

Number: **WG16763**



Llywodraeth Cymru
Welsh Government

www.cymru.gov.uk

Welsh Government

Consultation Document

Non-Material Amendments to Planning Permissions

Date of issue: **10 December 2012**

Responses by: **15 March 2013**

Overview

This consultation document seeks your views on the Welsh Government's proposals to introduce a statutory process for making non-material amendments to an existing planning permission.

The consultation, which forms part of the Welsh Government's planning application improvement programme, responds to the recommendations of:

- the 'Study to Examine the Planning Application Process in Wales' (June 2010), produced by GVA Grimley; and,
- the report 'Towards a Welsh Planning Act: Ensuring the Planning System Delivers' (June 2012), produced by an Independent Advisory Group.

How to respond

The consultation paper includes a set of specific questions to which the Welsh Government would welcome your views.

The closing date for replies is 15 March 2013.

You can reply in any of the following ways:

E-mail:

Please complete the consultation response form (at Annex 3) and send it to:
planconsultations-b@wales.gsi.gov.uk

(Please include 'Non-material Amendments to Planning Permission - WG16763' in the subject line.)

Post:

Please complete the consultation response form (at Annex 3) and send it to the address provided under the 'Contact Details' section.

Further information and related documents

Large print, Braille and alternate language versions of this document are available on request.

The proposals detailed in this paper are informed by a number of documents, which are listed in Section 2, paragraph 2.11 of this paper. Readers may want to refer to these documents for further information.

The consultation paper is also accompanied by a draft partial Regulatory Impact Assessment at Annex 2, and a draft guide at Annex 1, which should be read in conjunction with this paper.

Contact details

All responses should be sent by 15 March 2013 to:

Non-material Amendments to Planning Permissions Consultation
Development Management Branch
Planning Division
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

Or by e-mail to: planconsultations-b@wales.gsi.gov.uk

(Please include 'Non-material Amendments to Planning Permission' - WG16763' in the subject line.)

If you have any queries regarding this consultation please use the e-mail address above, or phone Nick Butler on 029 2082 3585 or Hywel Butts on 029 2082 1619.

Data protection

How the views and information you give us will be used

Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.

The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. This helps to show that the consultation was carried out properly. If you do not want your name or address published, please tell us this in writing when you send your response. We will then blank them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have

withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

Content

	Page
Section 1 – Introduction	2
Section 2 – Background: The Evidence for Change	3
Section 3 – Details of Proposals	6
Section 4 – Draft Guide	14

Annex 1 – Draft Guide – Approving Non-material Amendments to an Existing Planning Permission

Annex 2 – Draft Partial Regulatory Impact Assessment

Annex 3 – Consultation Response Form

Annex 4 – List of Bodies / Organisations Informed of the Consultation

Section 1 – Introduction

- 1.1 This consultation paper forms part of the Welsh Government's programme of measures to improve the planning application process.
- 1.2 It responds in particular to recommendation 11 of the 'Study to Examine the Planning Application Process in Wales' (June 2010), and recommendation 74 of the report 'Towards a Welsh Planning Act: Ensuring the Planning System Delivers' (June 2012). Both recommendations identify the need to simplify the process of amending planning permissions by introducing a procedure by which non-material amendments can be made to an existing planning permission.

Non-material Amendment to Planning Permissions

- 1.3 This consultation seeks views on the Welsh Government's proposals to introduce a statutory procedure to approve such amendments, which are detailed within this paper and draft guide at Annex 1.
- 1.4 The outcome of the procedure will establish if amendments can be made to an existing planning permission, based upon whether or not they will have a material effect on the overall context of the development scheme or its surroundings.

Minor Material Amendment to Planning Permissions

- 1.5 To simplifying the process of amending planning permissions, both research reports also identify the need to address minor material amendments to an existing planning permission.
- 1.6 Currently, the existing procedure under Section 73 of the Town and Country Planning Act 1990 (TCPA 1990) (applications to vary / remove planning conditions) provides a mechanism for making minor material amendments to existing permissions. Applicants can achieve this by varying a relevant condition of an extant planning permission.
- 1.7 This approach is however dependent on the existence of a relevant condition that can be modified on the original planning permission. Therefore, the Welsh Government, taking into consideration the recommendations of the report 'Towards a Welsh Planning Act: Ensuring the Planning System Delivers', is proposing to include in the forthcoming Planning Reform Bill a specific power for making and ratifying minor-material amendments. Detailed proposals will form part of the white paper and draft Planning Reform Bill to be issued for public consultation by the end of 2013, and are therefore not dealt with in this consultation paper.

Section 2 – Background: The Evidence for Change

Current Position

2.1 The Town and Country Planning Act 1990 (in so far as it applies to Wales) does not provide a specific provision for amendments to be made by an individual planning authority to any planning permission granted by them. With no statutory process for ratifying non-material amendments to an existing planning permission, the approach taken by local planning authorities (LPAs) in dealing with such changes varies across Wales.

2.2 This is particularly evidenced through the ‘Study to Examine the Planning Application Process in Wales’. In its analysis of responses received to a questionnaire sent to all LPAs, it identified that 24% of LPAs have protocols in place for dealing with non-material or minor material amendments to planning permissions. Paragraph 7.7 of the Study states,

“currently there is no standard procedures for this – with some authorities operating a flexible system and others finding it difficult to see any changes as minor or non-material (or employing a very rigid philosophy to this area)”.

2.3 Increased uncertainty of both LPAs and developers about the level of flexibility that exists to make minor amendments to existing planning permissions, resulted from the case *Sage v Secretary of State* (2003). This case gave rise to the view that developments must be built entirely in accordance with the approved plans and that any deviation from those plans renders the development unauthorised. This has led to more LPAs refusing to deal with non-material amendments to planning permissions and requiring applicants:

- to submit a further full planning application to make relatively small changes to their approved development; or,
- to apply for a Certificate of Lawfulness to test whether the changes are *de minimis*.

2.4 As a result, an inconsistent approach by LPAs to approving non-material amendments currently exists. Some LPAs are prepared to approve non-material amendments in an informal manner, whilst others refuse to do so and require the submission of a further full planning application.

2.5 The recent reviews of the planning system in Wales confirm that this results in uncertainty, delay and additional cost for the applicant, additional work for some LPAs and often unnecessary further consultation with stakeholders.

Rational for the Proposed Changes

- 2.6 To address the issues detailed above, the Welsh Government proposes to introduce a statutory procedure that will provide greater flexibility, allowing LPAs and applicants to make non-material amendments to an existing planning permission.
- 2.7 The Government considers it necessary to introduce the procedure detailed in this paper in order to:
- Provide a legal basis for making non-material amendments to planning permissions, thus providing greater certainty to both LPAs and applicants on the ability to make such amendments.
 - Provide a more responsive planning system that gives greater flexibility to applicants to take account of changes as the design and development process unfolds. This will allow applicants, such as businesses, to respond and adapt more effectively, quickly and cost effectively where the need to make a non-material amendment to an existing permission becomes apparent.
 - Provide greater certainty and transparency about the process and procedure by which non-material amendments can be made to permissions, thus reducing the risk of legal challenge to the approach taken by the LPA.
 - Allow a more proportionate approach to approving non-material amendments in cases where an entirely new application is not justified. This will reduce unnecessary delay, uncertainty and expense for applicants, as well as unnecessary time and expense for LPAs.
 - Provide a more consistent approach between LPAs to determine these amendments.
- 2.8 The draft partial Regulatory Impact Assessment at Annex 2 considers and assesses in greater detail the likely impacts of the proposed procedure detailed in this paper.

Approach Taken to the Proposed Changes

- 2.9 To form the statutory basis of a procedure for approving non-material amendments to an existing planning permission, the recent research reports into the planning system in Wales recommend the need to apply the provisions in Section 96A of the Town and Country Planning Act (TCPA) 1990 to Wales, (as it currently only applies to England). This section of the Act provides a simple procedure to consider such amendments and sets out some of the operational matters associated with it.
- 2.10 The Welsh Government is therefore minded to apply the provisions of Section 96A of the TCPA 1990 to Wales in order to introduce a statutory procedure for approving such amendments. The proposed application procedure, detailed in Section 3 of this paper and the draft guide at

Annex 1, builds upon the approach introduced in England and takes account of the changes / improvements identified by the 'Study to Examine the Planning Application Process in Wales' to that approach.

2.11 Other documents taken into account include:

- Greater Flexibility for Planning Permissions: Consultation, DCLG, June 2009.
- Greater Flexibility for Planning Permissions: Impact Assessment, DCLG, September 2009. [Web-link: <http://www.legislation.gov.uk/ukia/2009/222>]
- Greater Flexibility for Planning Permissions: Summary of Consultation Responses, DCLG, January 2010.
- Greater Flexibility for Planning Permissions: Guidance, DCLG, October 2010. [Web-link: <https://www.gov.uk/government/publications/greater-flexibility-for-planning-permissions-guidance>]

Section 3 – Details of Proposals

- 3.1 Details of the proposed procedure to approve non-material amendments to an existing planning permission are set out below and in the draft guide at Annex 1.

What is a non-material amendment?

- 3.2 In its recommendation for introducing a mechanism for making non-material amendments under Section 96A of the TCPA 1990, the ‘Study to Examine the Planning Application Process in Wales’ advocates the need for national guidance to establish what would or would not qualify as a non-material amendment.
- 3.3 The Welsh Government does not propose to provide a statutory definition or guidance that gives a definitive position as to whether or not a proposed change is non-material, given that the circumstance and context of each proposal will vary considerably from one application to another. The possible amendment(s) sought to the original planning permission, the specific circumstances of the site and its surroundings, as well as the overall context of the development scheme are some of the key determining factors, which will vary from one application to another. This position is supported in paragraph 5.17(i) of the report ‘Towards a Welsh Planning Act: Ensuring the Planning System Delivers’, which states,

“.....materiality is dependent on the context of the overall scheme - what may be non-material in one context may be material in another”.

For example, moving a window in a proposed building could be a material amendment if it results in the overlooking of a neighbouring property, but would be non-material if it does not.

- 3.4 Local judgement will be important when considering the context and more importantly the result of the proposed change. The responsibility for determining whether a proposed amendment will lie with the local planning authority (LPA). This is supported by case law, in particular by the *Lever Finance Ltd v Westminster City Council* (1970) judgement, which affirms the practice that planning officers are best placed to decide whether a variation from an approved plan is material or not.
- 3.5 While not providing detailed guidance, the Welsh Government proposes to issue tests that LPAs may wish consider in assessing and determining whether or not a proposed change would qualify as a non-material amendment. The following tests, some of which derive from case law, are suggested:
- Is the proposed change significant in terms of its scale in relation to the original approved development scheme?

- Would the proposed change result in a detrimental impact either visually or in terms of amenity?
- Would the interests of any third party or body who participated in or were informed of the original decision be disadvantaged in any way?
- Would the proposed change conflict with national or development plan policies?

3.6 Pre-application discussions will be important to establish whether or not the proposed amendments are non-material in nature and can be determined as an application under Section 96A of the TCPA 1990. This will avoid any possible abortive work by both the local planning authority and applicant. General advice on pre-application discussions is provided in the Welsh Government's 'Practice Guidance: Realising the potential of pre-application discussions'¹.

Q1. Do you agree with the identified tests to assist in assessing whether or not a proposed change would qualify as a non-material amendment to be determined under Section 96A of the TCPA 1990? If not, please specify the reasons and provide suggested alternatives.

The Proposed Procedure

3.7 The key aspects of the procedure to be introduced for approving non-material amendments to an existing planning permission is detailed below:

Making an Application

Who can make an application?

- 3.8 As specified by Section 96A of the TCPA 1990, an application can only be made by a person who owns or has a legal interest in the land to which the non-material amendment relates, or someone else acting on their behalf. For example, should a parcel of land covered by the original planning permission be subdivided and sold, it is only the current interest / owner that can seek amendments to the original planning permission and only in relation to the extent of their interest / ownership in the land.
- 3.9 The changes approved by the LPA will apply to the land and therefore any subsequent owners / occupiers will benefit from them.

¹ 'Practice Guidance: Realising the potential of pre-application discussions', Welsh Government (May 2012) - <http://wales.gov.uk/topics/planning/policy/guidanceandleaflets/preappguide/?lang=en>

Will there be a specific application form for use by applicants?

3.10 Recommendation 11 of the 'Study on Examine the Planning Application Process in Wales' suggests that the process for making such amendments should not include a requirement for applicants to submit a formal application or request.

3.11 The Welsh Government considers that such an application should be made in writing on a dedicated standard application form to the LPA. This will:

- introduce a consistent approach across LPAs to enable applicants to apply to make such amendments;
- provide a consistent approach to enable applicants to be clear about the extent of the information required; and,
- provide sufficient information at the start of the determination process to enable LPAs to make a decision within the determination period.

This is consistent with the approach taken in the introduction of the standard applications forms (1APP) for planning permissions and other associated consent regimes.

What information will the standard application form request?

3.12 Some of the key areas of information to be sought by the standard application form will include:

- Standard information associated with the applicant / agent and the site.
- Details of any pre-application advice.
- Confirmation that the applicant holds an interest in the land and has met the notification requirements.
- Declaration whether the applicant/agent is a council employee or elected member or is related to a member of staff or elected member of the Council.
- Information associated with the original planning permission.
- Details associated with the non-material amendment(s) sought, which may include any amended plans or drawing to accompany the application.
- The standard declaration associated with the completion of the form.

What must accompany a Section 96A application?

3.13 The completed application form must be accompanied by a fee (refer to paragraph 3.15) and if necessary any supporting information detailing the proposed amendment(s), which may include amended drawings / plans.

3.14 As this is not an application for planning permission, the existing provision relating to Design and Access Statements in the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (DMPWO) will not apply. It is considered unnecessary for a Design and Access Statement to accompany such an application given that the changes will be non-material in nature, and the requirement will have already been applied (if relevant) to the original planning application.

Q2. Do you agree with the proposed information requirements to support an application for making non-material amendments? If not, please specify the reasons and what information requirements that you considered are necessary.

Will there be a fee for making an application?

3.15 A standard fee is proposed:

- £25 for householder applications; and,
- £166 for other applications (this in line with the existing fee for Section 73 applications).

3.16 More than one non-material amendment can be applied for on the same form and for a single fee payment, provided they all concern the same extant planning permission.

Q3(a). Should a fee accompany an application for making non-material amendments to an existing planning permission? If not, please specify the reasons.

Q3(b). If the answer to question 3(a) is yes, do you agree with the proposed fee level? If not, please specify the reasons and the fee level considered to be appropriate for such an application.

Will applications have to be recorded on the planning register maintained by the local planning authority?

3.17 Local planning authorities will be required to record details of applications for non-material amendments on the planning register.

Determining the Application

Will a local planning authority have to undertake consultation / publicity on individual applications?

3.18 As an application for non-material amendments made under Section 96A will not be an application for planning permission, the existing DMPWO provisions relating to statutory consultation and publicity will not apply.

3.19 The Welsh Government does not propose to set out detailed requirements in the DMPWO for these matters, given that the

requirements for consultation and publicity will have already been applied and undertaken to the original planning application. LPAs will therefore have discretion in whether and how they choose to inform other interested parties or seek their views.

3.20 Given that the changes sought will be non-material in nature it is not expected that consultation or publicity will be necessary. This position is supported in paragraph 5.17(i) of the report 'Towards a Welsh Planning Act: Ensuring the Planning System Delivers', which states,

".....the non-materiality test will mean that it should not raise issues which would necessitate consultation or neighbour notification".

3.21 If the LPA consider it necessary to seek the views of an interested party, anyone notified must be told that they have 14 days to make representations from the date of notification.

Q4. Do you agree with the approach taken to consultation / publicity for non-material amendment applications? If not, please specify the reasons.

What notification will need to be given by applicants?

3.22 As this is not an application for planning permission, the existing DMPWO provisions relating to notification will not apply. However, before an application is made, the Welsh Government propose a requirement for the applicant to notify any other owners of the land, who would be affected by the non-material amendment; or where any part of the land comprises an agricultural holding, the tenant of that holding. Details of those persons consulted will need to be included on the standard application form.

3.23 Anyone notified by the applicant will have to be told where the application can be viewed, and that they have 14 days to make representations to the LPA.

Q5. Do you agree with the approach taken in relation to notification for non-material amendment applications? If not, please specify the reasons.

Proposed time period for the determination of the application?

3.24 Based on the expectation that there will be no need for consultation or publicity in relation to such applications, it is proposed that a decision should be made within 28 days of receipt of the application, or a longer period if agreed in writing between the applicant and the local planning authority.

3.25 Given that the changes sought through this application procedure should be non-material in nature, they are unlikely to raise any significant issues

that would merit such applications to be referred to Planning Committee for determination. In order to ensure timely decisions, the Welsh Government will expect local planning authorities to have appropriate delegated powers in place.

3.26 The Welsh Government is also seeking views as to whether it is necessary to introduce a remedy where LPAs do not determine the application within the proposed 28 days (see question 6b).

Q6(a) Should a decision on an application for non-material amendments be made within 28 days of its receipt? If not, please specify the reasons and the determination period considered to be appropriate for such an application.

Q6(b) Is it necessary to introduce a remedy in the circumstance that a local planning authority does not determine an application within the proposed 28 days? If the answer is yes, please specify what remedy is considered appropriate.

What does the local planning authority have to take into account when making their decision?

3.27 As specified by Section 96A of the TCPA 1990, the LPA must have regard to the effect of the change together with any previous changes made to the original planning permission.

3.28 In addition, the Welsh Government also propose a requirement for the LPA to take into account any representations made by anyone notified by the applicant or by the LPA, provided that they are received within 14 days of notification (see paragraphs 3.18 to 3.23).

3.29 These applications should also be determined in accordance with Section 38(6) of the Planning Compulsory Purchase Act 2004 – in accordance with the local development plan unless material considerations indicate otherwise. LPAs should, in making their decisions, focus their attention on national or local policies or other material considerations which may have changed significantly since the original grant of permission.

3.30 The decision reached by the LPA will ultimately establish whether or not the proposed changes have a material effect. In refusing such an application, the LPA will deem that the amendments will have a material effect. Their decision however will not prejudice subsequent applications that may be made under other existing application routes, such as an application made under Section 73 of the TCPA 1990 for determining minor material amendments.

Issuing a Decision

What is the proposed procedure?

- 3.31 The decision is to be issued in writing and should only relate to the non-material amendment(s) sought. LPAs will be required to record the details of the decision on the planning register that they maintain.
- 3.32 LPAs will also be required to record data relating to the determination of these applications as part of their existing data collection on the development management system.

Appeals

Is there a right of appeal?

- 3.33 There will be no right of appeal to Welsh Ministers. In refusing such an application, the LPA will deem that the proposed changes will have a material effect.
- 3.34 However, applicants will have the ability to submit an application made under Section 73 of the TCPA 1990 for determining minor material amendments (see paragraphs 1.5 to 1.7). This mechanism has a right of appeal to the Welsh Ministers, but the ability to use this mechanism is dependent on the existence of a relevant condition that can be modified on the original planning permission.

Implementation

- 3.35 The procedure detailed above for approving non-material amendments to an existing planning permission, will be introduced by:
- i. Applying Section 96A of the TCPA1990 to Wales by means of an order made by Welsh Ministers using the relevant powers and provisions within the Planning Act 2008, (Section 203 'Power to make provision in relation to Wales' and Section 190 ' Power to make non-material changes to planning permission'). This will form the basis of the procedure for making such amendments and will also prescribe some of the operational matters associated with it.
 - ii. Introducing changes to subordinate legislation via an amendment order, in particular to the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 and the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1989, as amended for Wales. These changes will prescribe some of the application procedure, which in summary will include introducing:
 - requirements for the application to be made in writing to the LPA on a standard form;
 - a fee for determining the application;
 - notification requirements;

- requirements for the LPA when determining the application;
and,
- the determination period.

Section 4 – Draft Guide

- 4.1 A draft guide has been prepared (at Annex 1) to provide practical guidance on the use of the proposed procedure detailed in the consultation paper.
- 4.2 It sets out the key features and statutory requirements for the procedure, provides a practical guide to its use, and explains how it differs from existing procedures.

Q7. Are there any other issues that the draft guide at Annex 1 should cover in explaining the proposed procedure for approving non-material amendments? If so please specify what.

General Questions

Q8. Do you have any comments to make about the draft partial Regulatory Impact Assessment at Annex 2?

Q9. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them: (*on the consultation response form at Annex 3*).