

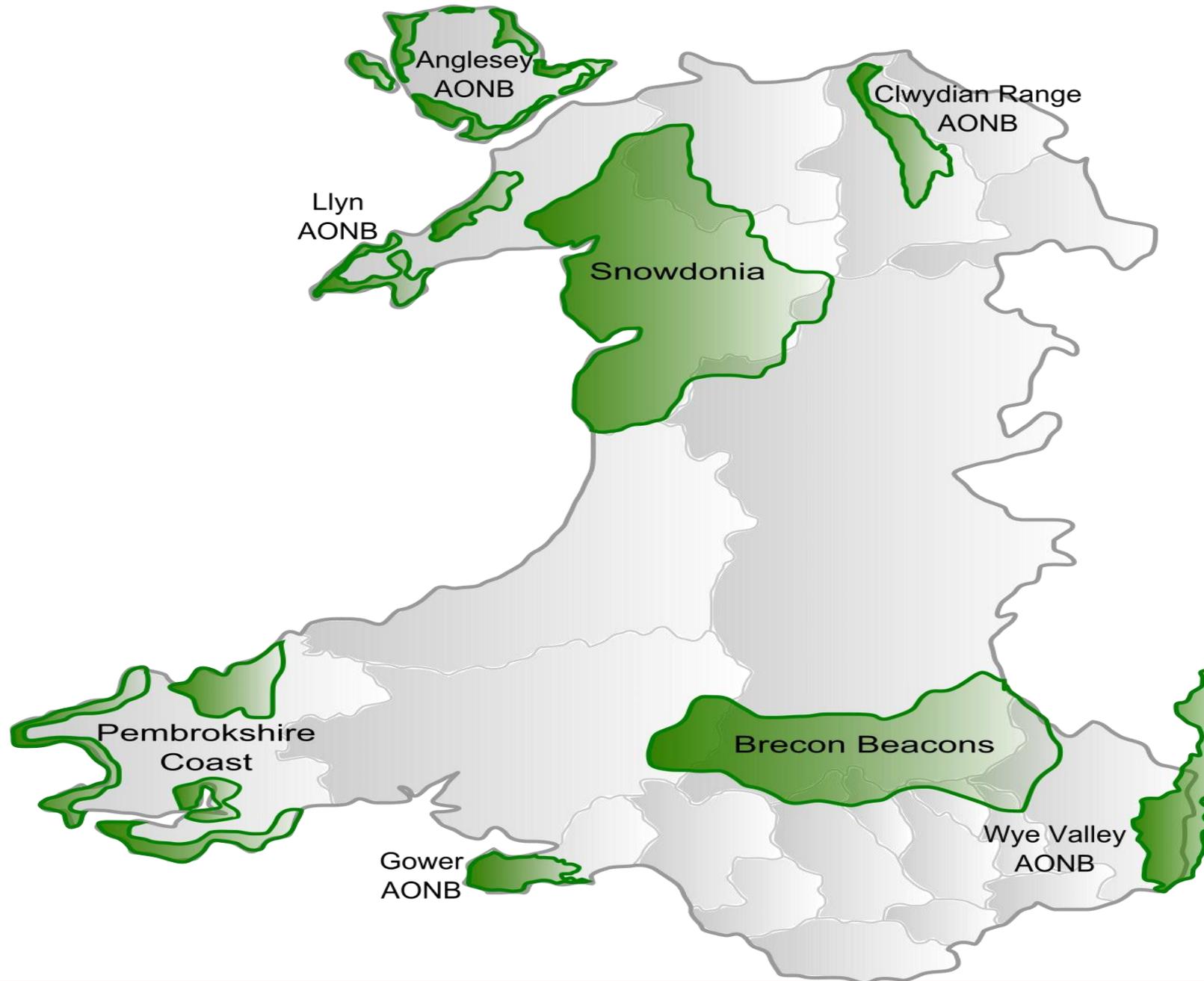
Delivering infrastructure in or close to National Parks and AONBs



James Maurici QC

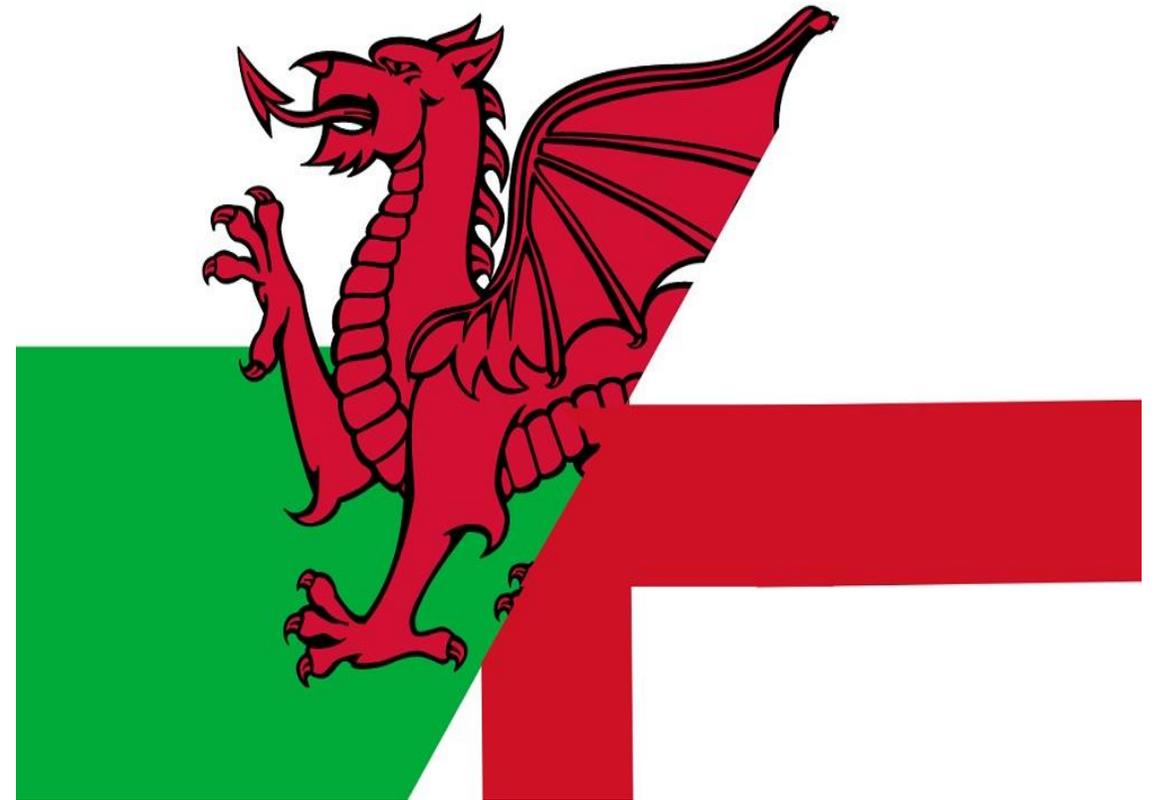
Delivering infrastructure in or close to National Parks and AONBs

- **Why am I discussing this topic?**
- 3 reasons
 - **Reason (1)**: a common issue:
 - Together, the three Welsh National Parks – Snowdonia, Pembrokeshire Coast and Brecon Beacons make up 20% of Wales: see <https://www.visitwales.com/things-do/nature-landscapes/national-parks>;
 - There are in addition the 5 AONBs: (1) Anglesey, (2) Gower, (3) Wye Valley, (4) Llŷn Peninsula and (5) the Clwydian Range and De Valley...
 - “... a quarter of the land area of Wales is designated as either a National Park or Area of National Outstanding Beauty (AONB)”: Para 6.32 of Planning Policy Wales (“PPW”).



Introduction (2)

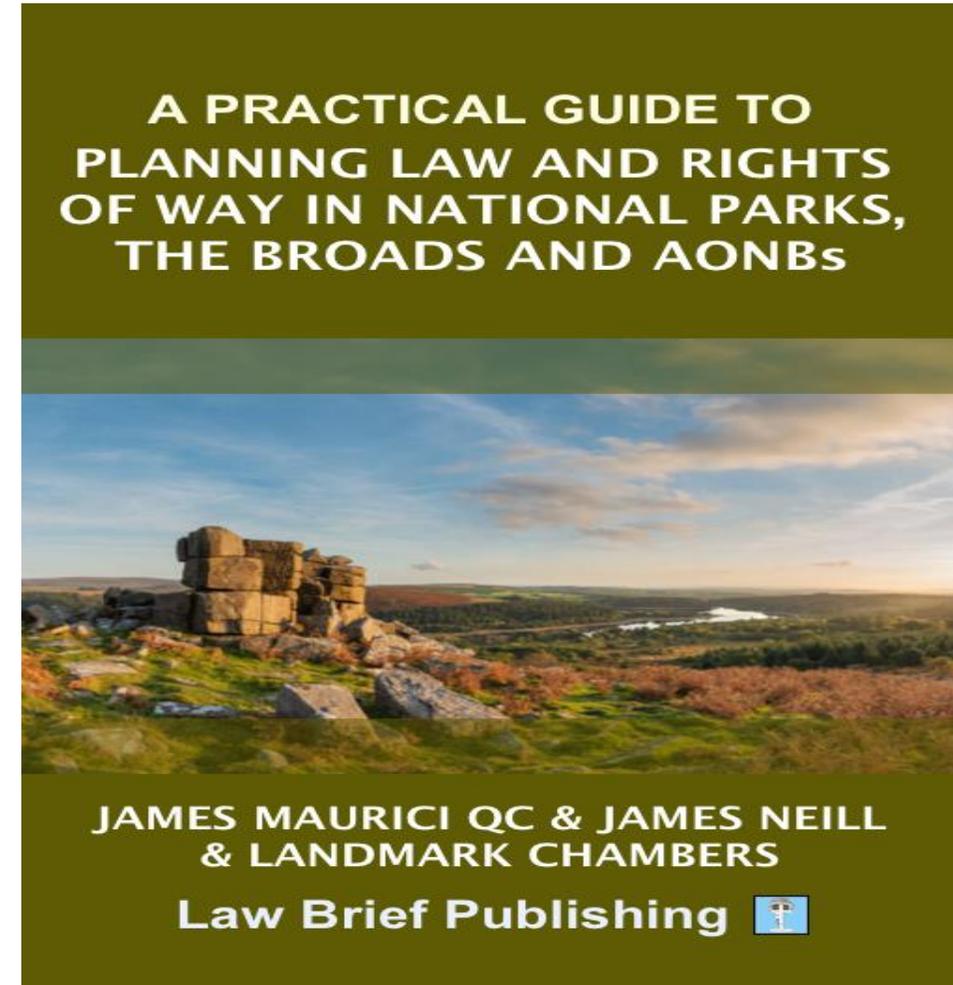
- **Reason (2):**
 - Lots of legal issues on meaning of the relevant policies;
 - The wording in the PPW on the protection of National Parks and AONBs has differences to the national policies in place in England;
 - Important to understand and appreciate these differences;
 - In England a number of Higher Court authorities on these policies, some of the reasoning in those cases applies in Wales and some does not.



Introduction (3)

Delivering infrastructure in or close to National Parks and AONBs

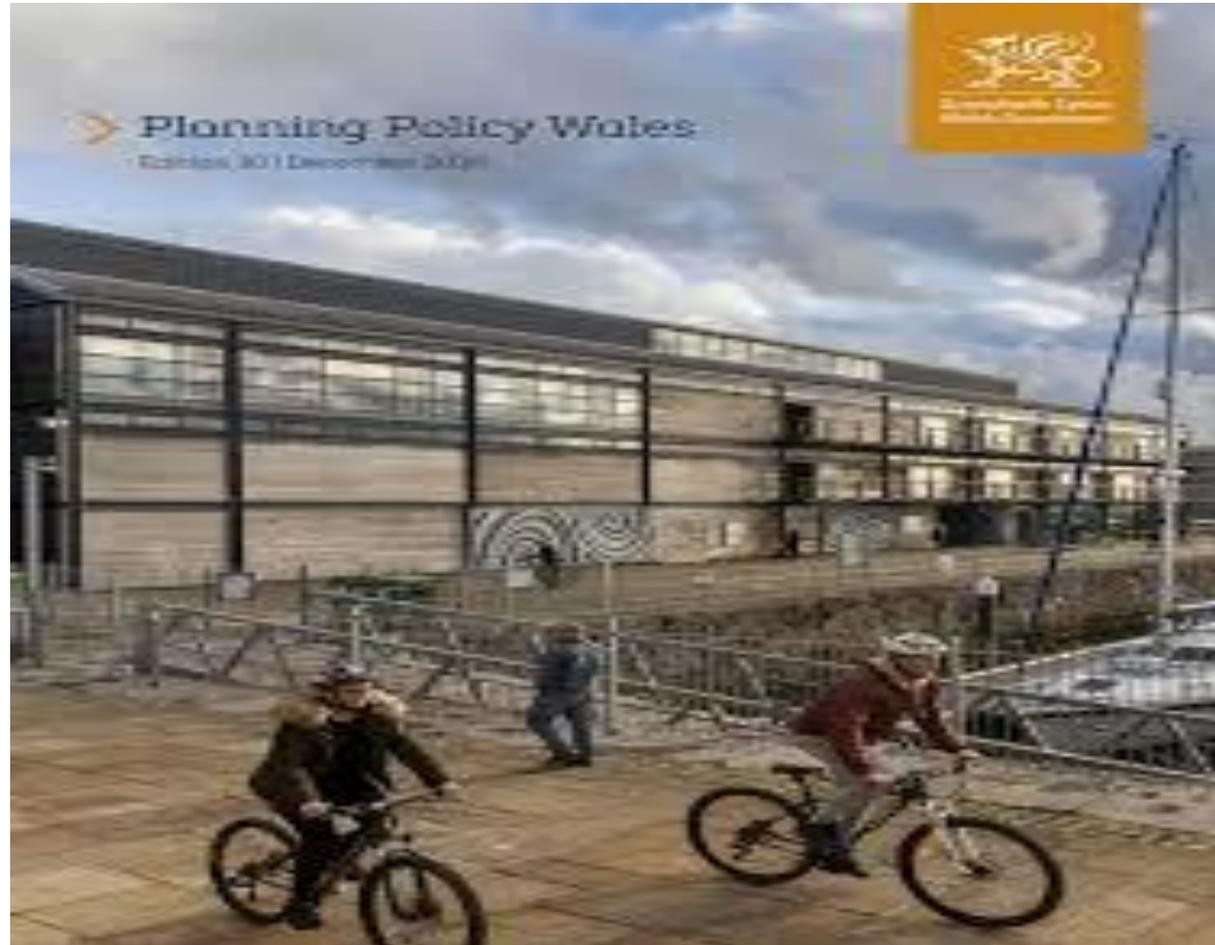
- **Reason (3)**: Publishing with others in Chambers next month a book: ***A Practical Guide to Planning Law and Rights of Way in National Parks, the Broads and AONBs***
<http://www.lawbriefpublishing.com/product/planninglawinnationalparks/> - the book covers Wales.



Introduction (4)

- If delivering infrastructure in Wales – 4 potential scenarios in relation impact on National Parks and/or AONBs:
 - (1) The proposed infrastructure is “*in*” a National Park/AONB and is “*major development*”
 - (2) The proposed infrastructure is in a National Park/AONB but is not “*major development*”;
 - (3) The proposed infrastructure is outside a National Park/AONB but it will be visible from inside one of those areas;
 - (4) The proposed infrastructure is outside a National Park/AONB but there are views of the National Park/AONB from outside those areas that would be affected.

PPW (1)



PPW (2) - general

“6.3.2 The landscapes of Wales are rich and varied. Many Welsh landscapes are iconic, and a quarter of the land area of Wales is designated as either a National Park or Area of National Outstanding Beauty (AONB). The character and special qualities of all our places and landscapes, both urban and rural, can provide a strong sense of place, inspiration and belonging, and contribute to the distinctive cultural identity of Wales”.



PPW (3) – the “great weight” policies

Apply to development in and out of National Parks/AONBs:

“6.3.6 In National Parks, planning authorities should give great weight to the statutory purposes of National Parks, which are to conserve and enhance their natural beauty, wildlife and cultural heritage, and to promote opportunities for public understanding and enjoyment of their special qualities. Planning authorities should also seek to foster the social, economic and cultural well-being of their local communities.”

6.3.7 In AONBs, planning authorities should give great weight to conserving and enhancing the natural beauty of AONBs ...

6.3.8 National Parks and AONBs are of equal status in terms of landscape and scenic beauty, and must both be afforded the highest status of protection from inappropriate developments.”

The PPW (4) – major development

“6.3.10 In National Parks or AONBs, special considerations apply to major development proposals which are more national than local in character. Major developments should not take place in National Parks or AONBs except in exceptional circumstances. This may arise where after rigorous examination, there is demonstrated to be an overriding public need, refusal would be severely detrimental to the local economy and there is no potential for locating the development elsewhere or meeting the need in some other way. Any construction and restoration must be carried out to high environmental standards. Consideration of applications for major developments should therefore include an assessment of:

- the need for the development, in terms of national considerations and the impact of permitting it or refusing it upon the local economy;*
- the cost of and scope for providing the development outside the designated area or meeting the need for it in some other way; and*
- any detrimental effect on the environment and the landscape, and the extent to which that could be moderated and/or mitigated.”*

PPW (5)

Other relevant provisions

- **GENERAL:** “6.3.9 The special qualities of designated areas should be given weight in the development planning and the development management process. Proposals in National Parks and AONBs must be carefully assessed to ensure that their effects on those features which the designation is intended to protect are acceptable. The contribution that development makes to the sustainable management of the designated area must be considered.”
- **MINERALS:**
 - “*Minerals development should not take place in National Parks and AONB except in very exceptional circumstances*” (see para 5.14.35).
 - “*Minerals development pro-posed adjacent or close to a National Park or AONB that might affect the setting of these areas, should be assessed carefully to determine whether the environmental and amenity impact is acceptable or not, or whether suitable, satisfactory conditions can be imposed to mitigate the impact*” (see para 5.14.36).
 - Mineral land banking requirements are also disapplied in AONBs and National Parks (see para. 5.14.15).

Other relevant policy: EN-1

“Development proposed within nationally designated landscapes

5.9.9 National Parks, the Broads and AONBs have been confirmed by the Government as having the highest status of protection in relation to landscape and scenic beauty. Each of these designated areas has specific statutory purposes which help ensure their continued protection and which the IPC should have regard to in its decisions. The conservation of the natural beauty of the landscape and countryside should be given substantial weight by the IPC in deciding on applications for development consent in these areas.

5.9.10 Nevertheless, the IPC may grant development consent in these areas in exceptional circumstances. The development should be demonstrated to be in the public interest and consideration of such applications should include an assessment of:

- the need for the development, including in terms of national considerations, and the impact of consenting or not consenting it upon the local economy;*
- the cost of, and scope for, developing elsewhere outside the designated area or meeting the need for it in some other way, taking account of the policy on alternatives set out in Section 4.4; and*
- any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated.*

5.9.11 The IPC should ensure that any projects consented in these designated areas should be carried out to high environmental standards, including through the application of appropriate requirements where necessary.”

Legislative provisions: National Parks (1)

- S. 5(1) of the National Parks and Access to the Countryside Act 1949 (as amended):
 - “*The provisions of this Part of this Act shall have effect for the purpose—*
 - (a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and*
 - (b) of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.”*
- S. 11A(1) of the 1949 Act further provides:
 - “*A National Park authority ... shall seek to foster the economic and social well-being of local communities within the National Park and shall for that purpose co-operate with local authorities and public bodies whose functions include the promotion of economic or social development within the area of the National Park.”*

Legislative provisions: National Parks (2)

- S. 11A(2) of the 1949 Act requires that:
 - “[i]n exercising or performing any functions in relation to, or so as to affect, land in a National Park, any relevant authority shall have regard to the purposes specified in subsection (1) of section five of this Act and, if it appears that there is a conflict between those purposes, shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park.”*
- NB:
 - 1. Any function of any relevant authority: have regard to purposes;
 - 2. If conflict - the Sandford Principle. This arose from a report of the National Park Policies Review Committee, chaired by Lord Sandford, published in 1974.

Legislative provisions: natural beauty

- S. 114(2) of the 1949 Act provides that the conservation of natural beauty of an area includes preservation of conservation of its flora, fauna, geological and physiographical features.
- S. 99 of the NERC Act 2006 provides:

“The fact that an area in England or Wales consists of or includes—

 - (a)land used for agriculture or woodlands,*
 - (b)land used as a park, or*
 - (c)any other area whose flora, fauna or physiographical features are partly the product of human intervention in the landscape,*

does not prevent it from being treated, for the purposes of any enactment (whenever passed), as being an area of natural beauty (or of outstanding natural beauty).”

Legislative provisions: AONB

- S. 85(1) of the Countryside and Rights of Way Act 2000 imposes a similar duty on public authorities to that outlined in s. 11A(2) of the 1949 Act :

“In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty, a relevant authority shall have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty.”

(1) Major development: introduction

- Where dealing with proposed infrastructure “*in*” Wales, the first question is whether it is “*major development*”, because if so it is subject to the exceptional circumstances test in the PPW.
- NB: this only applies only to development “*in*” a National Park and AONB:
 - The language in the PPW makes this clear; and
 - See on the similar provision in the NPPF: ***Stroud DC v Secretary of State for Communities and Local Government*** [2015] EWHC 1940 (Admin) at para. 6.

(2) Major development: definition

- Topic in and of itself!
- Very largely undefined in the PPW, as it was in English national policy until the NPPF (2018);
- Case-law in England has made clear not the same meaning as under the Development Management Procedure Order: see ***Aston v SSCLG*** [2014] 2 P&CR 10; ***R (Forge Field Society) v Sevenoaks DC*** [2015] JPL 22 and ***R (Green) v SDNPA*** [2018] EWHC 604 (Admin);
- May seem that any major infrastructure project will be “*major development*” ...
- But NB in Wales the definition of “*major development*” is different to that in England because PPW says “*major development proposals which are more national than local in character*”; that wording was in PPG7 but long gone from English national policy: see further below. Welsh wording more restrictive as to what is major development ...

Major development test: differences (1)

- Note re PPW – includes words not in the NPPF (but some of which were in earlier English policy e.g. PPG7 and/or PPS7), note 3 major differences:
 - (1) As just noted major development said to be “proposals which are more national than local in character”:
 - See the appeal decision concerning the re-development of a former army camp at Cwrt Y Gollen, near Crickhowell (dated 2 November 2011);
 - Inspector said that the different approaches meant that the definition of major developments was **materially broader in England** (see para. 229).
 - Could cause issues esp. Wye Valley AONB that crosses English and Welsh borders ...
 - The Inspector said that Ministers should consider the matter (see para. 233)
 - The Welsh Ministers gave the point short shrift: planning a devolved matter and so the Welsh Government entitled to take a different view on such matters ...

Major development test: differences (2)

- (2) On exceptional circumstances test:
 - NPPF: “*in exceptional circumstances, and where it can be demonstrated that the development is in the public interest*”;
 - PPW: says this re exceptional circumstances:
 - (i) “*This may arise where after rigorous examination ...*”: this wording was in PPS7 but not in NPPF
 - (ii) “*there is demonstrated to be an overriding public need*” – note the language is different “*in the public interest*” (England) vs “*overriding public need*” (Wales);
 - (iii) Also the PW in the main text of the policy repeats two matters set out in the 3 criteria so (i) impact on local economy and (ii) alternatives.
- (3) On the 3 criteria to be considered: the same except that on the 3rd in England says “*any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated*” – underlined words not in PPW.

Reminder: the 3 criteria from the PPW

- **To be considered under major development test:**
- **(1) NEED:** *“The need for the development, in terms of national considerations and the impact of permitting it or refusing it upon the local economy”;*
- **(2) ALTERNATIVES:** *“The cost of and scope for providing the development outside the designated area or meeting the need for it in some other way”;*
and
- **(3) DETRIMENTAL EFFECTS (& MITIGATION):** *“Any detrimental effect on the environment and the landscape, and the extent to which that could be moderated and/or mitigated”.*

Satisfying the major development test: legal principles (1)

- Looking at some of the English cases on the similar (but not the same) test in the NPPF:
- (1) ***R (Mevagissey Parish Council) v Cornwall Council*** [2013] EWHC 3684 (Admin), only grant major development if: (i) there are exceptional circumstances – ““*exceptional*” in this context connoting rarity”; and (ii) “*it is demonstrated that, despite giving great weight to conserving the landscape and scenic beauty in the AONB, the development is in the public interest*”;
- (2) The 3 criteria do not exclude other considerations relevant to whether there are exceptional circumstances and whether any development is in the public interest: see ***SSCLG v Wealden DC*** [2018] Env LR 18;

Satisfying the major development test: legal principles (2)

- (3) The 2nd criterion (ibid).:
 - “The second bullet point does not refer specifically to alternative sites. It refers to the “cost” and “scope” for development “elsewhere outside the designated area”, and to the possibility of meeting of the need for the development “in some other way”. In many cases, this will involve the consideration of alternative sites”
 - “But the policy does not prescribe for the decision-maker how alternative sites are to be assessed in any particular case. It does not say that this exercise must relate to the whole of a local planning authority’s administrative area, or to an area larger or smaller than that. This will always depend on the circumstances of the case in hand”
- (4) Exceptional circumstances is not as high a threshold as VSC for Green Belt: see ***R (Luton BC) v Central Bedfordshire Council*** [2015] 2 P&CR 19, and see the next case – Welsh case.

Satisfying the major development test: legal principles (3)

- ***Council for National Parks Ltd v Pembrokeshire Coast National Park Authority***
[2005] EWCA Civ 888
 - Court of Appeal upheld a decision to grant a major development in a National Park despite an officer recommendation for refusal.
 - The case concerned the Bluestone Holiday Village ("Bluestone"), which was on a 200 hectare site.
 - Factors upheld as relevant to the decision included that: (i) that the PPW allowed consideration of "*the impact of permitting it or refusing it upon the local economy*" in assessing major development and that the same factors were also relevant as a result of s. 11A of the 1949 Act; (ii) the policy is less stringent than Green Belt Policy and permits major development schemes within the National Park "*in exceptional circumstances*"; and (iii) there were other relevant factors "*including the proximity of the site to the edge of the National Park and to the Oakwood development which lies beyond its boundary. Our attention was also drawn to the landscaping features of the proposed development*".

Some major development examples from Welsh decisions (1)

- (1) **The South Hook CHP Order (23/10/14):**
- DCO granted by the secretary of State for Energy and Climate Change (“SSfECC”) under the 2008 Act for a combined heat and power (“CHP”) plant near a village in the Pembrokeshire coast national park.
- Found: (i) need established by NPS EN-1; (ii) positive effects on the local economy; (iii) adequate consideration of alternatives; and (iv) mitigation will reduce many adverse effects but remain localised impacts on the National Park.
- Found that the national need and the local economic benefits the development would bring were not outweighed by its potential adverse impacts.

Some major development examples from Welsh decisions (2)

- **(2) Biomass fuelled generation station at Penrhos Works, Holyhead, Anglesey (4/4/14):**
- Consent under s. 36 of the Electricity Act 1989 (“EA 1989”) and direction under s. 90(2) of the TCPA 1990 for deemed PP granted by SSfECC.
- Site located just *within* the Ynys Mon/Anglesey AONB;
- Finds overriding need for project;
- Local employment opportunities emphasised;
- The need and the benefits to local economy outweigh disbenefits;
- No suitable alternative elsewhere on Anglesey would have less impact on AONB;
- Planning conditions will help mitigate impacts on AONB.

Some major development examples from Welsh decisions (3)

- **(3) Trawsfynydd Power Station waste storage (31/7/03)**
- Proposal for intermediate level radioactive waste storage facility at a nuclear power station;
- Scheme part of the company's decommissioning process at former nuclear power station;
- Inspector, assisted by two assessors, concluded that the scheme involved major development and in scale and appearance it could have a potentially long term impact on the character and appearance of the national park, with the new building having a life of between 40 to 100 years;
- However exceptional circumstances justified the scheme;
- There was a need at a national level to store the waste and this could only be done efficiently if provision was made on site;
- Additionally it was concluded that there were clear benefits to the landscape of the national park if the reactor buildings were reconfigured in order to create a unified and less prominent design.

Some major development examples from Welsh decisions (4)

- **(4) Land in Powys, Mid-Wales (Llandbadarn Fynydd) (7/9/15)**
- Application under the EA 1989 for 17 x 126m wind turbines located within an AONB area of high sensitivity to turbines of the scale proposed was refused.
- SSfECC accepted the renewable energy benefits however the scale of the landscape and visual effect impacts, the impacts on residential amenity and the detraction from the historic character of the landscape would be in conflict with the relevant provisions of Energy NPSs, Welsh Government policies and local development plan policies.
- The proposal would affect 44 percent of an AONB, substantially harming its character

Where not major development

- NB often much debate on is something proposed in National Park/AONB major development or not but policy protection does not end there ...
- See Holgate J. in ***Monkhill Ltd v Secretary of State for Housing Communities and Local Government*** [2019] EWHC 1993 (Admin) holding that the first part of paragraph 172 of the NPPF (the great weight part of the policy, which is also in PPW ...) is capable of sustaining a clear and independent reason for refusal of a planning application:-
- *“Plainly, in a simple case where there would be harm to an AONB but no countervailing benefits, and therefore no balance to be struck between “pros and cons”, the effect of giving great weight to what might otherwise be assessed as a relatively modest degree of harm, might be sufficient as a matter of planning judgment to amount to a reason for refusal of planning permission, when, absent that policy, that might not be the case. But where there are also countervailing benefits, it is self-evident that the issue for the decision-maker is whether those benefits outweigh the harm assessed, the significance of the latter being increased by the requirement to give “great weight” to it. d, in the general exercise of development management powers.”*

Infrastructure outside an AONB/National Park (1)

- Where:
- (i) development in AONB/National Park not major development; or
- (ii) development (whatever the scale) outside the AONB/National Park

The major development test is inapplicable.

What may be relevant ?

- See in the PPW ...the great weight parts of the policy
- See *Monkhill* ...

Infrastructure outside an AONB/National Park (2)

- In the ***Stroud*** case in England in relation to the similar policies in the NPPF the Judge held:
 - In relation to what was then para. 115 of the NPPF (2012) and which provided “*Great weight should be given to conserving landscape and scenic beauty in ... Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty*” and is now part of para. 172 of the NPPF (2019) this:
 - (1) “*included the views from the AONB into the surrounding landscape, effectively taking the view that the beauty in the AONB would be harmed if looking out of it one saw ugliness*” (see paras. 21 and 22 “*the Inspector would have been unrealistic in adopting so narrow a view as to ignore for the purposes of paragraph 115 views out of the AONB and the effect of development upon them*”);
 - (2) Did not include “*views into the AONB from outside*” that encompass the proposed development.
 - NB that relevant but not the subject of the policy ...

Infrastructure outside an AONB/National Park (3)

- **EXAMPLES:**
- (1) Hirwaun Industrial East, Rhondda Cynon Taf, Wales (23/7/15): Natural gas turbine power plant 250m from Brecon Beacons: allowed;
- (2) Land In Powys, Mid-Wales (Carnedd Wen) (7/9/15): S/S refuses consent for a large scale windfarm, while only limited effect on landscape character of the Snowdonia National Park, finds significant visual impact from high point views in the Park. Not outweighed by benefits and not capable of mitigation.

Thank you for listening

jmaurici@landmarkchambers.co.uk

© Copyright Landmark Chambers 2020

Disclaimer: The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal counsel.

London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

Follow us

🐦 @Landmark_LC
🌐 Landmark Chambers