by SI 2015/340 and will come into force on 22 June 2015. This enables a LPA to issue a decision within an additional period prescribed by a development order as set out in Sections 78A(6) and 20A(6), effectively setting out a period of dual jurisdiction where an appeal has been lodged following the failure of a LPA to determine the application within the determination period.

1.9 Under the aforementioned sections 78A and 50A, where a LPA refuses permission within the additional prescribed period, the appeal against non-determination becomes an appeal against refusal. If the local planning authority grants permission, the appellant may withdraw the appeal or proceed with it on revised grounds (for example, an appeal against conditions which may have been imposed).

1.10 The Welsh Ministers also have powers under Section 78(3) of the Town and Country Planning Act and Section 20(3) of the Planning (Listed Buildings and Conservation Areas) Act 1990 to prescribe by development order the time in which appeals must be made. This provision is made in Article 26(2) of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 and regulation 12 of the Planning (Listed Buildings and Conservation Areas) (Wales) Regulations 2012.

1.11 All of the aforementioned regulations and orders are subject to negative procedure.

### Householder Appeals, Minor Commercial and Advertisement Consent Appeals

*The Town and Country Planning (Referrals and Appeals) (Written Representation Procedure) (Wales) Regulations 2015*

- 1.12 The Town and Country Planning (Determination of Procedure) (Wales) Order 2014 inserted section 319B into the Town and Country Planning Act 1990 and section 88E into the Planning (Listed Buildings and Conservation Areas) Act 1990. Under section 319B of the Town and Country Planning Act 1990 and section 88E of the Planning (Listing Buildings and Conservation Areas) Act 1990 the Welsh Ministers must determine the procedure by which certain applications referred to the Welsh Ministers or appeals are to be determined.
- 1.13 Under section 323 of the Town and Country Planning Act 1990 the Welsh Ministers have the power to prescribe by regulations the procedure to be followed in connection with proceedings under that Act, which pursuant to a determination under S.319B, are to be considered on the basis of representations in writing.
- 1.14 Section 89(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 applies the regulation-making provisions contained in section 323 of the Town and Country Planning Act 1990 to the Planning (Listed Buildings and Conservation Areas) Act 1990.

*The Town and Country Planning (Development Management Procedure) (Wales) (Amendment) Order 2015*

- 1.15 The Development Management Procedure (Wales) (Order) 2012 provides for procedures connected with planning applications, consultations in relation to planning applications, the determination of planning applications, appeals, local development orders, certificates of lawful use or development, the maintenance of registers of planning applications and related matters.
- 1.16 Part 5 of the Order sets out the provisions relating to time limits for lodging appeals, the content of appeals and the documents required. The power to make provision relating to appeals in the Development Management Procedure Order stems from Section 78 and 79 of the Town and Country Planning Act 1990.

**Purpose and intended effect of the provisions**

Non-determination appeals

- 1.17 There is an associated difficulty with the current regulations that can result in an applicant losing the right of appeal where the LPA fails to issue a decision. Currently an appeal must be lodged from the end of the determination period prescribed by regulations for issuing a decision, unless an extension of this period has been agreed in writing with the authority concerned. Authorities operate different practices regarding such time extensions. Whilst some routinely write to the applicant asking for their agreement, others do not and at least one LPA considers it is for the applicant to approach them. There have consequently been instances where applicants have lost their right of appeal

where the LPA has failed to issue a decision, because no extension of time has been agreed in writing.

- 1.18 Most applicants are unaware that their right of appeal can be lost in this way and some appeals have been found to be out of time. The Inspectorate has overcome this problem by using its powers to extend the appeal period. However, it is inequitable and frustrating for applicants to lose their right of appeal in this manner. Whilst it is proper that there should be a limit on the period in which an appeal can be made following a decision, the right of appeal should not be lost due to the failure of the LPA to make its decision within a reasonable period. The Inspectorate has, on occasion, exercised reserve powers to extend the timeframe in which an appeal can be made on a case-by-case basis. This, however, has given rise to an inconsistent approach.
- 1.19 In response, the Planning and Compulsory Purchase Act 2004 (Commencement No 14 and Saving) Order 2015 was made on 23 February 2015, and the provisions come into force on 22 June 2015. This Order commences Section 50 of the Planning and Compulsory Purchase Act 2004 in Wales. Section 50 inserts:
- Section 78A into the Town and Country Planning Act 1990; and
  - Section 20A into the Planning (Listed Buildings and Conservation Areas) Act 1990.
- 1.20 The effect of these provisions is to enable a LPA, in the case of appeals against the non-determination of planning and listed building consent applications, to issue a decision within an additional prescribed period set out by development order. Section 78A(6) of the Town and Country Planning Act 1990 and Section 20A(6) of the Planning (Listed Buildings and Conservation Areas) Act 1990 gives power to prescribe that period of dual jurisdiction.
- 1.21 It is proposed that the prescribed period shall be 4 weeks in both instances, for reasons of consistency, and shall be prescribed as amendments to the:
- Town and Country Planning (Development Management Procedure) (Wales) Order 2012; and
  - Planning (Listed Buildings and Conservation Areas) (Wales) Regulations 2012.
- 1.22 It is also intended to make changes to:
- Articles 26(2)(b), 29(15) and Schedule 1 of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012; and
  - Regulation 12 of the Planning (Listed Buildings and Conservation Areas) (Wales) Regulations 2012.
- 1.23 The effect of these amendments are to remove any limit on the end of the period within which an applicant may request a decision by Welsh Ministers or an appointed person where no decision has been made by the LPA. A consequential amendment will also be required to remove reference to the

period of 6 months in relation to the disposal of an application from the register for applications for planning permission.

- 1.24 The above proposals are to ensure that the process for non-determination appeals will provide:
- A more responsive planning system which gives a prospect for applications to be determined in a timely manner where an appeal against non-determination has been made;
  - An unrestrained and open-ended right of appeal against the non-determination of an application following the statutory determination period;
  - Opportunity for local decisions to be made at the local level where an appeal against non-determination has been submitted; and

#### Householder, Minor Commercial and Advertisement Consent Appeals

- 1.25 The procedure for appeals (written representations, hearing or public inquiry) is chosen based on the complexity of the appeal case. Public inquiries and hearings are far more resource-intensive to all parties to an appeal than written representations.
- 1.26 Householder, minor commercial and advertisement consent appeals generally relate to minor works. Such appeals are generally not complex enough to require an appellant being heard through an oral examination method. Most such appeals proceed via written representations as they represent the least complex cases and rarely raise wider questions of policy. However, those involved in such appeals follow the same procedures and timescales as larger and potentially more controversial schemes. This is considered disproportionate in its impact on appellants.
- 1.27 In Wales, householder and minor commercial appeals (within defined parameters) are currently being considered under a pilot scheme (established in 2010), which all 25 Local Planning Authorities (LPAs) participate in. If the appellant and LPA agree, the appeal is determined on the basis of the appellant's grounds of appeal and the LPA's electronic file, with the aim of issuing a decision in 12 weeks as opposed to the normal 16 weeks target for a written appeal in Wales. However, there is no statutory requirement to do so at present.
- 1.28 Advertisement consent appeals are not currently part of the pilot being carried out in Wales, and they continue to be determined following the provisions of Sections 78-79 of the 1990 Act (as modified by the Town and Country Planning (Control of Advertisements) Regulations 1992).
- 1.29 The effect will be that regulations will introduce an expedited procedure for certain specified classes of appeal in Part 1 and restate existing procedures for other prescribed applications proceeding by written representations in Part 2.

- 1.30 Secondly, it is also proposed to make changes to Parts I and V of the Development Management Procedure (Wales) Order 2012 by way of the Development Management Procedure (Wales) (Amendment) Order 2015.
- 1.31 The effect of these provisions is the addition of definitions of ‘householder application/appeal’ and ‘minor commercial application/appeal’ in Parts I and V of the Order, the prevention of further representations at the appeal stage for appeals classed as householder or minor commercial appeals at Part II of the Order, a change to the time limit within which such appeals can be made from 6 months to 12 weeks and the reduction in the amount of documents which must be submitted with such classes of appeal at Part V of the Order.

## **Consultation**

### Non-determination Appeals

#### *Positive planning (2013)*

- 1.32 Our proposals for appeals against the non-determination of applications were initially consulted upon in the Positive Planning consultation paper<sup>1</sup>. In that consultation paper it was proposed to amend secondary legislation to:
- (a) Allow non-determination appeals to be submitted any time following the ending of the statutory period for determination up to the point of determination of the application, thus removing the current 6 month maximum time limit; and
  - (b) Enable LPAs to determine an application which is subject to a non-determination appeal within a prescribed timescale set out in legislation following the submission of an appeal.
- 1.33 Whilst no specific questions were asked regarding these proposals, they received an overall positive response, particularly from the business sector. The proposals were considered to be beneficial in cases where LPAs would decide to consent an appeal within that prescribed timescale as it negates the need for the appeal process to continue, removing rigidity from the non-determination appeal process.

#### *Planning and related decisions of the Welsh Ministers (2014)*

- 1.34 Following this, further consultation was undertaken as part of the Planning and Related Decisions of the Welsh Ministers consultation paper<sup>2</sup>. This consultation asked respondents whether they agreed with the 4 week timescale proposed for the dual-jurisdiction of non-determination appeals. It also asked whether respondents had any other comments to make in relation to the proposals for non-determination appeals.

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<sup>1</sup> “Positive Planning: Reforms to the planning system in Wales” Welsh Government, December 2013, p.38.

<sup>2</sup> “Planning and related decisions of the Welsh Ministers” Welsh Government, November 2014, p.7.

- 1.35 There is an overall consensus in support of the period for dual jurisdiction, with 57% either agreeing with the 4 week proposal, or agreeing subject to further comment. Of those who supported the proposal, the majority were from businesses / planning consultants. Of the 29% who disagreed with the proposal, 38% were local planning authorities with the remainder being made up of business / planning consultants, professional bodies, interest groups and others. 14% had no opinion.
- 1.36 Following the outcome of consultation, it is still considered that a 4 week period strikes the correct balance as local planning authorities must also share the responsibility for speeding up decision-making. Where applications merit presentation to committee, LPAs may achieve speedier decisions through the arrangement of special committees. It is also noted that the majority of decisions by LPAs are delegated to officers. A number of respondents stated that 4 weeks would strike an appropriate balance in enabling constructive dialogue between developers and LPAs, and would provide a consistent approach for all appeal types.
- 1.37 Some representations were received against the proposal, with LPAs and professional interest groups raising the majority of those concerns. Reasons cited for not supporting the proposal for 4 weeks included:
- Insufficient time being left between committee cycles for meaningful discussion;
  - Decreasing staff resources in LPAs;
  - Difficulties surrounding section 106 agreements; and
  - A likely increase in unnecessary appeals.
- 1.38 Alternative time periods were suggested ranging from 6 weeks to 8 weeks.
- 1.39 There was general support in response to the proposals to remove the maximum time limit in which a non-determination appeal can be made. Comments received stated that the approach would address situations where the right to appeal against non-determination has been unknowingly lost, and cited an inconsistent approach between LPAs in agreeing time extensions.

### Householder Appeals and Commercial Appeals

#### *Improving the Planning Appeals Process (2011)*

- 1.40 The proposed changes to secondary legislation have been consulted on during three separate occasions. The principle of the Welsh Ministers legislating for an expedited process for householder appeals was consulted upon in the 'Improving the Planning Appeals Process' consultation paper. 39 responses were received to the consultation with 22 clear supportive responses received. While a generally favourable response was received to this consultation, more robust evidence has been obtained as a result of the pilot scheme. Feedback of the process is published by the Planning Inspectorate annually in their Annual Monitoring Report. This suggests that the percentage of cases determined within 8 weeks is consistently over 90%.

Regular appeals are determined in on average 14 weeks over the 3 year period monitored.

*Positive Planning (2013)*

- 1.41 The introduction of the expedited commercial appeal service was consulted on as part of the Positive Planning consultation paper in 2012. The consultation specifically asked whether a Commercial Appeals Service should be introduced. 267 responses were received. Of these 96 were supportive of the proposal and 15 were against. 156 did not directly answer the question. The comments received recognised that the introduced expedited householder pilot scheme had been a positive move towards speeding up the appeals process.

*Planning and Related Decisions of the Welsh Ministers (2014)*

- 1.42 The Planning and Related Decisions consultation paper asked a specific question on the inclusion of advertisement appeals within the expedited appeal system. Of the 29 responses received, 21 supported the inclusion of advertisement appeals within the expedited system. 8 respondents did not directly answer the question. No responses were received against the proposal.