

Infrastructure in Wales: Failure to deliver?

A high-level overview of the changing consenting structures,
some key decisions and some commentary



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The System in Wales: for now.....3 or more consenting regimes.....

- Nationally Significant Infrastructure Projects: projects in or partly in Wales relating to non devolved and identified important infrastructure projects. These are determined by Westminster Minister. Planning Act 2008
- Welsh Ministers decisions: Developments of National Significance (DNS) planning projects in Wales which are devolved and nationally important. Also generating projects upto 350MW and all onshore wind projects see Wales Act 2015 and 2017
- Other projects brought forward under planning, electricity, highways and other legislation mostly determined by local planning authorities and others- e.g M4 Relief Road. These often need additional consents under various regimes.



Recent Change and more to come

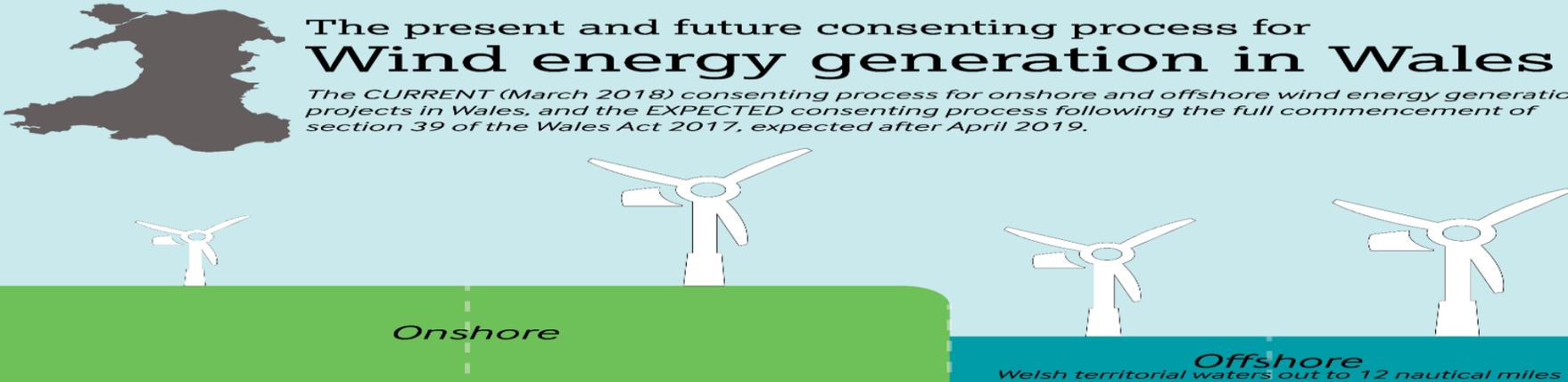
- The 2017 Wales Act (s 39) further devolved the power to determine certain infrastructure projects to Wales. Most importantly it increased the size of on and off shore power projects upto 350MW generation which could be determined in Wales. These projects were removed from the NSIP list for Wales. (On shore wind projects of any size were already devolved).
- The Act returned these powers in an anomalous way: which led to the need for an “interim system” of consenting by way of various complex SIs. These came into force in April 2019 and in effect made the larger on shore transferred Power Generator cases DNS. It also allowed for transmission lines associated to be treated as DNS but to be determined by a PINS inspector as opposed to a specific minister
- Offshore generators of upto 350MW are also WM decisions but using the E Act mechanisms and processes NOT TCPA.

Why an Interim SI based Solution for Infrastructure?

- This is an “interim” position because the WG has announced its intention to identify for specified infrastructure projects (including energy) a “one stop shop” infrastructure consent in Wales: the WIC. This requires primary legislation which was not ready for the April 2019 extension of the powers of Welsh Ministers: hence the scrappy interim solution. Also the Act by default returned the powers to LPAs leading to perverse hierarchy of decision making: hence the need for a series of re-allocating SIs.
- Both the interim and the one stop solution have been the subject of consultation. The “interim solution” came into force in April 2019.

Summary of outcome of the interim position for wind energy

The present and future consenting process for Wind energy generation in Wales
The CURRENT (March 2018) consenting process for onshore and offshore wind energy generation projects in Wales, and the EXPECTED consenting process following the full commencement of section 39 of the Wales Act 2017, expected after April 2019.



Onshore		Offshore <i>Welsh territorial waters out to 12 nautical miles</i>	
Current consenting process			
Up to 10MW	Over 10MW	1-100MW	Over 100MW
<small>DECIDING AUTHORITY</small> Local Planning Authorities	Welsh Government	Marine Management Organisation	UK Government
<small>PLANNING REGIME</small> Town and Country Planning	Town and Country Planning - Developments of National Significance	Section 36 Electricity Act 1989	Nationally Significant Infrastructure Projects
Future consenting process			
Up to 10MW	Over 10MW	1-350MW	Over 350MW
<small>DECIDING AUTHORITY</small> Local Planning Authorities	Welsh Government	Welsh Government	UK Government
<small>PLANNING REGIME</small> Town and Country Planning	Town and Country Planning - Developments of National Significance	Section 36 Electricity Act 1989	Nationally Significant Infrastructure Projects

Summary of outcome of interim position for energy other than wind: only 5 potential consenting regimes!

 **The present and future consenting process for Energy generation (other than wind) in Wales**
The CURRENT (March 2018) consenting process for onshore and offshore energy generation projects (excluding wind) in Wales, and the EXPECTED consenting process following the full commencement of section 39 of the Wales Act 2017, expected after April 2019.

Onshore			Offshore <i>Welsh territorial waters out to 12 nautical miles</i>	
Current consenting process				
Up to 10MW	10 - 50MW	Over 50MW	1-100MW	Over 100MW
<i>DECIDING AUTHORITY</i> Local Planning Authorities	Welsh Government	UK Government	Marine Management Organisation	UK Government
<i>PLANNING REGIME</i> Town and Country Planning	Town and Country Planning - Developments of National Significance	Nationally Significant Infrastructure Projects	Section 36 Electricity Act 1989	Nationally Significant Infrastructure Projects
Future consenting process				
Up to 10MW	10 - 350MW	Over 350MW	1-350MW	Over 350MW
<i>DECIDING AUTHORITY</i> Local Planning Authorities	Welsh Government	UK Government	Welsh Government	UK Government
<i>PLANNING REGIME</i> Town and Country Planning	Town and Country Planning - Developments of National Significance	Nationally Significant Infrastructure Projects	Section 36 Electricity Act 1989	Nationally Significant Infrastructure Projects

 National Assembly for Wales
Research Service

After the Interim- New Wales Infrastructure Consent

- The WIC would consolidate existing consents under the TCPA, Electricity Act, Harbours Act, and a number of other consents made under highways legislation, into one single type of consent. The WIC would also include a wide range of secondary consents, including Compulsory Purchase Orders, Marine Licences and Environmental Permits. “A One Stop Shop” or “un broses gydsynio syml”
- The consenting process would be accompanied by thresholds and policies against which the individual projects could be assessed.
- No fixed date for its introduction: most recent guidance states won't be in 2020...tied up with the National Development Framework delayed by COVID. So watch this space!

Proposed WIC categories

- **Electricity infrastructure**
- **Oil, gas and minerals**
- **Transport**
- Highways;
- Railways;
- Rail freight interchanges;
- Ports and harbours; and
- Airports.
- **Water**
- Dams and reservoirs;
- Transfer of water resources; and
- Wastewater treatment plants.
- **Waste**
- Hazardous waste facilities; and
- Geological disposal for the final disposal of radioactive waste.

The Consequences of the New Consenting regime: examples and a feel for the changes

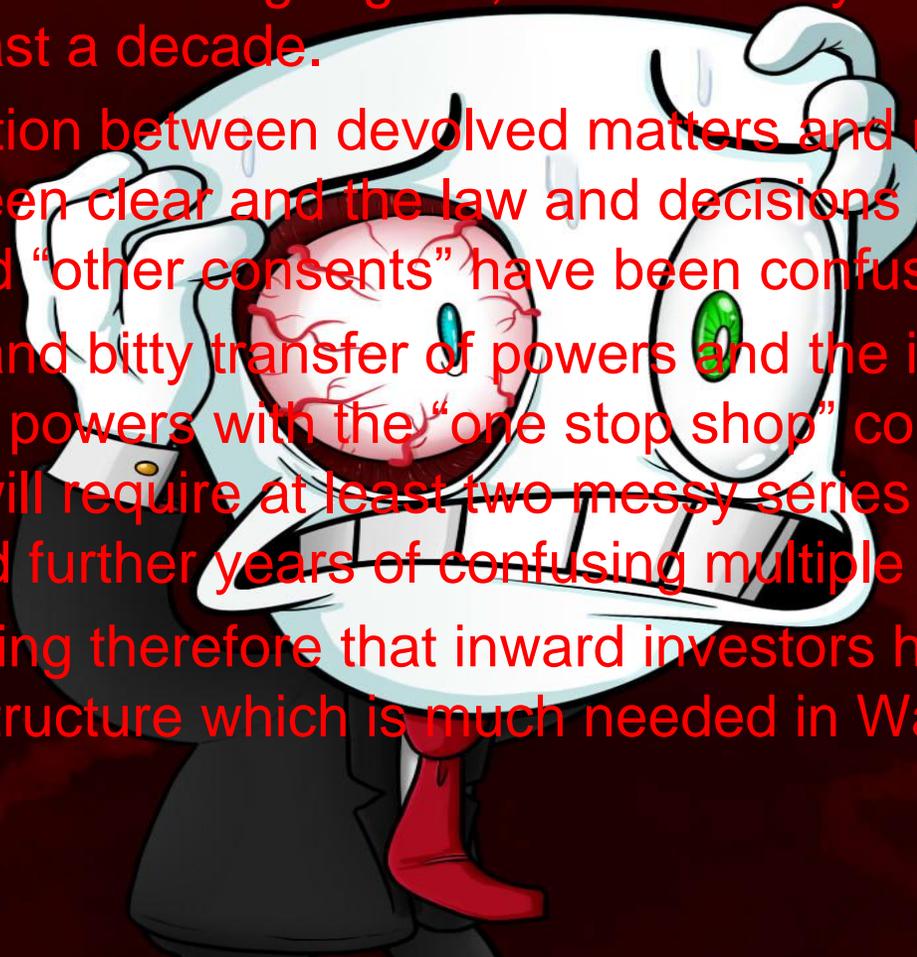
- The Wales Act 2017 and the interim arrangements put in place last April would now mean that the Swansea Barrage Tidal Lagoon case would now be determined in Wales not Westminster.
- The huge Wylfa Newydd power station on Anglesey would however remain with Westminster for all purposes: an NSIP
- The M4 Link Road in Newport would be eligible to be consented by Welsh ministers (not Boris) under the new streamlined “one stop shop” infrastructure consenting regime when enacted: as opposed to the multi-consent Highways/Planning Permission/CPO provisions which led to a year long inquiry.

A Welsh National Infrastructure Commission

- To assist in the new infrastructure consenting world the WG has newly created a new infrastructure commission which seeks to identify what infrastructure is needed and where.
- Its first annual report has been published and it has made a call for evidence and expressed its preliminary and provisional findings. The need for infrastructure provision is substantial and wide ranging.
- These are early stages.

A Pause : a reflection on where we are

- The infrastructure consenting regime, self evidently is and has been complex in Wales for at least a decade.
- In NSIPs the junction between devolved matters and non-devolved matters has not always been clear and the law and decisions on “Associated Development” and “other consents” have been confused and confusing.
- The incremental and bitty transfer of powers and the inability to “synchronise” the repatriation of powers with the “one stop shop” consenting legislation is unfortunate and will require at least two messy series of transitional arrangements and further years of confusing multiple systems.
- It is hardly surprising therefore that inward investors have not been flocking to provide the infrastructure which is much needed in Wales.



NSIPs: some success some failure

- First ever DCO application to be rejected/not accepted as valid by PINS was a Welsh DCO. The acceptance process is quite onerous and the wait for the DCO to be accepted, particularly in complex linear projects is a nervous one.
- Since then, the PINS web site records 18 Welsh NSIPs either determined, at decision stage or “in flight”. I know that the web site is not fully comprehensive but it gives a very good feel as to the nature and type of NSIPs being determined by Westminster.
- Of the 18 projects on the site, 12 decided 11 granted 1 refused. 1 is awaiting decision shortly (Wylfa Newydd) 5 are stated to be in pre-app (but 2 of those relate to mid-Wales wind and are to my certain knowledge stalled and unlikely to proceed soon)
- Some of the most noteworthy and newsworthy are considered below.

The Swansea Tidal Lagoon: Power Generation and more?



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An early and interesting case: DCO 2015

- Trespass on the devolution settlement.....significant leisure removed.
- Power to extend local planning authority powers beyond low water mark considered and rejected. Therefore need for additional marine consents.
- Many many pre-start conditions.... including a requirement to submit details of how the plant would be decommissioned once it had run its useful life.
- Westminster Secretary of State accepted Pins EX panel recommendation and granted the consent order (including CPO powers) 2015
- By 2017, Secretary of State Clarke made a Parliamentary Statement indicating that the project fell far short of “value for money” and would not therefore receive the needed UK Government funding/spot price fixing placing its future in doubt and delaying the start of the project. WG uproar!

Now Implemented or lost?

- The DCO was a 5 year consent.
- No application for an extension was ever made.
- There were a series of pre-commencement “requirements”
- Just before the expiry date in June 2020 and in the midst of the COVID crisis the operator and its lawyers claimed that the works had been done and the project consent saved “in perpetuity”. Big press campaign in Wales. A wall had been demolished in alleged compliance with the DCO.
- The Secretary of State in Westminster (and their lawyers) and Swansea Council (and its lawyers) claim it has not been lawfully implemented because of inter alia the absence of a PRE-COMMENCEMENT compliant decommissioning strategy and that the DCO has as a result been lost. Westminster refused to “save” the DCO by specific Act of Parliament.

Inevitable Legal Battle :lessons to be learned

- With both sets of lawyers clear that they are correct a legal battle is inevitable. Difficult to call without seeing all of the papers etc.
- The issue will probably turn on the proper interpretation of the DCO “requirements” the status of the submitted decommissioning report and their relationship to the works of demolition undertaken on site “comprised in the development”. (See “the Whitely principle” and its exceptions)
- The immediate lessons are obvious.... If you are seeking to “implement” a permission or consent. Make sure that the Act of implementation is simply not capable of being argued over OR seek an extension of time under the relevant provisions of the Act before time runs out..
- The wider impression given is of confusion, governmental change of direction and difficulty of infrastructure delivery in Wales.

Wylfa Newydd

- Building on Mam Mon's wish to be the energy island and reflecting the reliance on the existing power station, Anglesey's economy was set to be boosted by the construction of Wylfa Newydd Nuclear by mid 2020s. Had x party political support in principle. No so the transmission, more controversial.
- But, just before the Examination began, the Japanese parent company of the promoter (Hitachi) announced it would not be proceeding with the project because of the inability of the parent company to agree price regime with the Government in Westminster.
- The Examination nonetheless continued to a conclusion, the inspector's report has been received and a decision is expected in September 2020- already put off on two separate occasions.

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Wylfa Newydd Big Issues

- Examining Authority's report received by SofS but not public.
- Two sessions of post Examination consultation include
 - Impact on terns and Habitat.
 - Consequences of the parent company decision to withdraw funding and also to *withdraw many ancillary applications for needed environmental consents.*

Critically,

-no apparent movement on the funding/pricing issues. Funding has been confirmed as withdrawn.

-the DCO application for the transmission infrastructure (overhead pylons) which was accepted and due for Examination shortly after the Power Station is NOT for now being proceeded with. No alternative transmission solution is in train: the existing electrical infrastructure is insufficient to allow meaningful transmission in the short turn.

Little prospect of this project being delivered consistent with any realistic political wish: for one reason or another the infrastructure process has failed. Control of pricing and of decision-making at Westminster means another big and politically important project placed in jeopardy.

Some Success

<u>Hirwaun Power Station</u>	Hirwaun Power Limited	Decided
<u>Brechfa Forest West Wind Farm</u>	RWE Npower Renewables	Decided
<u>Clocaenog Forest Wind Farm</u>	RWE npower renewables	Decided
<u>South Hook Combined Heat & Power Station</u>	QPI Global Ventures Ltd	Decided
<u>Abergelli Power</u>	Abergelli Power Limited	Decided

And some more

Glyn Rhonwy Pumped Storage	Snowdonia Pumped Hydro Limited	Decided
Internal Power Generation Enhancement for Port Talbot Steelworks	Tata Steel UK limited	Decided
Brechfa Forest Connection	Western Power Distribution (South Wales) plc	Decided
North Wales Wind Farms Connection	SP MANWEB	Decided
Wrexham Energy Centre	Wrexham Power Limited	Decided

Mynydd y Gwynt : the refusal

- 27 wind turbines in Mid Wales generating 89MW
- ExA recommended the grant of the DCO having considered all of the issues
- Westminster Secretary of State felt unable to grant on the basis that insufficient evidence to establish no adverse effect on the integrity of the red kite feature of a nearby SPA. Objection by NRW.
- Identifies the importance of Habitat and Species protection and the very strict evidential rules that are in play. The burden of proof is on the Appellant to prove beyond reasonable scientific doubt that no adverse effect. See Heather for Court case.

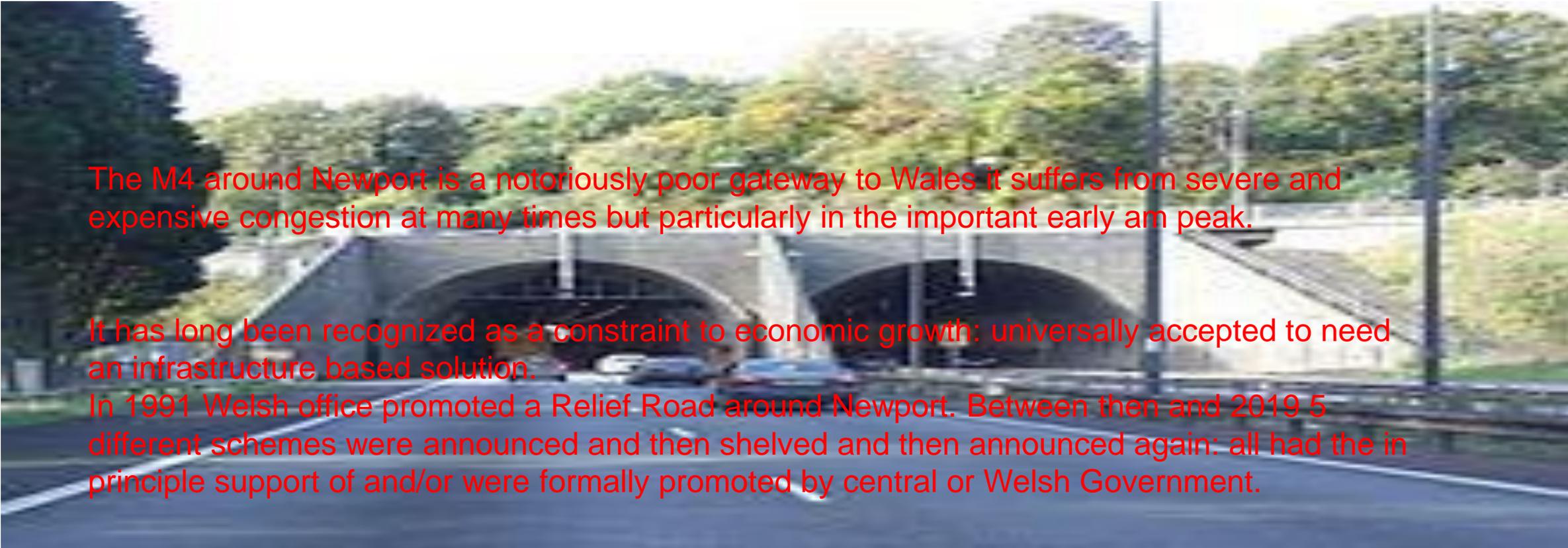
Conclusion on NSIP delivery in Wales

- Avowed aim was to make infrastructure delivery easier: gaining the early support of communities.
- Multi phase pre-application consultation hardly consensus forming.
- Smaller scale energy projects fare reasonably well.
- Larger scale projects critical to the economic well being of Wales do not, for a variety of reasons.

Developments of National Significance

- There are 35 DNS on the PINS WALES web site.
- Only two have yet been recorded as determined. One grant and One refusal. Many are now at the decision stage : expect a rash of decisions shortly.
- Too early to say how the system is working and..... it will if WICs happen post 2020 have a relatively short life in its present form.
- But note the one refusal was on Habitat/Species grounds re-emphasising the need for developers to get this aspect of applications right.

The M4 link Road around Newport: a shambles, a missed opportunity?



The M4 around Newport is a notoriously poor gateway to Wales it suffers from severe and expensive congestion at many times but particularly in the important early am peak.

It has long been recognized as a constraint to economic growth: universally accepted to need an infrastructure based solution.

In 1991 Welsh office promoted a Relief Road around Newport. Between then and 2019 5 different schemes were announced and then shelved and then announced again: all had the in principle support of and/or were formally promoted by central or Welsh Government.

The Inquiry

- In 2018/9 a Highways Act Inquiry costing over £50M considered the 34Km route.
- The Welsh Government promoted the scheme itself and called over 30 witnesses in support who described how the proposal met all the strategic and local policies for the area and the nation, described its economic effect and that it constituted value for money.
- It was supported by the CBI, a barrage of potential inward investors, almost all relevant local authorities in Wales. There were strongly held environmental and amenity objections.
- The Independent Inspectors found in favour of the proposal. They categorically ruled out all 18 alternative solutions and routes and advised the First Minister that the Welsh Government's case had been proven and that the benefits significantly outweighed the harm and that the Orders should be made.

The First Minister's Decision

- The Minister set aside the recommendations of the Independent Inspectors on 4th June 2019. In a short D/L he explained that his operative reason for not making the orders was that notwithstanding the fact that the WG had actively and fully promoted the scheme itself, the WG Cabinet had in April 2019 now decided that the road could no longer be prioritized in the forward capital programme budget having regard to resources and other commitments.
- In such circumstances he would not make the orders.
- He went onto explain that he didn't have to consider the balance of benefits and harms as part of his decision but he had and that he had found the unacceptable ecological and other harm to the Gwent levels would outweigh the benefits of the projects.

A Comment

- The decision stands and is therefore lawful. I appreciate the quasi judicial position of the FM.
- But without needing to express a view on the merits, the overall process involved in making this decision does not paint the infrastructure consenting process in Wales in a good light.
- The WG had been consistently supporting and fully promoting the relief road for decades including through published policies which had been the subject of SEA. It paraded 30 odd witness in support of the project only for a political decision on priorities made in the shadow of the inquiry to scupper delivery. How does this look to potential investors in Wales?
- The decision then to express a wholly unnecessary and superficial finding (3 paragraphs) on balance of benefit and harm was politically inept....it reduces the likelihood of central government funding in the BUILD BUILD BUILD Rooseveltian new deal promised by PM Johnson or of any other funding solution being found.

Conclusion (1)

- Wales needs more and better infrastructure if it is to be competitive.
- The scale of the infrastructure needed is huge: the record of large scale delivery is poor.
- The consenting regime is accepted by all at present NOT to be fit for purpose. The devolution settlement paid insufficient attention to the consequences of infrastructure planning leaving a system which is complex and cumbersome.

Conclusion (2)

- Something like the WIC process should have been put in place earlier and before the transfer of further powers to Wales in April 2019.
- It is needed now as soon as is possible.
- The operation of effectively a dual “interim” system with two sets of transitional arrangements over the next few years means that there is likely to be uncertainty and a reluctance in some to invest at a time when post Brexit, Wales will need all of the competitive advantage it can muster.
- For those giving advice, care, patience and a good working knowledge of the myriad of consenting regimes and procedures will continue to be necessary.

Thank you for listening

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