Law Commission
Reforming the law
Comisiwn y Gyfraith
Diwygio'r gyfraith

Planning Law in Wales
Final Report

Cyfraith Cynllunio yng Nghymru
Adroddiad Terfynol

HC 1788

Law Com No 383

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Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965; and presented to the National Assembly for Wales

Ordered by the House of Commons to be printed on 30 November 2018

November 2018

Tachwedd 2018

HC 1788

This publication is available at www.gov.uk/government/publications.

Print ISBN 978-1-5286-0905-0

CCS 1118073096 11/18

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the APS Group on behalf of the Controller of Her Majesty's Stationery Office

THE LAW COMMISSION

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The terms of this report were agreed on 6 September 2018.

The text of this report, and of each chapter in it, is available on the Law Commission's website at www.lawcommission.gov.uk/planning-law-in-Wales

To request a paper copy of the Final Report, or if you have any other queries, please send an email to: Planning_wales@lawcommission.gov.uk.

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GLOSSARY

Advertisement	A sign, placard, board, notice, hoarding, awning, blind, or other object or structure, that is designed or adapted for the purpose of announcement, publicity or direction, and is used wholly or partly for such a purpose (other than a memorial or railway signal).
Ancient Monuments Act	Ancient Monuments and Archaeological Areas Act 1979.
Blight notice	A notice served on a planning authority by the owner of land, requiring the authority to purchase land that has been rendered useless as a result of its allocation in the development plan (or in a similar document).
Breach of condition notice (BCN)	A notice issued by a planning authority requiring the recipient to comply with conditions attached to a planning permission that has been granted for development.
Cadw	The historic environment service of the Welsh Government.
Community Infrastructure Levy (CIL)	A levy imposed on most new development, used to fund local infrastructure (such as parks, sports facilities and police stations), imposed in areas where the planning authority has chosen to charge it.
Certificate of lawfulness of existing use or development (CLEUD)	A certificate issued by the planning authority to the effect that an existing use of land, or development that has been carried out, is immune from enforcement action.
Certificate of lawfulness of proposed use or development (CLOPUD)	A certificate issued by the planning authority to the effect that a proposed use of land, or development that is proposed to be carried out, would not be liable to be the subject of enforcement action.
Compulsory purchase	The acquisition of land, usually by a public authority for a public project, without the consent of the owner, subject to a right of compensation for dispossessed owners and occupiers.
Conservation area	Area of special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance, usually designated as such by the planning authority.
Conservation area consent (CAC)	Consent for the demolition of an unlisted building in a conservation area, in addition to planning permission (failure to obtain consent is a criminal offence).
Development	The carrying out of building, engineering, mining or other operations, or the making of a material change in the use of a building or land.

Development plan	Set of documents produced by the Welsh Ministers and planning authorities, setting out their proposals for future development and providing the policy context for making planning decisions.
Development of National Significance (DNS)	A large infrastructure project of national importance (for example, a wind farm, power station or reservoir), requiring approval by the Welsh Ministers rather than the planning authority.
Development order	Secondary legislation granting planning permission for all development in a specific category (general development order) or for some development in a particular area (special or local development order)
Discontinuance Notice	A requirement by the planning authority that an existing lawful activity or operation or use of land should cease (subject to a right to compensation for those suffering loss).
Environmental impact assessment (EIA)	The assessment of the effect of some more significant public and private projects on the environment, originally required under the relevant EU Directive.
Enforcement notice	A notice issued by a planning authority requiring steps to be taken to remedy the effect of unauthorised development, subject to a right of appeal to the Welsh Ministers (non-compliance with the notice is a criminal offence).
Enterprise zone scheme	Scheme made by the Welsh Ministers, under the Local Government Planning and Land Act 1980, effectively granting planning permission for development specified within it.
Felling licence	A licence from Natural Resources Wales authorising the felling of trees, not required for felling on a small scale or in other exceptional cases.
Grampian condition	A condition attached to a planning permission that prohibits it being implemented until some specified event has occurred.
Listed building	Building included by the Welsh Ministers in a list of buildings of special architectural or historic interest, on the advice of Cadw.
Listed building consent (LBC)	Consent required to demolish a listed building or to alter it in any manner that is likely to affect its character as a building of special interest, in some cases in addition to planning permission (failure to obtain consent is a criminal offence).
Listed Buildings Act	Planning (Listed Buildings and Conservation Areas) Act 1990
Local infrastructure tariff (LIT)	A proposed replacement for the community infrastructure levy, applying a low tariff to most new developments.
Local planning authority (LPA)	See “Planning authority”.

Minerals	All substances of a kind ordinarily worked for removal by underground or surface working, other than peat cut for non-commercial purposes.
National development framework (NDF)	A plan, to be produced by the Welsh Ministers, setting out national policies in relation to the development and use of land in Wales, and specifying the categories of development that constitute development of national significance.
Nationally significant infrastructure project (NSIP)	Major infrastructure project in one of five categories (electricity generating stations, power lines, underground gas storage, pipelines, harbours) requiring development consent from the Secretary of State (not planning permission).
Owner (of land)	Person who would be entitled to receive the rack rent if the land were to be let.
Permitted development	Development, generally minor in character, for which planning permission is granted by a general development order (or, exceptionally, a local development order).
Planning authority	Local authority or national park authority, responsible for producing a development plan and determining applications for planning permission (referred to in legislation as “local planning authority” or “mineral planning authority”).
Planning contravention notice (PCN)	A notice issued by a planning authority requiring the recipient to supply information as to the ownership of land, its use, and activities taking place there, and an explanation as to why those use or activities are not in breach of planning control.
Planning enforcement order	An order, granted by a magistrates’ court on the application of a planning authority, that allows the authority to extend the time limit within which enforcement action can be taken against a breach of planning control that has been deliberately concealed.
Planning Inspectorate (PINS)	Executive agency of the Welsh Ministers, responsible for the determination of called-in applications and appeals, and the holding of inquiries into draft development plans.
Planning permission	Approval granted by the planning authority or the Welsh Ministers for the carrying out of development.
Planning Policy Wales (PPW)	National planning policy, issued by the Welsh Government following consultation – Edition 9, issued November 2016; Edition 10, in preparation.
Pre-commencement condition	A condition attached to a planning permission requiring that certain details of the development are approved, or some other action is taken, before the development is started (or possibly before the building is occupied).

Purchase Notice	A notice served by the owner of land on a planning authority, requiring it to purchase land that has been rendered useless as a result of a planning decision.
Rack rent	Rent representing the full open market annual value of a property, or the market rent.
Scheduled monument	An ancient monument included by the Welsh Ministers in the schedule of monuments under the Ancient Monuments Act.
Scheduled monument consent	Consent needed to demolish or carry almost any works affecting a scheduled monument, obtained from the Welsh Ministers.
Simplified planning zone (SPZ)	Area within which planning permission is granted by a simplified planning zone scheme for development within specified classes.
Statutory undertaker	Public body undertaking the provision of certain public services, including railways, roads, air traffic, canals, docks and harbours, gas, electricity, highways.
Stop notice	A notice issued by a planning authority at the same time as or immediately after the issue of an enforcement notice, requiring unauthorised development to cease immediately.
Technical Advice Note (TAN)	Detailed advice produced by the Welsh Government on a range of topics.
Temporary stop notice (TSN)	A notice served by a planning authority requiring the recipient to cease immediately development appearing to be in breach of planning control.
Tree preservation order (TPO)	An order made by a planning authority to protect specific trees, groups of trees or woodlands in the interests of amenity.
Urban development corporation	An organisation set up by the Welsh Ministers to bring about the development of an urban area.
Whitley principle	The principle that a failure to implement a pre-commencement condition that goes to the heart of the permission renders invalid any purported commencement of the development.

OTHER ABBREVIATIONS

CBC	County Borough Council
CC	County Council
CLA	Country Land and Business Association
DC	District Council
DMP(W)O	Town and Country Planning (Development Management Procedure) (Wales) Order
ECHR	European Convention on Human Rights
GPDO	Town and Country Planning (General Permitted Development) Order
HE(W)A	Historic Environment (Wales) Act
MPA	Mineral Products Association
NRW	Natural Resources Wales
PEBA	Planning and Environmental Bar Association
PCPA	Planning and Compulsory Purchase Act
POSW	Planning Officers Society (Wales)
P(W)A	Planning (Wales) Act
RICS	Royal Institution of Chartered Surveyors
RTPI	Royal Town Planning Institute
TCP	Town and Country Planning
TCPA	Town and Country Planning Act

THE LAW COMMISSION

PLANNING LAW IN WALES

To the Right Honourable David Gauke, MP, Lord Chancellor and Secretary of State for Justice

SUMMARY

Chapter 1: Summary

INTRODUCTION

1.1 The Law Commission was invited by the Welsh Government to consider the codification of planning law in Wales, and to make recommendations for technical reforms. We published a Consultation Paper in November 2017, containing over 180 provisional proposals and consultation questions. We then carried out a programme of meetings and events over the following three months; and we received over 160 written responses. We are grateful to all those who accepted our invitation to comment.

1.2 In the light of what we heard at those meetings and the written responses, we reviewed our proposals, and this Report sets out our final recommendations. As would be expected, in many cases these recommendations reflect the provisional proposals in the Consultation Paper; but in several instances we have withdrawn or amended proposals, and in a few we have added new recommendations, based on our research and consultees' responses.

1.3 This introductory summary provides a brief outline of the Report. It is available, along with the whole Report, and individual chapters of it (in both languages), on the Commission's website www.lawcom.gov.uk/planning-law-in-wales.

1.4 Part One of the Report deals with general principles. Chapter Two opens with a brief outline of the project so far – from the initial invitation to the Commission from the Welsh Government, via the Scoping Paper published in 2016, to the Consultation Paper in 2017 and now the Final Report in 2018 (Chapter One). Chapter Three describes the consultation exercise. We received a number of general responses, relating to the codification exercise as a whole, summarised in Chapter Four.

1.5 The fourteen chapters in Part Two of the Report then summarise the responses to our proposals in the Consultation Paper relating to each of the major areas in this field, and set out our recommendations as to the way in which the law can best be presented and, in some respects improved, for the benefit of all those who use it. We list our recommendations at the end of Part Two.

Terminology

1.6 We have, in many places throughout this chapter and the remainder of this Report, made a recommendation that such-and-such a statutory provision, currently in force in both England and Wales, should be repealed, omitted, abolished or amended. What is meant by such a statement is that the provision in question should either no longer apply in Wales or apply there in an amended form; and that an appropriate amendment should be made to the existing provision to ensure that it continues to operate in England in the same way as it does at present. Provisions that currently only apply in Wales, and are no longer needed, can be repealed in the formal sense (that is, removed from the statute book).

Acknowledgements

1.7 The following members of the Public Law Team have contributed to this project at various stages: David Connolly and Henni Ouahes (team managers); Beth Gascoyne and Dr Charles Mynors (team lawyers); and Anjoli Foster, Gayatri Parthasarathi, Thomas Jones, Ffion Bevan and Alex Shattock (research assistants).

1.8 We are grateful for the considerable assistance given to us by a number of officers of the Welsh Government throughout this project, as well as by many others with whom we have shared ideas. We emphasise, however, that the Final Report represents the views of the Commission, and not those of any who have assisted us.

PART ONE: GENERAL PRINCIPLES

CHAPTER TWO: TOWARDS A NEW PLANNING CODE FOR WALES

Background

1.9 The first significant piece of planning legislation in the UK was the Town and Country Planning Act ("TCPA") 1947, which applied uniformly in England and Wales. This was followed by the TCPA 1962 and the TCPA 1971 (both consolidating measures); each was amended many times. The most recent consolidation measures were the TCPA 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990 and the Planning (Hazardous (Substances) Act 1990, which incorporated some minor changes recommended by the Law Commission.

1.10 The 1990 Acts have themselves been amended, or supplemented, on a number of occasions – notably by the Planning and Compensation Act 1991, the Environment Act 1995, and the Planning and Compulsory Purchase Act ("PCPA") 2004. Since 2004, planning Acts passed by the Westminster Parliament have generally, but not entirely, applied only in England.

1.11 Distinctive national planning policy started appearing in Wales from around 1996, and separate secondary legislation from the late 1990s. Under the Government of Wales Act 2006, amended by the Wales Act 2017, the Welsh Assembly now has legislative competence in relation to all planning matters. The first results of that were the Planning (Wales) Act ("P(W)A") 2015 and the Historic Environment (Wales) Act 2016.

The involvement of the Law Commission

1.12 Against this background, the Law Commission was invited to review the law relating to town and country planning in Wales, and to make recommendations to modernise and simplify the law. This led to the production of a Scoping Paper, published in June 2016 – alongside the Commission's final report on the Form and Accessibility of the Law Applicable in Wales.[1] The Scoping Paper focussed on the scope of the exercise, and described our approach to consolidation and technical reform.

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1 *Form and Accessibility of the Law Applicable in Wales*, Law Com No 366.

1.13 Following consultee responses to the Scoping Paper, and in the light of continuing liaison with the Welsh Government and further research, we published a Consultation Paper, Planning Law in Wales, in November 2017, setting out 186 possible technical reforms, in the form of Consultation Questions. This Final Report builds on the responses we received to the Consultation Paper, and makes a similar number of final recommendations addressed to the Welsh Government.

CHAPTER THREE: THE CONSULTATION EXERCISE

Those we met

1.14 Following the publication of the Consultation Paper, we met with a wide range of stakeholders. We attended meetings organised by the Royal Town Planning Institute ("RTPI"), the Royal Institution of Chartered Surveyors ("RICS"), Planning Aid Wales, and the Town & Country Planning Association. We also held very helpful meetings with each of the three regional groups of the Planning Officers Society of Wales ("POSW").

1.15 We also gave presentations at meetings organised by various groups – including the Welsh Government, the Law Society, two barristers' chambers specialising in planning law, the Home Builders Federation, the Residential Landlords Association, Community Housing Cymru, the National Assembly Cross-Party Group on Housing, the Historic Environment Group, and One Voice Wales.

1.16 And we met with representatives of a wide variety of stakeholders, including the Royal Society of Architects in Wales, the Welsh Planning Consultants' Forum, the Mineral Products Association, the Woodland Trust, and the Royal Society for the Protection of Birds.

The response we received

1.17 We received 165 written responses from a wide range of individuals and organisations, including local authorities, community and town councils, the Planning Inspectorate ("PINS"), developers, landowners, third sector organisations, and professional bodies – see Appendix A for a complete list.

1.18 The responses we received generally supported our proposals. Some were almost unanimously popular. But a small number (for example, the questions relating to the possible unification of listed building consent and planning permission, and those relating to outline planning permission) attracted a large volume of responses, mainly from those with a specialist interest in the topic concerned, expressing a wide range of views.

CHAPTER FOUR: GENERAL RESPONSES TO THE CONSULTATION PAPER

1.19 In this Chapter, we outline the general responses we received that related to the codification exercise as a whole. The more detailed responses relating to specific topics are considered in the later chapters.

1.20 Several stakeholders expressed concerns about reform for the sake of it (along the lines of "if it isn't broken, don't fix it"), both in general and in relation to specific proposals. However, the great majority of consultees agreed that codification was in principle desirable, with overwhelming support for simplification and consolidation of the legislation.

1.21 Some stakeholders from specialist interest groups (including those concerned with rights of way, and minerals) expressed disappointment that their particular area of interest was not within the scope of our project.

1.22 Many stakeholders expressed concerns about the practicalities of a planning Code – what it should contain (especially whether guidance should be included), how it will be presented and updated, and how it can be made as accessible and navigable as possible. We agree that these issues are of critical importance if the Code is to work effectively.

PART TWO: SPECIFIC TOPICS

References in square brackets in the remainder of this Summary are to the principal Recommendations within the remainder of the Report. A full list of our recommendations is at Appendix B.

CHAPTER FIVE: INTRODUCTORY PROVISIONS

Principles underlying the Planning Code

1.23 We first consider the statutory purpose of the planning system, and the duties that should guide public bodies exercising functions under the Planning Code.

1.24 The duty to have regard to the development plan, so far as material to the matter in hand, currently applies to the determination of planning applications and appeals (under sections 70 and 79), and to many other functions under the planning Acts – but by no means all. And that duty, where it applies, is paramount. We recommend that the duty should be extended so as to apply explicitly to the exercise by a public body of any of its functions under the Code – other than those relating to the formulation of the development plan, the determination of applications for certificates of lawfulness, and the making of subordinate legislation. **[5-1].**

1.25 Every public body in exercising its functions is under a general duty to have regard to all matters that are relevant, and disregard all those that are irrelevant. But the TCPA 1990 explicitly requires those exercising certain functions under the planning Acts to have regard to "all other material considerations". We do not consider that it would be helpful to try to define that phrase, but we recommend that it would be helpful for the duty to be applied explicitly to the exercise by planning authorities, strategic planning panels and the Welsh Ministers of any functions under the Code. We also recommend that the word "material" be replaced in the English language version by "relevant", in line with modern usage. **[5-2; 5-3]**

1.26 The Listed Buildings Act imposes a duty on those determining applications for planning permission and listed building consent to have special regard to the desirability of preserving listed buildings, and to have regard to the desirability of preserving or enhancing conservation areas. We recommend that there should be a requirement for any public body exercising any function in relation to any historic asset (including a scheduled monument and a world heritage site) to have regard to the desirability of preserving or enhancing the asset, its features and its setting, and for any decision-making body exercising functions under the planning Act to have special regard to such matters. **[5-4]**

1.27 The P(W)A 2015 introduced duties to have regard to considerations relating to the use of the Welsh language, but only in relation to the appraisal of draft development plans and the determination of planning applications. We recommend that such considerations should apply in relation to the exercise by planning authorities, strategic planning panels and the Welsh Ministers of any functions under the Code, so far as relevant to the exercise of that function, by being explicitly included as a relevant consideration – again, except in relation to the formulation of the development plan and the determination of applications for certificates. **[5-5]**

1.28 Planning authorities are required to have regard to the policies of the Welsh Government in preparing a local development plan. But such policies are mentioned nowhere in the TCPA 1990, even though they are in reality a major factor in most if not all planning decisions. We therefore recommend that they too should be explicitly included in the list of relevant considerations to be considered by planning authorities, strategic planning panels and Welsh Ministers. **[5-6]**

1.29 Section 2 of the P(W)A 2015 introduced a duty for public bodies exercising some functions under the planning Acts – but, again, not all of them – to do so as part of their duty to carry out sustainable development under the Well-being of Future Generations Act 2015. We observe that the general duty under section 3 of the Well-being Act applies to all planning functions; and we therefore recommend that it will not be necessary to restate the more limited duty currently imposed by section 2 of the P(W)A 2015. **[5-7]**

1.30 In the light of the above considerations, we recommend that there is no need for the Bill to include a statutory provision as to the overall purpose of the planning system. **[5-10]**

Administration of the planning system

1.31 We recommend that persons appointed by the Welsh Ministers to discharge various functions be referred to in primary and secondary legislation not as “persons appointed” but as “inspectors”, so as to conform to current practice. [**5-11]**

1.32 We note that no body other than a local authority or a national park authority has ever been designated as a “local planning authority”. We accordingly recommend that there is no need to include in the Bill powers for enterprise zone authorities, urban development corporations, housing action trusts and new own development corporations to be designated as planning authorities. **[5-12]**

1.33 We also recommend that, in the light of the unitary system of local government in Wales, the simpler term "planning authority" should be used in place of "local planning authority" and "minerals planning authority". **[5-13]**

CHAPTER SIX: FORMULATION OF THE DEVELOPMENT PLAN

The development plan

1.34 The preparation of the various components of the development plan in Wales is the subject of Part 6 of the PCPA 2004, which was substantially amended by the P(W)A 2015. Once those amendments have been brought fully into force, the "development plan" will consist of the National Development Framework, the strategic development plan and the local development plan.

1.35 The amendments to the relevant primary legislation are of recent origin, and have not yet been tested in practice. We therefore recommend that the provisions currently in Part 6 of PCPA 2004, as amended, should simply be restated in the Bill. **[6-1]**

1.36 The process for formulating each component of the development plan involves a sustainability assessment (SA). In addition, an environmental assessment of each component must be carried out, in accordance with regulations implementing the EU directive on sustainable environmental assessment (SEA). The Local Development Plan Manual produced by the Welsh Government notes that the requirements of the SEA Regulations are best incorporated into the SA process. In the Consultation Paper we invited views as to the need for the SEA process as a separate requirement alongside the requirement for SA. In the light of the responses received, we recommend that the SEA process should be retained; but that the guidance on implementing the SA requirement should be drafted so as to minimise the burden in practice. **[6-3]**

Planning blight

1.37 We recommend that the statutory provisions relating to blight notices (in Chapter 2 of Part 6 of the TCPA 1990) should be restated in the Planning Bill in broadly their present form. **[6-5]**

CHAPTER SEVEN: THE NEED FOR A PLANNING APPLICATION

Definition of "development"

1.38 The provisions of section 55 of the TCPA 1990, providing an extended definition of "development" – for which planning permission is generally required – are at the heart of the planning system.

1.39 The law regarding the need for planning permission to be obtained for demolition is notoriously complex. We recommend that it could be simplified by omitting the power of the Welsh Ministers to exempt certain types of demolition from the definition of "development", with the same result being achieved by the use of the GPDO. **[7-1]**

1.40 Building operations are generally exempt from the need for planning permission, save for works to create new space underground, and works to create a significant amount of additional space in retail stores. We recommend that the law could be simplified by introducing a single provision to the effect that any works to increase the floorspace of a building, underground or otherwise, would always be development – with the GPDO providing for the cases in which such works would be automatically permitted. **[7-2]**

1.41 The TCPA 1990 includes no definition of the term "engineering operations". We suggested in the Consultation Paper that it might be appropriate for one to be included; but in the light of responses received, we have not pursued that. **[7-3]**

1.42 The TCPA 1990 currently provides that a change of use of a building (or a part of a building) from one dwelling to two is development requiring planning permission; but the position is less clear as to a change in the other direction. We recommend that any change in the number of dwellings in a building should be categorised as a material change of use, and thus development. **[7-5]**

1.43 There are other exceptions from the definition of development, which have been in the Act for many years; we make no proposals to change these. We consider that any new exceptions are generally best provided for in the GPDO, rather than by provisions in the Act.

Redundant methods of granting planning permission

1.44 The Act provides that planning permission can be granted by an enterprise zone scheme; no such scheme has been created in Wales for over thirty years. Simplified planning zones, created in 1986, have hardly been used at all, and apparently never in Wales. We consider that both procedures are redundant, not least in view of the existence of local development orders, and recommend that they should be abolished. **[7-9, 7-10]**

Certificates of lawfulness

1.45 Landowners should have a reasonably accessible means of establishing what can be done lawfully with their property. A procedure exists to enable anyone to obtain a certificate of lawfulness of existing (or proposed) use or development. We recommend that the statutory provisions relating to such certificates be included alongside those relating to the need for planning permission – as they were prior to 1991 – rather than linked to enforcement. **[7-11]**

1.46 In the Consultation Paper, we proposed that an application for planning permission should automatically be deemed to include an application for such a certificate in respect of the development that is the subject of the application. In the light of the responses we received, we have decided not to pursue that idea. **[7-12]**

CHAPTER EIGHT: APPLICATIONS TO THE PLANNING AUTHORITY

Seeking planning permission

1.47 At present, planning permission can be sought in three ways. First, it is possible to submit an application for full planning permission to carry out development. Such permission may be grated subject to conditions requiring certain matters to be approved before the development is started. Secondly, it is possible for permission to be sought and granted after the development has been carried out. Thirdly, it is possible to apply for outline permission, reserving certain matters for subsequent approval.

1.48 In the Consultation Paper, we suggested that it would be simpler to abolish outline planning permission, and for there to be a single procedure whereby anyone proposing to carry out development that is not permitted by a development order – or seeking to authorise development that has already been carried out – needs to make a planning application, accompanied by sufficient material to describe the development; this would effectively do away with the concept of "outline planning permission". In the light of concern expressed by a number of consultees as to the effect of such a change on investor confidence, we have decided not to pursue our provisional proposal; but we recommend that the primary legislation be restructured to increase clarity. **[8-1]**

1.49 It is important that every planning application is supported by sufficient material to enable the planning authority and other interested parties to know precisely what is proposed. Where an application is accompanied by material considered to be insufficient, the authority is able to serve on the applicant a notice that the application is invalid – against which there is a right of appeal. In the light of that provision, we consider that section 327A of the TCPA 1990 – which provides that an authority must not entertain such an application – is unhelpful, and recommend that it should not be restated in the new Bill. **[8-2]**

Determining planning applications

1.50 Under section 70A of the TCPA 1990, a planning authority has a power to decline an application where the applicant is seeking to wear down the authority by repeatedly submitting similar applications. We consider that the revised version of section 70A, introduced by section 43 of the PCPA 2004, should be brought into force in Wales. But we see no purpose in section 70B, which prevents twin-tracking – a practice that appears to have several practical advantages. We recommend accordingly. **[8-5, 8-6]**

1.51 A planning authority is currently required to produce a "community involvement scheme", specifying those who will be consulted during the formulation of the development plan. We recommend that a similar duty should apply to determine those who are to be consulted during the determination of applications for planning permission. **[8-7]**

Conditions attached to planning permission

1.52 We recommend that "conditions" be defined to include "limitations", doing away with the distinction between the two terms. **[8-9]**

1.53 The test for the validity of a condition is currently as explained by the House of Lords in *Newbury DC v Secretary of State* [1981], and elaborated in Welsh Government guidance. We recommend that this should be included in primary legislation. We also recommend that there should be a right to see draft conditions proposed by the planning authority. **[8-10]**

1.54 We noted in the Consultation Paper that it would be possible to include in the Bill an explicit power to impose certain types of conditions. On reflection, we recommend that such a provision should only be included where explicit statutory authority is necessary. Advice as to particular types of conditions should otherwise generally be in guidance – for example, as to *Grampian* conditions.[2] **[8-11, 8-12, 8-15, 8-16 and 8-18]**

1.55 There is currently uncertainty as to the status in law of pre-commencement conditions – that is, conditions requiring something to be done before the development is started. We suggested that it might be helpful for authorities to have a power (but not a duty) to categorise certain conditions as "true conditions precedent", going to the heart of the permission, such that a failure to comply with them would mean that starting any of the development would be unlawful. Such a categorisation would be subject to a right of appeal. This was not supported by consultees, who considered that the suggested procedure would be bureaucratic and burdensome. On reflection, we recommend against it. **[8-13]**

1.56 But we recommend that it should be possible for a developer to apply for a certificate that all pre-commencement conditions have been complied with. And where a development has commenced in breach of such a condition, the permission that would otherwise have authorised it is should be deemed to have been granted without the conditions in question, so that the other conditions may subsist and be enforceable. [**8-13]**

Approval of details required by conditions

1.57 In some cases, conditions attached to a planning permission require certain matters to be approved before the start of development. The procedure governing the obtaining of such approval is not as clear as would be desirable, and we recommend that it should be tightened up. **[8-19 to 8-21]**

Variation of planning permission

1.58 It is currently possible to seek to amend a planning permission, or a condition attached to it, under section 73 or 96A of the TCPA 1990. The precise procedure is determined by the nature and magnitude of the proposed change. In the Consultation Paper, we suggested that these procedures should be brought together into a single

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[2] A *Grampian* condition is one that prevents development starting – or, possibly, being occupied – until some other event has occurred (for example, a new housing development cannot be built or occupied until the access to the highway has been improved).

procedure to enable an applicant to apply for the variation of a permission. However, on reflection, we recommend that section 96A should be retained, as it provides a useful way to deal with non-material amendments. But section 73 should be amended to apply to any amendment to a planning permission, not just to conditions. **[8-23]**

1.59 We also recommend the introduction of an expedited procedure to enable an applicant to seek approval for the variation of a permission once the development has started, but only in non-controversial cases. **[8-25]**

Other points

1.60 In response to a number of comments from consultees, we recommend that there should be an explicit power for an authority to make a split decision, granting permission for only some of the development that was the subject of an application. And, in addition to the existing cases where reasons are required, an authority should be required to give reasons for a grant of permission in the face of a recommendation by officers to refuse. **[8-30, 8-31]**

CHAPTER NINE: APPLICATIONS TO THE WELSH MINISTERS

1.61 The provisions in the TCPA 1990 enabling a planning application to be made directly to the Welsh Ministers in the area of an underperforming planning authority are of recent origin – introduced by the P(W)A 2015 – and we do not recommend any change. **[9-1]**

1.62 Applications for planning permission for developments of national significance (DNSs) are decided by the Welsh Ministers in the light of a report by an inspector. Here too, the relevant primary and secondary legislation is of recent origin and has yet to be fully tested in practice; and we do not recommend any change other than as to one or two minor details **[9-2 to 9-4]**

1.63 The procedures allowing for the establishment of planning inquiry commissions to decide on proposals for major importance or raising novel technical considerations were introduced in 1968, and have never been used. We recommend that they should be abolished. **[9-5]**

CHAPTER TEN: THE PROVISION OF INFRASTRUCTURE AND OTHER IMPROVEMENTS

Community infrastructure levy (CIL)

1.64 The Community Infrastructure Levy (CIL) was introduced by the Planning Act 2008. It will only be within the legislative competence of the Welsh Assembly once the changes introduced by the Wales Act 2017 have been brought into effect. It is likely that the Welsh Government will then wish to review its policy on the operation of CIL in Wales, and it would seem to be premature to pre-empt such a review.

1.65 We therefore recommend that the statutory provisions relating to CIL, currently in Part 11 of the 2008 Act (as amended by the Localism Act 2011), should be incorporated in the Bill. **[10-1]**

Planning obligations

1.66 We recommend that the provisions of the TCPA 1990 relating to planning obligations (in sections 106 to 106B) should be incorporated in the Bill. The rules as to the purpose for which a planning obligation may be entered into, currently in regulation 122 of the CIL Regulations 2010, should also be included. **[10-2, 10-3]**

1.67 In the Consultation Paper, we suggested that it might be helpful for a power to be introduced enabling a single agreement to operate both as a planning obligation, under section 106, and as an agreement under the Highways Act 1980. And we provisionally proposed that the enforcement of a planning obligation could be made more straightforward by including the breach of such an obligation within the definition of a breach of planning control. In both cases, in the light of points raised by consultees, we have decided not to pursue the proposals at this stage, but recommend that they be considered in any future review of planning obligations. **[10-4, 10-5]**

1.68 We also suggested that it might be useful to introduce in Wales a procedure to enable the resolution of disputes as to the terms of a planning obligation, similar to the one envisaged by Schedule 9A of the TCPA 1990, which is to be introduced in England by the Housing and Planning Act 2016. And we asked whether the Welsh Ministers should be able to limit the enforceability of certain clauses in obligations, again in line with the 2016 Act. Here too, we were persuaded by consultees that such proposals would be better considered as part of an overall review of planning obligations, and we therefore do not pursue either. **[10-8, 10-9]**

1.69 We do however recommend that it should be possible for a planning authority to bind its own land by a planning obligation, and for a person other than the owner of land (such as a prospective purchaser) to be able to enter into such an obligation. In each case, we provide more detail as to how this might be achieved. **[10-10, 10-11]**

CHAPTER ELEVEN: APPEALS AND OTHER SUPPLEMENTARY PROVISIONS

Appeals

1.70 The TCPA 1990 provides that those determining an appeal "*may* deal with the application as if it had been made to them in the first instance". We provisionally proposed that the Bill should make it plain that they will always consider the applications afresh. In the light of comments received from stakeholders, and in particular those from the Inspectorate, we have decided not to proceed with this proposal. **[11-1]**

1.71 At present the Welsh Ministers can prescribe classes of appeals to be determined by a person appointed by them (in practice, an inspector). The vast majority are determined by inspectors. We therefore recommend that the Bill should provide that

all appeals are determined by inspectors unless the Welsh Ministers prescribe otherwise – rather than the reverse. **[11-2]**

1.72 We also recommend that the power to appoint assessors to assist inspectors be extended to apply to all appeals, including those determined on the basis of written representations. **[11-3]**

Other supplementary provisions

1.73 Where a purchase notice is to be served following an unsuccessful appeal to the Welsh Ministers against a refusal of planning permission, it is not clear when the 12-month time period within which to serve the notice starts. We recommend that the Bill should clarify that it runs from the decision on the appeal. **[11-5]**

1.74 The powers of a Welsh Ministers to extinguish public rights over a highway where a planning authority wishes to pedestrianise it in connection with the scheme to improve the area, under section 249 of the TCPA 1990, are similar to (but less extensive than) the power of an authority to pedestrianise a road (including a public road) under section 1 of the Road Traffic Regulation Act 1984. We therefore recommend that sections 249 and 250 of the TCPA 1990 are not restated in the Bill. **[11-8]**

CHAPTER TWELVE: UNAUTHORISED DEVELOPMENT

1.75 In this Chapter, we make several relatively minor recommendations as to technical reforms to procedure, designed to improve the operation of the enforcement system – not least in the light of relevant case law. We only highlight a few below.

Preliminary procedure

1.76 At present, there are two procedures enabling a planning authority to obtain information as to the ownership of land and its use – under sections 171C and 330 of the TCPA 1990. We recommend that it would be preferable for there to be a single procedure, resulting in the service of a "planning information order". **[12-1]**

1.77 Some enforcement procedures are modified in their application to "dwellinghouses" – entry without prior warning; service of temporary stop notices and stop notices. We recommend that this should apply in relation to all dwellings, including flats. **[12-2, 12-5, 12-16]**

Enforcement notices

1.78 We recommend that it should be possible for an enforcement notice to require steps to be taken to achieve either or both the of the purposes specified in section 173(4) of the TCPA 1990. And a notice relating to an unauthorised change of use should be able to require the removal of building works integral to a change of use. **[12-9, 12-10]**

1.79 At present, an appellant who appeals against an enforcement notice on "ground (a)" (that permission should be granted for the allegedly unauthorised development) is deemed to have applied for planning permission. We do not consider that any purpose is served by this reference to a "deemed planning application". We

recommend that the Welsh Ministers, on determining a ground (a) appeal, may grant planning permission, or discharge the condition in question, or issue a certificate of lawfulness, as appropriate. **[12-12]**

Stop notices

1.80 A stop notice is currently "served" on those responsible. We recommend that, as with an enforcement notice, a planning authority should "issue" a stop notice, which would come into effect on the date stated in it; copies could then be served as appropriate. The offence of non-compliance with a stop notice would then relate to a notice that has come into effect, rather than one that has been served. **[12-17, 12-18]**

Criminal penalties

1.81 We have reviewed the penalties for the various offences created by the TCPA 1990, and recommend that they be made more consistent. The offence of supplying false information in response to a request should attract a fine, not a sentence of imprisonment. Failure to comply with a breach of condition notice, or reinstating an unauthorised building [etc] after complying with an enforcement notice, should each be triable either by magistrates or in the Crown Court, and (in either case) punishable on conviction by a fine of any amount. **[12-24, 12-25]**

CHAPTER THIRTEEN: WORKS AFFECTING LISTED BUILDINGS AND CONSERVATION AREAS

Overlapping consents

1.82 At present, some development affecting a listed building requires planning permission, some requires listed building consent ("LBC"), and some requires both. In some cases, the limits of development permitted by a development order are different in the case of works affecting a listed building. Demolition of an unlisted building in a conservation area requires planning permission and conservation area consent ("CAC"), but planning permission is granted automatically (by a development order). Determining which forms of approval are required for any particular proposal can be bewilderingly complex.

1.83 Where two types of permission are required, that will require two applications, two committee reports, two decisions (although the online portal recognises the problem, and allows for a single composite application); and, where appropriate, two appeals, two appeal decisions, two enforcement notices, two enforcement appeals, and again two appeal decisions. Usually both permissions are granted, or both refused. Split decisions are possible, but rare.

1.84 The same policy considerations will underlie both types of decisions – the duty to preserve the listed building, and the duty to preserve and enhance the conservation area; the development plan; and all other relevant considerations.

1.85 In view of the significant overlap between the various consents, we suggested in the Scoping Paper that it might be worth unifying them into a single form of approval. In the Consultation Paper we considered range of options, from no change – retaining

planning permission, LBC and CAC, as at present – through to merging the three consents into one.

1.86 There was considerable opposition, especially from within the heritage sector, to the idea of losing LBC. We discuss the issue, and the views of consultees, at length in Chapter 13. For the reasons we give there, we consider on balance that to merge the consents would be a considerable simplification of the legislation and would not lead to any loss of control, nor to a loss of specialist expertise. As noted in paragraph 1.26 above, we also recommend the strengthening of the general duty to have regard to the desirability of preserving listed buildings. We therefore recommend that LBC should be merged with planning permission, by extending the definition of "development" to include any works affecting the special character of a listed building. **[13-1A]**

1.87 There was significantly greater support for the merger of CAC with planning permission than for the merger of LBC with planning permission. Both CAC and planning permission will usually be required for demolition in a conservation area (as well as planning permission for the ensuing new building). We recommend that demolition should only require planning permission. **[13-1B]**

Detailed points

1.88 We recommend that it should not be possible for a development order to grant planning permission for works to listed buildings; but that heritage partnership agreements should be able to do so. We also recommend that certificates of lawfulness should be available for works that currently require only LBC or CAC. **[13-2 to 13-4]**

1.89 We further recommend that grounds of appeal against the refusal of planning permission should be amended, to include the existing specific grounds relating to listed buildings and conservation areas. **[13-5]**

Unauthorised works

1.90 We recommend that unauthorised works to listed buildings and unauthorised demolition in a conservation area should remain a criminal offence, as at present – with the same penalties and defences as the corresponding existing offences under the Listed Buildings Act. **[13-6]**

1.91 We similarly recommend that the time limits within which it is possible to take enforcement action should not apply in the case of unauthorised works to listed buildings and unauthorised demolition in a conservation area, and that the grounds of appeal against enforcement notices be amended to include the existing specific grounds relating to listed buildings and conservation areas. **[13-7, 13-8]**

Other points

1.92 We do not recommend that scheduled monument consent be merged with planning permission, as the consenting authority is different, and the works involved will rarely overlap with those requiring planning permission. **[13-9]**

1.93 The law as to the extent of the protection offered by listing (currently in section 1(5) of the Listed Buildings Act 1990) is not clear in respect of objects and structures in

the curtilage of a building included in the list. We recommend that it should be made plain that pre-1948 objects and structures are to be included if they were within the curtilage of the building in the list as it was on 1 January 1969 or, if the building was listed after that date, if they were within its curtilage at the date it was listed. **[13-10]**

1.94 Areas of archaeological importance were introduced in 1979; and five were designated in 1984, all in England. They have never been used in Wales. We recommend that the power to designate them should be abolished. **[13-11]**

CHAPTER FOURTEEN: OUTDOOR ADVERTISING

Definitions

1.95 The definition of "advertisement", in section 336 of the TCPA 1990, is unsatisfactory – not least because it is circular. We recommend that it should be clarified. We also recommend that the word "land" should be used in place of "site", with the Bill and the Regulations where appropriate being drafted to refer to an advertisement being displayed "on or at" land. A clearer definition should be provided of "person displaying an advertisement". And these definitions should be included in the Bill alongside the other provisions relating to advertising. **[14-1 to 14-4]**

Deemed consent

1.96 Because the control of advertisements is primarily the subject of regulations, rather than in primary legislation, we have also included some recommendations for changes to be introduced when the regulations are next updated.

1.97 We provisionally recommend that the procedures relating to discontinuance notices – removing the deemed consent for particular advertisements – should be tightened up, so that such a notice is "issued" by the authority, with copies "served" on those deemed to be displaying the advertisement, and comes into force on a date stated in it. This would bring such procedures into line with those relating to enforcement notices. **[14-5]**

1.98 We recommend that deemed consent should be granted for an display of advertisements that has the benefit of planning permission (such as a shop fascia) – to avoid two approvals being necessary. We also recommend that the display of an advertisement on the exterior of a vehicle not on a highway (or one stationary on a highway for more than 21 days) should be brought within the scope of the regulations, and normally benefit from deemed consent, to enable planning authorities to bring particular displays within control. **[14-7, 14-8]**

1.99 We recommend that there should be a procedure, similar to applying for a certificate of lawfulness of existing or proposed development, to enable anyone to discover whether a particular display of advertisements is or would be lawful. And we recommend that deemed consent be granted for an advertisement on land that has been used for advertising for ten years – rather than, as at present, for an advertisement on a site that has been used since 1974. **[14-9, 14-10]**

Unauthorised advertisements

1.100 At present, there is a power to remove an unauthorised poster or placard, under section 225 of the TCPA 1990, but not the hoarding or structure on which it is being displayed (other than under the Dyfed Act 1987). We recommend the introduction of a new procedure, equivalent to the one currently available in Dyfed, enabling the removal of an unauthorised advertisement anywhere in Wales. **[14-12]**

1.101 In view of the ease with which advertisements can be put up and taken down, and in the light of the substantial gains that can be made from unauthorised advertising, we recommend that the maximum sentence on conviction for unauthorised advertising be increased to an unlimited fine. **[14-13]**

CHAPTER FIFTEEN: PROTECTED TREES AND WOODLANDS

Making of tree preservation orders

1.102 Tree preservation orders can be made to protect trees and woodlands in the interests of amenity. We conclude that it would not be helpful to include in the Bill a definition of "tree" or a "woodland" in this context; but that it would be helpful to make it clear that "amenity" includes appearance, age, rarity, biodiversity and historic, scientific and recreational value. **[15-1, 15-2]**

1.103 We recommend that the Bill (as well as the regulations) should make it plain that a tree preservation order can protect trees specified individually or by reference to a group of trees or an area. An area order is one that protects trees, of whatever species, anywhere within a specified area – and is typically used either to protect trees in open parkland or to provide interim protection for trees on a large development site. However, the use of area orders, other than on a short-term basis, can be problematic; and we therefore recommend that, when an area order is confirmed, it must should be converted into an individual, group or woodland order. We recommend that guidance should emphasise the desirability of converting existing area orders into individuals, groups or woodlands; but we do not recommend that area orders, if not converted, should cease to have effect. **[15-3]**

1.104 We also recommend that woodland preservation orders, as distinct from tree preservation orders, should be able to protect woodlands – including trees planted or self-seeded after the order was first made. **[15-3]**

Need for consent

1.105 The new system introduced by the Planning Act 2008 (whereby the details as to the need for consent for works to trees protected by an order, and the procedures for seeking such consent, are contained in regulations rather than in the order itself) has not yet been brought into effect in Wales. We assume that it will be.

1.106 Consent is currently not required for works to a protected tree that is dying or dead or has become dangerous. Dead and dying trees can often continue to provide habitats for wildlife; and the categorisation of a tree as dangerous is open to abuse. We recommend that the exemption from consent should only apply where works are urgently necessary to remove an immediate risk of serious harm. **[15-6]**

1.107 Consent to carry out works to a protected tree is not required where the works are necessary to prevent or abate a nuisance. The scope of this exemption is unclear – in particular, whether it applies where a tree is merely encroaching into neighbouring soil or airspace. We recommend that it would be preferable to remove the exemption altogether. **[15-7]**

1.108 We suggested in the Consultation Paper that it should be possible to carry out without consent works to a sapling not exceeding a specified size, save where it has been planted as a result of a tree replacement notice or a planning condition. In response to points made by those objecting to this suggestion, we have not pursued it. **[15-8]**

1.109 We recommend that there should be a procedure, similar to applying for a certificate of lawfulness of proposed use or development (CLOPUD), to enable anyone to discover whether particular works to a tree would be lawful. **[15-9]**

Tree replacement

1.110 We recommend that, where a protected tree has been felled unlawfully, or removed because it is dead, dying or dangerous, and a replacement must be planted, it should be sufficient to plant the replacement at or near the location of the tree being replaced – rather than, as at present, at precisely the same location. We also recommend that, where trees in woodland are to be replaced, the planting requirement should be expressed by reference either to the number of trees to be replaced or the area of woodland to be replanted. **[15-11]**

Unauthorised works

1.111 It is currently an offence (under section 210(1) of the TCPA 1990) to destroy a tree wilfully, or to damage it wilfully so as to be likely to destroy it. We recommend that the wording be changed to refer to "intentional or reckless" destruction or damage, so as to apply in the case of reckless or indirect damage, such as digging trenches for pipes and cables, using harmful chemicals, changing soil levels or grazing animals in woodlands. **[15-14]**

1.112 At present there are two offences under section 210 – works resulting in the death of a tree (s 210(1)) and other works (s 210(4)). We recommend that it would be more straightforward, and result in less scope for abuse, if there were to be a single offence, applicable in the case of any breach of a preservation order (or tree preservation regulations under the new system) – with the sentence varying in accordance with the seriousness of the offence. We also recommend that the prosecution should have to prove that the order had been served on the accused, or was available for public inspection; and that the order should record the date on which it was first made available for public inspection. **[15-15, 15-16]**

Trees in conservation areas

1.113 At present, a person carrying out works to a tree in a conservation area must give six weeks' notice to the planning authority. The authority can then, if it wishes, impose a tree preservation order; if it does, the applicant then must seek consent under the order. We recommend that this be simplified by enabling the authority to allow the works, possibly subject to a condition, or to impose a tree preservation order, without the need for a second application. **[15-17]**

CHAPTER SIXTEEN: IMPROVEMENT, REGENERATION AND RENEWAL

Unsightly land and buildings

1.114 It is possible for a planning authority to serve a notice under section 215 of the TCPA 1990, requiring land (including buildings) to be improved. We recommend that the law be clarified by making plain that a notice can only be issued where land is unsightly and where the unsightliness does not arise in the normal course of events from a lawful use of the land. We also recommend that a notice under section 215 cannot be served where the condition of the land results from the unlawful deposit of waste (which can be dealt with under powers in the Environmental Protection Act 1990). **[16-1]**

1.115 We recommend that appeals against such notices should generally be determined by inspectors. **[16-4]**

1.116 Alongside the procedure in section 215, there is also a procedure under section 89 of the National Parks and Access to the Countryside Act 1949, whereby an authority can carry out remedial works to any unsightly land, and can carry out landscaping works on any land; and can if necessary acquire the land. We recommend that this be brought into the new Bill. We also recommend that there should be a new power enabling the authority to act where the owner is unknown or cannot be contacted – but that the power of compulsory acquisition should apply only where it wishes to carry out works to remediate the state of land in poor condition, and not where it wishes to carry out improvement works to land already in reasonable condition (except where the owner cannot be traced). **[16-5, 16-6]**

Graffiti and fly-posting

1.117 There used to be specific provisions to enable planning authorities in Wales to deal with graffiti and fly-posting. We are recommending that these should be reinstated, so as to enable the Welsh Ministers to make regulations that enable planning authorities to take appropriate action to secure the removal of unsightly or offensive graffiti and to deal with persistent unauthorised advertising, and community councils to serve fixed penalty notices in appropriate cases. **[16-7]**

Area-based initiatives

1.118 Enterprise zones were introduced in the Local Government, Planning and Land Act 1980. Four orders were made in the early 1980s designating zones in Swansea and Milford Haven; each lasted for ten years. No further orders have been made. A new type of “enterprise zone” was subsequently introduced in the Finance Act 2012. We recommend that the system of enterprise zones set up under the 1980 Act be abolished in Wales (leaving in place the system of enterprise zones under the 2012 Act). **[16-8]**

1.119 New town development corporations at Cwmbran and Newtown (Powys) were designated under the New Towns Act 1949; both were effectively wound up in the 1980s. Only one urban development corporation was ever designated in Wales (at Cardiff Bay), under the 1980 Act; it was dissolved in 2000. No housing action trusts have ever been designated in Wales under the Housing Act 1988. One rural development board, in mid-Wales, was proposed in the late 1960s; but none was ever set up. We recommend that all these schemes be abolished. **[16-9 to 16-12]**

Acquisition of land for planning purposes

1.120 In the Consultation Paper, we suggested that it would not be appropriate to include the provisions of the TCPA 1990 relating to acquisition of land for planning purposes. However, on reflection, we consider that it would be straightforward to incorporate Part 9 (other than section 231), and sections 251, 258, and 271 to 282 – without any amendments other than purely as to drafting style. This would have the advantage that the whole of the TCPA 1990, not merely most of it, would apply only in England. That would make the drafting of the amendments to the TCPA 1990 much more straightforward. More importantly, users of the legislation, on both sides of the border, will know that, in future, it will only be necessary to refer to one piece of legislation. **[16-13, 16-14]**

CHAPTER SEVENTEEN: HIGH COURT CHALLENGES

1.121 Part 12 of the TCPA 1990 provides for challenges in the High Court to the validity of certain orders and decisions. These include various orders made by planning authorities, and local or strategic development plans; as well as most decisions of the Welsh Ministers, including in response to applications decided by them (for a development of national significance, or following a call-in) and appeals.

1.122 The time limit within which to bring a High Court challenge under Part 12 has always been within six weeks of the date of the decision being challenged (or four weeks in the case of certain decisions relating to enforcement appeals). There used to be an automatic right to institute such a challenge; but the permission of the court is now required (since the coming into force of the Criminal Justice and Courts Act 2015).

1.123 Other decisions, notably those of planning authorities to grant planning permission, may only be challenged by way of an application for judicial review, under Part 54 of the Civil Procedure Rules (CPR). Such a challenge may only be brought with the permission of the Court. The time limit within which permission must be sought used to be "promptly, and in any event within three months"; since 2013 it has been six weeks.

1.124 Very few other Acts contain special challenge procedures equivalent to those in Part 12 of the TCPA 1990. And the procedure under Part 12 is now virtually identical to that under Part 54 of the CPR – particularly as regards time limits and the need for permission from the Court.

1.125 We therefore recommend that Part 12 should not be restated in the new Bill, so that all High Court challenges must in future be brought by way of an application for judicial review under Part 54 of the CPR. **[17-1]**

CHAPTER EIGHTEEN: MISCELLANEOUS AND SUPPLEMENTARY PROVISIONS

1.126 The last Chapter of the Consultation Paper deals with a variety of topics that relate to the whole of the Bill, and its application in particular situations.

Statutory undertakers

1.127 Part 11 of the TCPA 1990 deals with the special position of statutory undertakers – that is, broadly, bodies that provide various public services – in relation to planning law. There are various definitions of "statutory undertaker", in the TCPA 1990 and in the GPDO 1995. Any reforms in this area would not be possible if they involve change to legislation outside the legislative competence of the Assembly. However, subject to that, we recommend that the Bill should rationalise as far as possible the categories of bodies that are to be treated as statutory undertakers, and to clarify in each case what is to be considered as operational land and who is the appropriate Minister. **[18-1]**

Minerals

1.128 There are in the TCPA 1990 and in the GPDO 1995 a series of interlocking definitions of "minerals", "the winning and working of minerals", and "mining operations". We recommend that these are rationalised as far as possible. **[18-5]**

1.129 It has long been recognised that mineral working is different from other forms of development in a number of respects. As a result, planning law and procedures for such development have been the subject of many changes over the years. We provisionally consider that the special provisions regarding minerals permissions granted before 22 February 1982 (in Schedule 2 to the Planning and Compensation Act 1991 and Schedule 13 to the Environment Act 1995) need not be restated in the Bill, but should remain as they are. However, the special provisions relating to more recent permissions (in Schedule 14 to the 1995 Act and Schedule 9 to the TCPA 1990) should be included. **[18-6, 18-7]**

Fees

1.130 There are an increasing number of situations in which the Welsh Ministers and planning authorities may charge for the performance of planning functions. We recommend that the Bill includes a power enabling Welsh Ministers to amend the scale of fees relating to the performance of any such functions, by publishing the new scale rather than prescribing it in regulations – on the understanding that the income from the fees so charged does not exceed the cost of performing the function in question. **[18-9]**

Inquiries, hearings and other proceedings

1.131 The principles on which parties to inquiries and other proceedings have been entitled to claim their costs have become established over many years. In short, the party claiming costs must be able to show it has been led to incur unnecessary expense by the unreasonable behaviour of the opposing party. We recommend that this principle should be included in the Bill. **[18-12]**

Definitions

1.132 The term "dwellinghouse" is used in a variety of contexts, and there are several different statutory definitions, which are inconsistent and sometimes mutually contradictory as to whether they include a flat. We recommend that the word be replaced with the term "dwelling", defined so to include a house and flat (and by

implication other forms of dwelling, such as maisonettes, houseboats, and yurts). **[18-15]**

1.133 "Curtilage" is another word not in everyday use, and for which there is no obvious synonym. We recommend that the curtilage of a building should be defined as land closely associated with it, and the question of whether a structure is within the curtilage of a building be determined with regard to the physical layout of the building, the structure, and the surrounding buildings and land; the ownership, past and present, of the building and the structure; and their use and function, past and present. **[18-16]**

1.134 We also recommend that the definitions of "agriculture", "agricultural land" and "agricultural unit" should be rationalised and simplified. **[18-17]**

PART ONE: GENERAL PRINCIPLES

Chapter 2: Towards a new Planning Code for Wales

INTRODUCTION

2.1 This Chapter summarises briefly the need for reform in this area of the law and, against that background, the process by which we have arrived at the recommendations in this, our Final Report.

PLANNING LAW IN WALES

Background: pre-2006

2.2 In our Consultation Paper, we explored the present state of the law governing town and country planning in Wales. We recounted the history of the legislation, noting that until 2007 primary legislation on planning was the exclusive preserve of the United Kingdom Parliament in Westminster.[1]

2.3 The first significant Act was the Town and Country Planning Act ("TCPA") 1947, which came into force on 1 July 1948, almost exactly seventy years ago. It was amended on various occasions, being in due course replaced by the TCPA 1962, which was in turn amended (in particular by the TCPA 1968) and then replaced by the TCPA 1971. Further changes were made by the TCP (Amendment) Act 1972, the Local Government, Planning and Land Act 1980, and the Housing and Planning Act 1986.

2.4 The Government then invited the Law Commission to consolidate planning legislation again, this time incorporating a small number of minor technical amendments.[2] The result of that exercise was the enactment of four new statutes – the TCPA 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990,[3] the Planning (Hazardous Substances) Act 1990 and the Planning (Consequential Provisions) Act 1990. They were almost immediately amended by the Planning and Compensation Act 1991 (principally in relation to enforcement) and the Environment Act 1995 (minerals and national parks) – the latter coming into force on 23 November 1996.

2.5 All the pieces of planning legislation noted above, and almost all associated secondary legislation, applied to Wales just as to England. And policy was the same in the two countries until the 1990s.

2.6 The Local Government (Wales) Act 1994 then introduced a unitary system of local government, which had consequences for the administration of the planning system, from 1 April 1996. Distinctive national planning policy started appearing from around 1996, and separate secondary legislation governing the mechanics of the planning system in Wales from the late 1990s. The Planning and Compulsory Purchase Act

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1 Consultation Paper, paras 1.12 to 1.25.

2 Law Com 189, Cm 958.

3 Referred to in this Report, as in practice, as the "Listed Buildings Act".

("PCPA") 2004 ushered in different systems of development planning in England and Wales.

Planning law since 2006

2.7 Since the coming into force of Part 3 and then Part 4 of the Government of Wales Act 2006, the National Assembly for Wales has had exclusive responsibility for planning legislation. This has resulted in the Mobile Homes (Wales) Act 2013, the Well-being of Future Generations Act (Well-being Act) 2015, the Planning (Wales) Act ("P(W)A") 2015, the Local Government (Wales) Act 2015, the Environment (Wales) Act 2016, and the Historic Environment (Wales) Act 2016.[4]

2.8 The Westminster Parliament passed the Planning Act 2008, which governed the handling of major infrastructure projects in both England and Wales – although it is noteworthy that the Act applies somewhat differently on either side of the border. Further legislation passed in Westminster significantly affected planning, but only in England, with a major new Act appearing almost annually. Some (but not all) of the changes introduced by those Acts were introduced in Wales by the P(W)A 2015.

2.9 Finally, as a result of the Wales Act 2017, which came into force on 1 April 2018, the Assembly now has legislative competence in relation to all planning matters – including, for the first time, the Community Infrastructure Levy ("CIL").

2.10 Because of this somewhat piecemeal process of legislation, there are now in the region of 20 statutes governing planning and related matters in England and Wales – in some cases applying significantly differently in the two countries – as well as a further eight applying only in Wales, and twelve applying only in England. The precise number depends on what is understood by the term "planning".

2.11 In our Consultation Paper we noted that this has led to an unnecessarily complex legislative code, which is difficult even for seasoned practitioners to find their way around, and almost impossible for lay people. And only some of it is available in Welsh. The unsatisfactory nature of planning legislation – originally to be found in a single-volume loose-leaf work, but now requiring ten volumes[5] – has been well-known by practitioners for many years. The particular problems of trying to understand the law as it applies in Wales were noted in debates in Parliament on the Wales Bill.[6]

THE INVOLVEMENT OF THE LAW COMMISSION

2.12 Against that background, the Law Commission was invited to review the law relating to town and country planning in Wales, and to make recommendations to modernise and simplify the law. We looked particularly at the development management process, and spoke with a range of key stakeholders.

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4 Consultation Paper, paras 1.26 to 1.44.

5 *Encyclopedia of Planning Law and Practice*, 10 vols., Sweet & Maxwell.

6 Consultation Paper. paras 1.45 to 1.75.

2.13 We did not find that there was a need for further fundamental policy-driven reform in that area. That exercise had largely been achieved by the Independent Advisory Group ("IAG") and the Welsh Government, resulting in the passing of the P(W)A 2015, the Historic Environment (Wales) Act 2016, and the other pieces of legislation referred to above. However, widespread concern was expressed as to the complexity and inaccessibility of the law in this area.

2.14 In agreement with the Welsh Government, therefore, the project was reformulated, to encompass the consolidation and simplification of planning legislation for Wales, including:

1) the restatement of the law in a single code, so as to be easily accessible;

2) the making of adjustments, to produce a satisfactory consolidated text;

3) the simplification of the law by way of streamlining and rationalising unnecessary process and procedure; and

4) the writing into statute of propositions derived from case law.

Our recommendations on the form and accessibility of the law applicable in Wales

2.15 This review coincided with a more wide-ranging exercise being carried out by the Law Commission, also at the invitation of the Welsh Government, to review generally the form and accessibility of the law applicable in Wales. The Commission's final report on that subject, published in June 2016,[7] noted the need for the law to be clear and accessible and surveyed the reasons why the law in Wales had become inaccessible – in part a result of problems of inaccessibility of the law affecting the United Kingdom as a whole, but compounded in Wales by the nature and process of devolution.

2.16 To address these problems, we recommended that the Welsh Government pursue a programme of codification, to be executed in accordance with our further recommendations. In particular, legislation whose subject-matter is within the competence of the Assembly but is scattered across a number of statutes should be brought together in a single piece of Assembly legislation, accompanied by reform as appropriate. And future legislation in the subject area of a code would take effect by way of amending the code.

2.17 The Welsh Government accepted, or accepted in principle, all but one[8] of our recommendations. In April 2017 the Counsel General announced the launch of a pilot programme of consolidation, codification and better publication of legislation. He also explained that the Welsh Government saw a code not simply (as we had conceived it) as a piece of Assembly legislation, but rather as a collection of related primary legislation, secondary legislation and guidance, all of which should be accessible together through the Law Wales portal.

2.18 The present project became one of the constituents of the pilot programme. If our recommendations in this Report are implemented, it will lead to the emergence of a

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7 *The Form and Accessibility of the Law Applicable in Wales* (Law Com No 366), June 2016.

8 A recommendation as to responsibility for Welsh language terminology was not accepted.

single Planning Act to replace all of the 30 or so statutes currently in force in Wales; accompanied by related secondary legislation and guidance, this can form the centrepiece of Wales's first Code.

THE SCOPING PAPER

2.19 Simultaneously with the publication of our report on the Form and Accessibility of the Law, we published in June 2016 a Scoping Paper[9] on the planning project, setting out our provisional views as to the nature and scope of a possible codification and simplification exercise. This was made available online, and a wide range of key stakeholders were sent a copy or notified of its existence.[10]

2.20 Over 60 organisations and individuals responded, or met us to discuss its contents.[11] They told us of the problems caused by the present system, and identified the likely benefits of consolidation and simplification. They also made various detailed points in relation to specific topics.[12]

THE CONSULTATION PAPER

2.21 We considered carefully all the responses to the Scoping Paper, and continued our research, in consultation with the Welsh Government. In November 2017 we published a substantial Consultation Paper, *Planning Law in Wales*.

2.22 The first two chapters of the Consultation Paper, *General Principles*, set out in slightly more detail the introductory material we have summarised above. The third chapter outlined our provisional conclusions as to the scope of the codification exercise. The fourth chapter described the nature of the technical reforms we were making. The remaining chapters (5 to 18) set out a series of possible technical reforms, framed as consultation questions.

The scope of the codification exercise

2.23 As to the scope of the codification exercise, we confirmed that any new Bill should include all the core planning provisions – that is, those dealing with the purpose of the planning system, how the system is administered, the plan-making process, the nature of development, the process of seeking planning permission, remedies, and enforcement. This would include both the provisions currently in the TCPA 1990 and the PCPA 2004, and those scattered through various other statutes.

2.24 We also suggested that it should include provisions ancillary to the development management system – modification and revocation of permission; discontinuance

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9 *Planning Law in Wales: Scoping Paper* (Law Commission Consultation Paper No 228), June 2016 (referred to in this report simply as "Scoping Paper").

10 Consultation Paper, Chapter 2.

11 Listed in Consultation Paper, Appendix A. An analysis of the responses is available online.

12 Noted in the relevant topic chapters in Part Two of the Consultation Paper.

action; purchase notices; highways affected by development; and application to minerals development, statutory undertakers and the Crown – as well as challenges in the courts; and the provision of infrastructure by means of CIL and planning obligations.[13]

2.25 We also explored a number of other consent regimes that overlap with the main planning system or operate closely alongside it. We thus explored whether it would be possible and practical to merge planning permission with listed building consent, conservation area consent and scheduled monument consent. We also explored the special regimes relating to the control of outdoor advertising and works to protected trees.[14]

2.26 We then considered the various statutory provisions relating to improvement, regeneration and renewal, found in the TCPA 1990 and related statutes, concluding that it would be appropriate for the new Planning Bill to include a clear restatement of the law relating to the powers of public authorities to bring about improvement on private land.[15]

2.27 We accordingly concluded that the new Planning (Wales) Bill should include as far as possible all of the primary legislation relating to:

1) the planning and management of development (including works affecting listed buildings and conservation areas);

2) the provision of infrastructure and other improvements;

3) outdoor advertising and works to protected trees;

4) public-sector led improvement and regeneration (insofar as currently within the TCPA 1990); and

5) supplementary and miscellaneous provisions.

2.28 We noted the possibility that there would be a Historic Environment (Wales) Bill emerging at around the same time as the Planning (Wales) Bill. That would be largely a consolidation, without technical reform.[16]

2.29 We also considered but rejected the possibility of including within a new Planning Bill the statutory provisions relating to the countryside and rights of way; compulsory purchase and compensation; hazardous substances; major infrastructure projects; approval under the Building Regulations; and various other self-contained codes.[17]

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13 Consultation Paper, paras 3.18 to 3.46.

14 Consultation Paper, paras 3.47 to 3.62.

15 Consultation Paper, para 3.63 to 38.82.

16 As to the difference between consolidation and our conception of codification, see *Form and Accessibility of the Law Applicable in Wales*, para 2.14.

17 Relating to transport infrastructure, mobile homes, high hedges, and protected wrecks.

2.30 We briefly consider again the scope of the codification exercise in Chapter 4 and Chapter 16.[18]

Technical reforms to the legislation

2.31 In the Scoping Paper, we had identified four (to some extent overlapping) categories of possible technical improvements to the current legislative framework:

1) clarification where words or phrases used in the legislation lack clarity or consistency;

2) improvements to streamline procedure or amend discrepancies;

3) amendments where provisions do not reflect established practice; and

4) rationalisation or removal of duplicative, obsolete or uncommenced provisions.

2.32 Respondents to the Scoping Paper broadly supported those categories, and made various suggestions relating to particular topics, which we considered in the relevant topic-based chapters in Part Two of the Consultation Paper.[19] A similar approach has been adopted in this Report.

2.33 We also suggested that it would be appropriate to review the balance between primary and secondary legislation, although we considered that, overall, the present balance was broadly correct.[20] And we proposed some reforms that would need to be the subject of amendments to secondary legislation – particularly in those areas of planning law that are principally governed by secondary legislation (notably advertising and trees[21]).

2.34 We tentatively considered whether it would be desirable to codify case law – that is, principles derived from judicial decisions. We concluded that this might sometimes be appropriate. However, in line with the caution expressed in the Scoping Paper, and by a number of those responding to it, we generally concluded that codification of case law is not as helpful as it might at first sight appear to be.[22]

2.35 In the light of those broad principles, we outlined in Part Two of the Consultation Paper the existing law in relation to each of the main topic areas within the broad field of planning law, and put forward 186 possible reforms, in the form of Consultation Questions. The topics were grouped into fourteen Chapters, as follows:

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18 See **paras 4.28 to 4.48 and 16.98 to 16.111**.

19 Consultation Paper, paras 4.4 to 4.28.

20 Consultation Paper, paras 4.39 to 4.50.

21 Consultation Paper, Chapters 14 and 15.

22 Consultation Paper, paras 4.51 to 4.98.

5. Introductory provisions
6. The formulation of the development plan
7. The need for a planning application
8. Applications to the planning authority
9. Applications to the Welsh Ministers
10. The provision of infrastructure and other improvements
11. Appeals and other supplementary provisions
12. Unauthorised development
13. Works affecting listed buildings and conservation areas
14. Outdoor advertising
15. Works to protected trees
16. Improvement, regeneration and renewal
17. High Court challenges
18. Miscellaneous and supplementary provisions

2.36 The chapters in Part Two of this Report follow the same order.

Responses to the Consultation Paper

2.37 The Consultation Paper was published in November 2017, with a four-month period for responses, expiring on St David's Day, 1 March 2018. In the following Chapter, we describe the consultation exercise undertaken, and the general character of the responses we received.

Chapter 3: The consultation exercise

INTRODUCTION

3.1 In the previous Chapter, we described the background to the codification project, leading up to the publication of the Consultation Paper in November 2017. In this Chapter, we outline briefly the consultation exercise we carried out following the publication.

THE DISTRIBUTION OF THE CONSULTATION PAPER

3.2 We distributed the Consultation Paper electronically to over 500 stakeholders, and sent hard copies where requested.

MEETINGS WITH STAKEHOLDERS

Meetings solely to discuss Consultation Paper

3.3 The Consultation Paper was launched at an event in Cardiff, hosted by the Royal Town Planning Institute ("RTPI") and sponsored by Francis Taylor Building (FTB), in November 2017, repeated in Colwyn Bay in February 2018.[1] Each was addressed by representatives of the main professions and organisations working in the field.

3.4 Planning Aid Wales and the Town & Country Planning Association organised an event at the University of Cardiff in February 2018, to publicise our proposals, particularly to third sector groups.

3.5 We also had particularly useful meetings with senior planning officers from most of the planning authorities, helpfully organised by the three regional groups of the Planning Officers Society of Wales ("POSW"), in Mold, Caerphilly and Llandeilo.

3.6 And we met with members of the Royal Institution of Chartered Surveyors (RICS) at meetings in Cardiff and Llandudno Junction.

Presentation at meetings organised by others

3.7 We were also invited to give a presentation on the project, and on our proposals, at events organised by various bodies – an event entitled Development Management Conversations organised by the Welsh Government; the Future Renting Wales Conference, organised by the Residential Landlords Association; a regular meeting of the Historic Environment Group, at Fonmon Castle, Barry; and an event for town councils and community councils organised by One Voice Wales in Llandrindod Wells.

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[1] The meeting in Colwyn Bay was postponed from December to February, due to adverse weather.

3.8 We also made presentations at the two FTB Annual Planning Law Seminars in Cardiff, the 39 Essex Chambers Planning Law Conference in London, a meeting of the UK Environmental Law Association in Cardiff, and a meeting of the Joint Committee of National Amenity Societies in London.

3.9 Each of these meetings was open to all, and enabled us to present the principal proposals in the Consultation Paper to a wide selection of users of the planning system in Wales.

Meetings with other stakeholders

3.10 Thirdly, we met representatives from a number of relevant organisations – the Planning and Environment Committee of the Law Society, the Royal Society of Architects in Wales, the Welsh Planning Consultants Forum, the National Assembly Cross-Party Group on Housing, Community Housing Cymru, the Home Builders Federation, the Minerals Products Association, the Royal Society for the Protection of Birds ("RSPB"), the Woodland Trust, the Church Buildings Council, and the Department of Housing, Communities and Local Government.

3.11 Each of these groups had a chance to circulate our proposals to their members, and to produce responses accordingly.

THOSE WHO RESPONDED

3.12 We received 165 responses, from a wide range of individuals and organisations – see Appendix A for complete list.

3.13 We heard from most of the planning authorities in Wales – both local authorities and national park authorities – and various local authority representative bodies (including POSW). We also had representations from 21 community and town councils, and from a range of other public bodies. We have had a number of meetings with officials from the Welsh Government (including Cadw). And we had particularly helpful comments from the Planning Inspectorate ("PINS").

3.14 We had a range of views from developers, landowners, and housing bodies. And we had many representations from third sector organisations (including national and local heritage bodies, faith groups, tree-related organisations, and others) – not least in relation to our proposals in Chapter 13 (the historic environment) and Chapter 15 (trees and woodlands).

3.15 And we received responses from a range of professional bodies (representing barristers, solicitors, architects, planners, surveyors, engineers, conservation professionals and others), and from individual professionals and other individual respondents.

Summary

3.16 We are satisfied that that the provisional proposals in our Consultation Paper were brought to the attention of a wide range of stakeholders.

THE NATURE OF THE RESPONSES WE RECEIVED

3.17 In response to the circulation of our Consultation Paper, and the various meetings with groups and individuals noted above, we received a good selection of views.

3.18 Some consultees produced general comments relating to the codification exercise as a whole. Some responded to every question, in many cases in considerable detail. Some responded to just a few questions that were of particular concern; or to one chapter.

3.19 In the following Chapter, we summarise those responses we received which consisted of or contained comments on the codification exercise as a whole. In the topic chapters (5 to 18), we summarise the principal responses relating to each topic

3.20 In each case, we have not mentioned every response – as a number of consultees, not surprisingly, made similar points. And in some instances we have paraphrased the comments made by a particular consultee. But we have attempted to reflect the overall tone of the responses as a whole.

3.21 Some of our suggestions, particularly the less consequential ones (for example the removal of reference to war-time rules) but also the proposals to do away with unused legislation, were universally popular, with unanimous or almost unanimous support from those who responded. Some generated comments that were evenly split for and against; in a few cases, a majority of respondents disagreed. However, the responses, taken as a whole, were generally supportive of our proposals.

3.22 A small number of our provisional proposals (notably those related to outline planning permission and those relating to the possible unification of listed building consent and planning permission) attracted a large volume of responses, principally from those with a specialist interest in the topic concerned. The responses were mixed, with several expressing strong opposition. We have considered them all very carefully, and we are as a result not pursuing our original proposal to merge outline and detailed planning permission (see **Chapter 8**). But we still consider, on balance, that listed building consent and conservation area consent should be merged with planning permission. We discuss the arguments for and against in **Chapter 13**.

3.23 We emphasise that we have not been carrying out a simple referendum, but have sought to reach a conclusion as to what represents the most appropriate form for the legislation governing the planning system, in the light of the various comments that we have received.

Chapter 4: General responses to the Consultation Paper

INTRODUCTION

4.1 As explained in the previous Chapter, we received responses to the Consultation Paper from a wide range of individuals and groups. The great majority of the responses related to the specific questions we asked in Part Two of the Paper; these have been incorporated in the topic chapters in Part Two of this Report. However, some consultees made some general points, relating to the codification exercise as a whole. We summarise those points in this Chapter.

VALUE OF CODIFICATION

4.2 A number of consultees commented on the benefits of codification. Given the volume of comments on this point, we divide responses broadly into public authorities, professional bodies, private sector bodies and their advisers, third sector organisations, and individual consultees (recognising that some consultees may not fit easily into one particular category).

Public authorities

4.3 There was overwhelming support for the codification exercise from the Planning Inspectorate (PINS) and from planning authorities.

4.4 PINS noted that it was "generally supportive of the suggested proposals", and that "the Law Commission has set out many worthwhile and reasonable improvements to current planning legislation."

4.5 Most authorities supported codification in principle. Pembrokeshire Coast National Parks Authority, National Parks Wales, and Carmarthenshire CC all suggested that the Consultation Paper "presents an overwhelming case for the creation of a new Planning Code for Wales". Newport City Council noted that "there is masses of legislation relevant to Wales and it would be helpful [to have] a consolidated Code".

4.6 The North and Mid Wales Association of Local Councils said that "the Association supports the introduction of a Planning Bill which consolidates all the others." Presteigne and Norton Town Council described codification as "very sensible and … very helpful to the lay person." Llandysilio Community Council and Llandrinio & Arddleen Community Council said that they "appreciate the overarching importance of tidying up and bringing together existing planning law". Cynwyl Elfed Community Council was more cautious, noting that:

> Generally there is a need to order the current legislation, to clean and eliminate legislation which is never used. But, care should be taken to keep the important legislation.

4.7 We agree, and we are grateful to consultees who flagged specific provisions that might be worth retaining.

4.8 The Welsh Language Commissioner also supported codification in principle:

> I also support the intention to try and simplify and reinforce planning law as it is relevant in Wales and to produce a new Planning Bill and Planning Code. Such a move would also provide an opportunity to ensure that a large piece of legislation which affects Wales is available through the medium of Welsh.

Professional bodies

4.9 The relevant professional bodies generally supported codification in principle. The Royal Town Planning Institute ("RTPI") Cymru said that it supported "a fully bilingual statute applicable to the planning system in Wales…There is a need to ensure that practitioners can easily access and identify the laws applying in each country." The Chartered Institute of Building commented that "the CIOB welcomes steps taken to simplify planning law." The UK Environmental Law Association stated that "the central themes of consolidation and clarification rather than attempting significant amendments of the substantive law are to be welcomed".

4.10 Likewise, the Bar Council stated that it "supports the Law Commission's objectives in proposing reforms to planning legislation in Wales through a consolidation and simplification of the current legislation". It added that:

> We agree that such an approach would make the planning system in Wales far more accessible to the public as well as to those more used to dealing with the planning system, would help avoid inconsistent decisions being made, and would bring about greater fairness overall. For this reason, we agree with the majority of the proposals in the consultation paper.

Private sector bodies

4.11 Many of our consultees were from landowners and developers. These generally supported planning law consolidation. National Grid stated that:

> The suggestion seems intended to provide useful foundations to the broader revisions to the planning system in Wales. There is a logic to the structure proposed, the revisions seem likely to work well, and should help to achieve the stated aims. … The proposed rationalisation of the planning system within Wales will, we believe, have the long-term effect of simplifying the operation of planning policy and development control in Wales. This is a useful change to offset some of the additional costs that may come from an increasingly divergent planning system in England and Wales.

4.12 Innogy Renewables UK, a major energy developer and operator in the UK, was very supportive of planning law codification:

> We welcome many of the recommendations included in the Law Commission's consultation which should address the complex and often confusing structure of the existing legislative framework in Wales. We

> therefore support the work of the Law Commission, along with the principles of simplification, consolidation and codification of planning law in Wales.

4.13 Tidal Lagoon Power, a Welsh developer associated with large energy projects, made similar comments.

4.14 Some stakeholders highlighted the importance of not changing the law for the sake of change when it was working well. The Home Builders Federation stated that:

> The HBF are supportive of the general principle of codification and note that this second consultation has considered far wider issues than original envisaged. We do however have some concerns that some of the areas of proposed change are ones which the industry does not have issues or problems with so question the need for change.

4.15 This sentiment was echoed by Redrow Homes, who noted that:

> Redrow supports the principle of a new Planning Code to consolidate existing planning legislation. This includes the removal of legislation that has never been used or not been applicable for many years. … However, change for the sake of change should not be made.

4.16 We have taken these concerns on board. While the overall aim of our project is to simplify and consolidate the law, where the existing law is widely accepted and understood in its current form we are in favour of an approach that could be described as "if it isn't broken, don't fix it". We are grateful to the many consultees who have emphasised this point in respect of several of our provisional proposals.

4.17 The Mineral Products Association took a less positive view of codification overall:

> We applaud the recognition of the need to review the system and feel this is long overdue. However, whilst planning law is undoubtedly overly complex, we do not feel that the measures proposed in the consultation will improve the effectiveness and efficiency of the system.

4.18 This concern appears to relate to the scope of the codification exercise, in particular the lack of detailed proposals for reform of the law relating to minerals. We discuss the scope of codification in more detail below.

4.19 We also heard from a number of professional firms, advising landowners, developers and public authorities. Arup, an independent firm of designers, planners, engineers and consultants, stated that "rationalising the excessive amount of planning legislation in Wales is a significant step towards streamlining the existing planning system and will ultimately benefit all stakeholders involved." Elfed Williams of ERW Consulting was similarly positive.

4.20 Douglas Hughes Architects Ltd provided a useful insight into the effect planning law consolidation could have on a medium-sized firm:

> We broadly welcome simplification of primary legislation related to land use and development and believe that by doing so it will save unnecessary time,

> work and expense both for our clients and ourselves. We usually manage the whole process [for our clients], from undertaking surveys and sketch schemes through to completion of works on site. The area that proves most problematic for us to manage is … obtaining planning permission. … Simplifying the planning process and providing our clients with more certainty would therefore be most beneficial and welcome.

Third sector organisations

4.21 There was widespread support for planning law codification from the third sector (charities and voluntary organisations). The National Trust "welcomes the work of the Law Commission and the principles of simplification, consolidation and codification of planning law in Wales" and "welcomes the potential benefits of greater engagement and involvement in the planning system with simplification and codification". The Theatres Trust was "supportive of the stated intention to simplify and consolidate planning law in Wales". The Royal Society for the Protection of Birds stated that "we welcome your consultation and fully support the progressive move towards a comprehensive but simpler planning code in Wales." Planning Aid Wales was also positive about codification:

> As an organisation that seeks to improve understanding of, and accessibility to, planning processes, PAW strongly supports the proposals to clarify and simplify statutory planning provisions.

4.22 The Churches' Legislation Advisory Service ("CLAS") and Cytûn (Churches Together in Wales) were less positive about the need for planning law codification:

> Neither CLAS nor Cytûn, nor our member Churches, takes a view on the principle of codification and consolidation of planning law in Wales. However, in giving evidence to the Culture, Welsh Language and Communication Committee of the National Assembly for Wales on 22 November 2017, Cytûn and two of its member Churches indicated that they are not hampered by the current lack of such consolidation and would not perceive it to be a legislative priority.

4.23 We make few recommendations in respect of planning law that specifically affect churches and church land,[1] and so we expect the effect of codification on Welsh churches to be minimal.

Individual respondents

4.24 A number of individual stakeholders commented on the difference codification would make to their work. Allan Archer, an independent planning consultant, highlighted some of the issues with the current system from a practitioner's perspective:

> There are many aspects of the Commission's analysis and general conclusions about the problems with the legislation as it currently exists with which I agree – the complexity and confusing structure of the existing legislative framework and the lack of clarity about which Westminster legislation applies in Wales with the consequent difficulties this causes for

[1] See **para 18.110**.

> practitioners and users. I regularly find it very frustrating not to be able to access primary and secondary legislation in consolidated form and time consuming to have to laboriously create consolidated text from the original statute and subsequent amendments. I find it is not possible to rely confidently on general legal reference books, which often ignore differences between England and Wales, or the Government's www.legislation.gov.uk website which is often not completely up-to-date.

4.25 Andrew Ferguson, a senior planning officer writing in a personal capacity, stated that:

> In general, I wholeheartedly support the intention to simplify, consolidate and modernise planning law in Wales as the current legislation is not user friendly in the slightest. Having the legislation in one place, as one resource, would be invaluable to planning practitioners and all users of the system. At the present time, it is very difficult to find out what is applicable in Wales at any time, often involving cross-referencing with several other statutory instruments, and even when you do find what you're looking for, you're not entirely sure that it everything has been enacted in Wales and you query whether you've missed something along the route.

4.26 Janet Finch-Saunders, AM commented that:

> Clearer, more accessible guidance for applicants, objectors and all relevant parties must be an utmost priority as regards planning law. As noted in the consultation, there are more than 25 Acts of Parliament and the Assembly covering planning law, making it often complex to navigate for many.

Conclusion: codification in principle

4.27 Almost every consultee who responded to our Consultation Paper supported codification of Welsh planning law in principle. There was overwhelming support for simplification and consolidation of the current planning law system as an exercise across a variety of different sectors and across many different interest groups.

SCOPE OF THE CODIFICATION EXERCISE

4.28 If codification is desirable in the context of Welsh planning law, the first inevitable question is what aspects of Welsh planning law should be codified. In our Consultation Paper, we noted five areas of planning law that could usefully be codified into a single, consolidated planning Code:

1) development planning and development management;

2) the historic environment;

3) the rural environment;

4) regeneration and development; and

5) hazardous substances.[2]

4.29 In our Scoping Paper, we originally recommended that these areas should be approached in five phases.[3] However, we revised this position in our Consultation Paper,[4] noting that there was a balance to be drawn between 1) the resources required of a small number of large codification phases and 2) the uncertainty and potential complexity arising from a large number of smaller codification phases.[5] Following helpful consultee responses, we therefore recommended approaching planning law codification in *three* phases:

1) development planning, development management and regeneration; including listed buildings, conservation areas and trees (the subject of this Report);

2) the historic environment (now the subject of a separate, contemporaneous Welsh Government exercise[6]); and

3) the rural environment, and hazardous substances (areas suitable for a future codification exercise).[7]

4.30 We asked consultees for general comments on this approach. We received few. National Grid said that:

> The five themes set out in the consultation documentation are supported, and have provided a good framework for the work which has followed. The inclusion of such topics as listed buildings, conservation areas, and protected trees within the Code has a logic to it.

4.31 We did, however, receive a number of specific comments in relation to areas outside our intended scope. The largest number of comments were made in relation to legislation governing the countryside and rights of way (which we called "the rural environment"), and in particular its relation to the new Planning Code.

Countryside and rights of way: possible inclusion in the present codification

4.32 In general, there was scepticism among consultees regarding the separation of the rural environment from development planning, development management, and regeneration. We had suggested that legislation relating to the countryside and rights of way could perhaps be codified in a separate Code, given the modest overlap between rural environment legislation and planning law.[8] However, few consultees accepted this argument. RTPI Cymru stated that:

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2 Consultation Paper, para 3.1.

3 Scoping Paper, para 4.8.

4 Consultation Paper, para 3.5.

5 Consultation Paper, paras 3.9 to 3.17.

6 Consultation Paper, paras 3.87 to 3.100.

7 Consultation Paper, paras 3.6 to 3.8.

8 Consultation Paper, para 3.104.

> We raise strong concerns at the proposal at paragraph 3.7 relating to the separation out of 'the rural environment'… It may be appropriate to have additional elements of the Code which are only relevant to rural areas, but this needs explanation.

4.33 The National Trust noted that it was "concerned about the inclusion and separation of "the rural environment" and asked if "the existence of a separate Rural Environment Code [would] separate rural issues from planning?"

4.34 Allan Archer commented that:

> I have some concern about the possible splitting away of rural planning from urban planning if the proposed Planning Code was to be separated from the Countryside and Rights of Way Code, because of their inter-related nature.

4.35 Huw Evans (Geldards LLP) argued that:

> Reference to a code for the Rural Environment needs clarity. There are very distinctive issues relating to the rural environment but how these are dealt with through the development plan and in day to day decision making may well be a matter for WG policy and technical advice.

4.36 It is clear from these comments that we did not make our intention clear. We had no intention of suggesting that the application of the normal planning process in rural areas should in some way be separate from its application in suburban and urban areas.

4.37 What we had in mind was that there exists a substantial body of primary legislation relating to the protection of the countryside, public access to private land, and pedestrian rights of way, largely to be found in the National Parks and Access to the Countryside Act 1949, the Countryside Act 1968, the Wildlife and Countryside Act 1981, the Countryside and Rights of Way 2000, and the Natural Environment and Rural Communities Act 2006. Related provisions are to be found in the Highways Act 1980 and (in relation to England only) the Deregulation Act 2015.

4.38 These various statutory provisions might well be appropriate for codification insofar as they apply in Wales. And that code could be freestanding, as a Countryside and Rights of Way (Wales) Code, or it could form a further part of the Planning Code – although the former approach would seem to be preferable, given the relatively modest overlap between the two. However, in either case, they would need to be the subject of considerable further thought. And if the Welsh Government is contemplating further legislation relating to environmental matters, it would be sensible for such codification to follow the conclusion of that exercise.

4.39 Much of this law also links in with the legislation relating to protecting wildlife, which was the subject of a recent Law Commission review.[9] That law is in turn strongly influenced by EU Directives relating to the protection of species and habitats, which are likely to be the subject of further review in the light of the impending departure of the UK from the European Union. It also clearly relates to the general law on

[9] *Wildlife Law: Report*, November 2015, Law Commission Report No 362.

biodiversity and related topics, which was recently the subject of the Environment (Wales) Act 2016. And the powers and duties of Natural Resources Wales, set up under the Public Bodies Act 2011, and elaborated in the Functions Order 201310 will be relevant.

4.40 But we continue to be of the view that this should be the subject a separate codification exercise, of comparable scale to the present exercise relating to planning legislation. The timing of that exercise will no doubt depend on the availability of resources.

Countryside and rights of way: detailed points

4.41 Some consultees expressed a desire to include issues relating to the rural environment in the first phase of codification. The Home Builders Federation suggested that, in relation to the first phase of codification:

> Some additional areas could be looked at that could help speed up the development process. For example, those matters where we need planning before we deal with other issues, such as Public Right of Way diversions or dealing with Natural Resources Wales (NRW) licences. Why could these not be dealt with at the same time as the planning application, something which is being looked at in England?

4.42 Redrow Homes made a similar suggestion.

4.43 The Open Spaces Society also questioned the exclusion of certain rural environment provisions from our Consultation Paper:

> The consultation does not make any reference to Part 8 of Planning (Wales) Act, which alters the existing town and village green (WG) legislation by amending the Commons Act 2006.

4.44 The Open Spaces Society went on to make specific recommendations in respect of public rights of way and common land, to encourage the retention of existing commons, greens and rights of way, and to facilitate the creation of new ones. We consider that these are in in essence policy issues, rather than technical reforms to the legislation.

Minerals

4.45 The Mineral Products Association stated that “we are somewhat concerned that the scope of the review may have been overly restrictive and those consulted on the scope somewhat limited.” The Association’s main point of concern, which was confirmed in our meeting after the end of the consultation period, was that wider reform of the planning system, particularly in relation to minerals, was not considered at either the scoping phase or subsequently.

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10 Natural Resources Body for Wales (Functions) Order 2013, SI 755.

4.46 We accept that there may well be a need for more widespread reform of the way in which the planning system applies to minerals development; however, such reforms are likely to be outside the scope of a technical law reform exercise.

Hazardous substances

4.47 Allan Archer questioned why we did not include the law relating to hazardous substances in the present exercise, given that it is a relatively self-contained area.

4.48 However, we noted in the Consultation Paper that the Health and Safety Executive had commented that for hazardous substance consent to be outside the scope of the code would not present any problems for them. We also observed that the legislation, which was consolidated in 1990 as a separate statute (the Planning (Hazardous Substances) Act 1990) seems to be operating broadly satisfactorily; and there seems to be no particular need to change it at present.

PRACTICALITIES OF THE PLANNING CODE

The nature of a Code

4.49 We received a number of general responses from consultees questioning what was meant by the term "Planning Code". The National Trust requested "clarification of what constitutes a Code." Huw Evans stated that "greater clarity as to what is meant by a 'Code' would be helpful." The RTPI similarly sought "further clarification of the meaning of consolidation and codification of planning law", and questioned how widely the term "Code" was understood in this context. Newtown and Llanllwchaiarn Town Council stated that

> The use of the word 'Code' is somewhat confusing. This is often used to describe de facto and recommended practice rather than law. It would appear that what is actually being put forward is a planning law framework comprising law, secondary legislation and guidance notes.

4.50 The Bar Council suggested that:

> …the term "Code" is defined within the provisions. Whilst it is accepted that the term is familiar to planning practitioners as a collective description in Compulsory Purchase legislation and case law, it is not yet well established in the Law of England and Wales and requires some definitional precision, particularly in respect of the interaction between primary legislation, secondary legislation and (national) planning policy.

4.51 This problem may be overcome by a clear definition of the term "Code".

4.52 We initially suggested, in our report on the Form and Accessibility of the Law Applicable in Wales, that a Code should incorporate all of the primary legislation on a particular topic, and should then be the subject of a discipline by which all amendments or new legislation would be in the form of amendments to the Code rather than new freestanding pieces of legislation.

4.53 The Welsh Government has taken the view that a Code should include all primary legislation, secondary legislation and Government guidance on a particular topic.

4.54 In its response to our Consultation Paper, Ceredigion CC expressed "reservations about the practicability of including policy and advice/guidance in a Code". But Pembrokeshire Coast National Parks Authority, National Parks Wales, and Carmarthenshire CC all expressed support for "creation of a comprehensive Planning Code of the primary planning legislation as a first priority (as part of the Welsh Government's initial codification programme)" and "support for publication of policy and guidance / advice documents in codified form." Allan Archer was also cautiously supportive:

> I also support the creation and publication of policy and guidance/advice documents in codified form, although I have reservations about the practicability of including all policy and advice/guidance in a Code, although I would be less concerned if it was limited to the WG's policy documents PPW and TANs.

4.55 On that understanding of the term, this Report focusses on the piece of primary legislation that would form the principal element in such a Code. For simplicity, we refer to this simply as "the Bill". But we are aware that the Bill will be used alongside the relevant secondary legislation and guidance – whether they all form part of a Code or are considered as separate items.

Contents and presentation of the Code

4.56 There was some scepticism among consultees about whether a Planning Code containing primary legislation, secondary legislation and guidance would continue to maintain a clear legal distinction and order of precedence between its separate elements. Pembrokeshire Coast National Parks Authority, National Parks Wales, and Carmarthenshire CC all expressed support for the "maintenance of a clear distinction between primary and secondary legislation." Allan Archer noted that "it is important to maintain a clear distinction between primary and secondary legislation and between legislation and policy and guidance", in particular "a clear understanding of the question of precedence – there is an obvious scope for misunderstanding without this clarity."

4.57 Huw Evans also noted that:

> There needs to be a distinction between primary and secondary legislation and clarity on the role and weight to be given to Orders, Regulations, Circulars, Case law, Ministerial Statements together with Welsh Government policy, advice and guidance.

4.58 We agree that, without clear explanations and signposting, a Planning Code comprising primary legislation, secondary legislation and guidance is liable to confuse. The distinction between primary and secondary legislation is largely a matter of convenience, with broad principles in the Act and details in regulations. But every piece of legislation, whether primary or secondary, is binding on all. Guidance, on the other hand, is merely persuasive – however much some users may treat it as though it binds others.

4.59 However, this appears to be largely a matter of presentation. If the distinction between the three types of provision within the Code is highlighted from the outset and throughout the Code, the likelihood of misunderstanding will be significantly reduced.

4.60 The structure of the Code may also assist in making planning law in Wales more navigable. The RTPI noted that:

> Thought needs to be given to how a Code is published, to ensure that it is easy to access and identify a topic of interest. Even a large code should be able to be made intelligible and easily accessible.

4.61 We are in complete agreement with this view in principle. But it remains to be seen how the gradual introduction of new technology into the production of legislation (including, for example, hyperlinks) can best be used to assist the lay reader.

4.62 Finally, Monmouth Town Council made an important point in respect of the language used in the Code:

> The committee feels that it would be very helpful to everyone if the language used was in plain English and used less technical terms. The reading of such documents that is full of technical jargon is off putting.

4.63 Here too, we agree in principle, although the need for precision will always result in legislation that is not as readable as a novel.

Resources required to maintain the Code

4.64 Many consultees expressed concern that the creation and maintenance of a comprehensive Planning Code would require significant Welsh Government resources. POSW, North Wales Development Managers' Group, Monmouthshire CC, Ceredigion CC, Pembrokeshire CC, Carmarthenshire CC, Pembrokeshire Coast National Parks Authority, and Neath Port Talbot CBC all suggested that "the issue of resources to carry out a codification programme and maintain and publish Codes effectively thereafter is a serious issue" and noted that "even effectively resourced, this could be a long process". The National Trust noted that "codification will be a very challenging and complex process. To be successful, the project requires sufficient funding and a specific delivery timescale".

4.65 The RPTI noted that "timescale, resources, commitments to delivery etc are all important elements in the success of this project". The Bar Council made a similar point:

> We reiterate that it is self-evident in the Bar Council's view that the aims behind a wholescale re-drafting or rather re-configuration of planning related legislation in Wales will require significant political will and support for the project accompanied by a recognition that the process is most likely to take a considerable period of time. The envisaged benefits therefore from this proposal will also have to await. The alternative of more piecemeal reform may necessarily be more attractive.

4.66 Overall, it appears that many consultees were sceptical about whether the funding and political will required to undertake such a large project would be forthcoming over the sustained time period necessary to achieve it. However, no consultees suggested that for this reason the project should not be attempted.

Updating the Code

4.67 Many consultees expressed the view that the Code should be updated regularly and accurately, and that an effective mechanism must be put in place to ensure that this happened. Allan Archer noted that:

> It is one thing to create a Code but it requires a continuing commitment to maintain and update it and to create effective arrangements affording free and easy access for all to up-to-date bilingual versions of all primary and secondary legislation, policy and guidance/advice. Even well resourced, considering the correspondence with WG after your earlier report, it seems that this could be a long process with the possibility of it being postponed or slowed down if there is an over-riding need to introduce replacement 'European' legislation.

4.68 Several authorities expressed similar views. Neath Port Talbot CBC stated "this codification exercise should be able to withstand the test of time and as far as possible it should be updated as one document every time the legislation is changed or added to" and that "the importance of this cannot be over emphasised." Ceredigion CC sought assurance from the Welsh Government that "once codified, there would be a continuing commitment to further changes being incorporated into the code." Huw Evans noted that "the manner in which the Code is monitored and reviewed is crucial. Guidance needs to be given as to how the Code is to be revised and assurance that there are adequate resources to maintain it."

4.69 Several consultees also stated that the Code should be available via the Welsh Government Website, should be presented in a similar format to Planning Policy Wales, and should be updated in a similar way.

4.70 Some consultees had more specific suggestions regarding how the Code should be updated. Andrew Ferguson noted that:

> If there is to be a specific Code website, it would be extremely useful to have a link to any enacting legislation, and for this to be updated regularly. If not, it must be absolutely clear (or easy to ascertain) about what provisions are in force and when they were enacted, otherwise it will result in the same confusion as exists currently.

4.71 The Public Service Ombudsman for Wales made a related point in respect of older versions of the Code:

> It is important during our investigations to be able to identify what the law was at any given point in time (that is, what the law was when the problem we are investigating occurred). Therefore, it will be important to have an archive where previous 'editions' of the Code can be easily found.

4.72 This can in principle be done – existing commercial websites contain earlier versions of statutory material that has since been amended or repealed, so the technology clearly exists. And the historical material available on *legislation.gov.uk* is constantly improving. But the creation and maintenance of such an archive will need significant additional resources in addition to those required merely to update the Code.

OTHER GENERAL COMMENTS

4.73 We note here some of the other general comments we received from consultees, and specific suggestions for law reform that do not fit easily into the later chapters.

The planning system as a barrier to smaller developers

4.74 The Chartered Institute of Building argued that "at present the planning system does not work in proportion to the size of the project" and "can act as a barrier to smaller developers being able to compete" with larger developers. We consider that this suggestion is a matter for planning policy rather than planning law.

Changes to environmental legislation and Aarhus Convention obligations

4.75 Friends of the Earth Cymru highlighted Article 1 of the Aarhus Convention, which states that

> in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

4.76 It therefore argued that in considering the simplification of the planning system in Wales, each provision that is discarded or simplified

> …must follow the Aarhus test – is there an opportunity for the public to find out what is happening in a timely way and respond? Planning should not simply be a series of negotiations between a developer and planning officer. This is particularly important in the light of the principles of collaboration and involvement enshrined in the WFG Act 2015.

4.77 We have taken on board this point, and we have considered the Aarhus Convention in respect of our recommendations that affect environmental legislation or may have an environmental impact.

Requirement for a planning authority to take positive action when dealing with planning applications

4.78 CMet Residents Action Group, a group of Cardiff residents opposing Cardiff Metropolitan University's planning application to build a new hall of residence, stated that:

> We welcome the Commission's point contained in paragraph 3.66 [of the Consultation Paper], which emphasises that a planning authority should be proactive in dealing with applications rather than reactionary.

4.79 However, in that section of our Consultation Paper, we were talking about the proactive role of a planning authority in promoting regeneration and renewal, rather than in dealing with planning applications.

Focus on Development Management

4.80 Barratt & David Wilson Homes South Wales, a property developer, stated that:

> We would suggest that significant changes to the development management procedure should be subject to a separate planning consultation. It is possible that many stakeholders may not be aware of the full extent of the proposals and therefore the key changes to the development management procedure (i.e. the abolishment of the outline planning application process) should be advertised independently.

4.81 As it happens, many were aware of our proposals, and advised us accordingly. In respect of the abolition of outline planning permission, we have amended our proposal on the basis of these comments.[11]

LEGISLATIVE COMPETENCE

4.82 Finally, we should for completeness note that, both in this Chapter and throughout those that follow, we have assumed that the Welsh Ministers will be in a position to take forward some or all of our recommendations, as they consider appropriate, but clearly their ability to do so will be governed by the extent of the legislative competence of the National Assembly.

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[11] See **Recommendation 8-1.**

PART TWO: SPECIFIC TOPICS

Chapter 5: Introductory provisions

INTRODUCTION

5.1 Chapter 5 of the Consultation Paper listed a number of general provisions underlying the operation of the planning system and proceeded to discuss two categories of such provisions. These were:

1) whether there is a need to include within the Planning Bill an explicit statement as the purpose of the planning system;

2) how to rationalise and simplify the various statutory duties that currently apply to the exercise of planning functions; and

3) the provisions dealing with the administration of the planning system.

5.2 In this chapter of our Report, we consider first the rationalisation and simplification of the various statutory duties; in the light of our consideration of that, we explain our conclusion that an explicit statement of the purpose of the planning system is unnecessary. We turn finally to the administration of the system and make some recommendations for simplification of the provisions regarding the administration of the system.

PRINCIPLES UNDERLYING THE PLANNING CODE

Statutory duties applicable to the exercise of planning functions

5.3 There are at present two general principles specifically relating to planning in Wales. The first, which has existed since the planning system was introduced 70 years ago, is the duty of decision-makers to have regard to the development plan, so far as material, and to all other material considerations.

5.4 There are also certain specific material considerations that are highlighted in one way or another: the preservation or enhancement of listed buildings and conservation areas; the use of the Welsh language; and Welsh Government policy.

5.5 The second general principle, introduced by the Well-being Act 2015 and the P(W)A 2015, relates to sustainable development. Section 2 of the P(W)A 2015 provides that any function relating to the formulation of the development plan or the management of development must be exercised as part of carrying out sustainable development in accordance with the Well-being Act.

5.6 In addition to those two general principles, there are a number of general duties in other legislation that will at least to some extent be relevant to the exercise of functions under planning legislation.

5.7 In our Consultation Paper, we accordingly made a number of suggestions as to specific duties, and how they might best be dealt with. These were on the whole well received by consultees, as noted below in relation to each specific Consultation Question, but certain broader concerns did emerge, leading us to review the issue of statutory duties more generally, both in planning legislation and in other, related legislation.

Statutory duties: the Planning Acts

The development plan

5.8 Firstly, as noted in the Consultation Paper,[1] there are various situations in which a planning authority is to exercise a particular function having regard to the development plan, so far as material, and to any other material considerations. These are the determination of a planning application, the imposition of conditions limiting the duration of a planning permission, the revocation or modification of a permission, the making of a discontinuance order, and the issue of an enforcement notice.[2]

5.9 The Welsh Ministers are under a similar duty when determining called-in applications, or deciding appeals.[3] But they have no such duty when imposing conditions limiting the duration of a planning permission, or when exercising their default powers to revoke or modify a permission, make a discontinuance order, or issue an enforcement notice.[4]

5.10 A strategic planning panel, when preparing a strategic development plan, must have regard to the NDF, the strategic plan for any adjoining area, and the local development plan for each area within the panel's area (but not for any adjacent area).[5] A planning authority, when preparing a local development plan, must have regard to the NDF and the strategic plan for the area and any adjacent area (but not the local plan for any adjacent area).[6] Local plans must be in general conformity with the NDF and any strategic plan for the area.[7]

5.11 Where planning authorities and the Welsh Ministers are to have regard to the development plan when making any determination, they are to make that determination in accordance with the plan unless relevant considerations suggest otherwise.[8]

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1 Consultation Paper, para 5.16.

2 TCPA 1990, ss 70(2)(a),(c), 91(2), 92(6), 97(2), 102(1), 172(1)(b), Sched 9, para 1(1).

3 TCPA 1990, ss 70(2), 77(4)(a), 79(4)(a).

4 TCPA 1990, ss 100, 104, 182, Sched 9, para 11.

5 PCPA 2004, s 60I(6), inserted by P(W)A 2015.

6 PCPA 2004, s 62(5), amended by P(W)A 2015.

7 PCPA 2004, s 62(3A), amended by P(W)A 2015.

8 PCPA 2004, s 38(6).

The Welsh language

5.12 Planning authorities are under a duty to have regard to any relevant considerations relating to the Welsh language when determining planning applications;[9] and the Welsh Ministers are under a similar duty when determining called-in applications and appeals.[10] But that does not alter the weight to be given to any other material consideration.[11]

5.13 The Welsh Ministers, in preparing the NDF, must carry out an appraisal of its sustainability. Similarly, the relevant plan-making body, in preparing a strategic plan or a local plan, must carry out an appraisal of its sustainability. In each case, such an appraisal must include an assessment of its likely effects on the use of the Welsh language.[12]

5.14 However, neither planning authorities nor the Welsh Ministers are under any such duties when carrying out their other planning functions – such as the approval of details required by a condition on a planning permission, the taking of any enforcement action other than issuing an enforcement notice, decision making in relation to advertisements and protected trees, the exercise of powers relating to waste land, and the acquisition of land for planning purposes.

The historic environment

5.15 Planning authorities and the Welsh Ministers are to have special regard to the desirability of preserving a listed building, its setting and its special features when granting either listed building consent or planning permission.[13] Authorities are to have regard (but not special regard) to the desirability of preserving features of special interest, and listed buildings in particular, when acquiring and disposing of land – but no similar duty applies to the exercise of such functions by the Welsh Ministers.[14] And authorities and the Welsh Ministers must pay special attention to the desirability of preserving or enhancing the character or appearance of a conservation area when exercising any planning functions.[15]

5.16 There are no statutory duties on either planning authorities or the Welsh Ministers to have regard to listed buildings when carrying out any other functions under the TCPA 1990, or any functions under the Listed Buildings Act 1990. And there are no similar duties under the Planning Acts laid on other persons or bodies who have various functions to perform, notably as consultees.

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9 TCPA 1990, s 70(2)(aa).

10 TCPA 1990, ss 70(2), 77(4)(a), 79(4)(a).

11 P(W)A 2015, s 31(4).

12 PCPA 2004, ss 60B(2), 60I(8), 62(6A), inserted by P(W)A 2015.

13 P(LBCA)A 1990, ss 16(2), 66(1).

14 P(LBCA)A 1990, s 66(2).

15 P(LBCA)A 1990, s 72(1).

5.17 From the above analysis, we observe that:

1) all of the existing statutory duties are laid upon either planning authorities or the Welsh Ministers or both;

2) the duty may be to "have special regard", "pay special attention", or "have regard" to the various matters;

3) the functions to which they apply are set out specifically; and

4) the incidence of those duties is not consistent.

Statutory duties: other related legislation

5.18 A number of related statutes impose duties on various categories of public bodies. We consider them in the order that they were first introduced.

5.19 Section 11 of the Countryside Act 1968 creates a duty to have regard to the desirability of conserving the natural beauty and amenity of the countryside. The duty is laid on Ministers, government departments, and public bodies when exercising any function under any enactment relating to land. "Public bodies" includes any local authority or statutory undertaker, and any not-for-profit statutory body acting for the improvement of any place or the supply of any service.[16] "Statutory undertaker" is not defined.

5.20 Section 62 of the Environment Act 1995 inserted section 11A into the National Parks and Access to the Countryside Act 1949.[17] This imposes a duty on relevant authorities, when exercising "any functions", to have regard to conserving and enhancing the natural beauty [etc] of national parks, and of promoting opportunities for the understanding and enjoyment of their special qualities by the public. "Relevant authorities" means Ministers, statutory undertakers, those holding public office, local authorities (including community councils), and national park authorities. Here too, "statutory undertaker" is not defined.

5.21 Section 17 of the Crime and Disorder Act 1998 imposes a duty on various authorities to exercise their "various functions" with due regard to their likely effect on crime and disorder. The authorities in question are a wide variety of local authorities and similar bodies, including national parks authorities, but not community councils or statutory undertakers. The list of authorities can be extended by the Welsh Ministers.

5.22 Section 85 of the Countryside and Rights of Way Act 2000 imposes on any relevant authority exercising any function in relation to an area of outstanding natural beauty (AONB) to have regard to the purpose of conserving and enhancing the natural beauty of the AONB. "Relevant authority" has the same meaning as in section 11A of the 1949 Act (above), save that "statutory undertaker" is defined as having the same meaning as in Part 11 of the TCPA 1990.

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16 Countryside Act 1968, s 49.

17 Applied in Wales by s 4A of the 1949 Act.

5.23 Section 149 of the Equality Act 2010 creates a duty to have due regard to the need to eliminate discrimination, advance equality and foster good relations. The duty is laid upon every public authority, in the exercise of its functions, and a person exercising public functions. The term "public authorities" is exhaustively defined in Schedule 19 to the Act, to include Government departments (other than the security services, the SIS and GCHQ), the Welsh Ministers, the First Minister for Wales, the Counsel General, and a subsidiary of the Welsh Ministers. It also includes local authorities,[18] national park authorities, urban development corporations, and a wide variety of bodies active in various areas of public life (such as the armed forces, broadcasters, health authorities, regulators, the police, and transport operators), but not statutory undertakers.

5.24 Section 3 of the Well-being Act 2015 requires every public body to carry out sustainable development. "Public body" for this purpose means the Welsh Ministers, local authorities, national park authorities, Natural Resources Wales (NRW), fire and rescue authorities, various health bodies, and five other national bodies.[19] The Welsh Ministers can amend that definition.[20]

5.25 Finally, section 6 of the Environment (Wales) Act 2016 requires public authorities to seek to maintain biodiversity in the exercise of functions in relation to Wales. This explicitly does not apply to the exercise of functions by HMRC or judicial functions by the courts. "Public authority" for this purpose means Ministers of the Crown, the Welsh Ministers, the First Minster, the Counsel General, Government departments, local authorities, planning authorities, strategic planning panels, persons holding public office, and statutory undertakers (defined more or less as in the TCPA 1990).

5.26 From the above analysis, we observe that:

1) all of the above duties are laid upon public authorities in various specified categories;

2) the extent of the relevant categories in the various pieces of legislation are by no means the same – in particular, with relation to statutory undertakers;

3) the nature of the duty varies as between having regard, and having "due regard" to various matters; and that

4) in most cases, the duties relate to the carrying out by the body concerned of any function under any legislation, such that the functions are not specifically noted.

5.27 Other legislation imposes general environmental duties on particular categories of utilities – such as water undertakers, electricity suppliers, and telecommunications operators – when formulating proposals.[21]

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18 But not community councils.

19 WBFGA 2015, s 6.

20 WBFGA 2015, s 52.

21 Consultation Paper, para 5.115.

Duties at common law: other relevant considerations

5.28 We have noted above that there is a limited duty on planning authorities and the Welsh Ministers to have regard to "any other material considerations".[22] This echoes the duty laid upon any public body (however that term is defined) under common law, to take into account any relevant matters, and to ignore any irrelevant ones, when carrying out any function under any legislation.[23]

THE DUTY TO HAVE REGARD TO THE DEVELOPMENT PLAN

We provisionally proposed that a provision be included in the Bill to the effect that a public body exercising any function under the Code must have regard to the development plan, so far as relevant to the exercise of that function; and must exercise that function in accordance with the plan unless relevant considerations indicate otherwise (Consultation Question 5-1).

Proposed enlargement of the duty

5.29 In the Consultation Paper, we noted that the duty to have regard to the development plan applies to a wide range of significant functions under the TCPA 1990, but that the list of those functions is by no means comprehensive.[24]

5.30 In reality, many of those powers are in fact exercised by planning authorities with regard to the development plan, insofar as it contains any policies that are relevant. Where, for example, an authority is considering the terms of a proposed planning obligation under section 106 of the TCPA 1990, or taking various forms of enforcement action, or withdrawing an enforcement notice that has been issued, it will almost inevitably have regard to the provisions of the development plan. On the other hand, if it is considering an application for a certificate of lawfulness, the development plan will not be relevant.[25]

5.31 We also noted that the duty to have regard to the development plan applies at present only to the exercise by a planning authority (and in some cases the Welsh Ministers) of any of various functions, and not to the exercise of such a function by any other public body – although we did not specify what we meant by "public body".

5.32 We therefore provisionally suggested that the duty currently in section 70 (and in the other provisions referred to above[26]) to have regard to the development plan should be applied to the exercise by any public body of any functions under the Planning Code – not just to those specifically named duties. It should thus be included at the

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22 See **paras 5.8 to 5.9**.

23 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, CA, per Lord Greene MR at p.229; see also *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, HL, per Lord Reid at p 1030, and *R v Alconbury Developments Ltd v Secretary of State* [2003] 2 AC 295 at [50].

24 See Consultation Paper, para 5.20.

25 Subject to the decision in *Richmond-upon-Thames v Secretary of State* [2002] 2 PLR 115 (see **para 7.34**). see Consultation Paper, para 5.24.

26 See **fn 2** above.

outset of the Bill, along with the principle as to the primacy of the plan, now currently to be found in section 38(6) the PCPA 2004.

5.33 Forty-one consultees responded to this question, of whom 32 were in agreement.

5.34 Nine respondents were equivocal. PINS noted that our proposals would make little difference to current practice, but would nevertheless be a significant change to the law, and could have an impact on public bodies. Three consultees took the opportunity to suggest that the requirement should apply only where the development plan is up-to-date – although case law already recognises that qualification.[27]

5.35 NRW sought clarity as to the impact of the proposal on the role of various bodies who are consulted in relation to planning applications. Ceredigion CC, Carmarthenshire CC, Pembrokeshire Coast NPA and National Parks Wales suggested that consideration would need to be given as to the implications for plan making. And in our discussions with the WG it was emphasised that we would need to be clear as to which functions were to be covered by the new duty, and which public bodies.

The bodies to whom the duty should apply

5.36 Firstly, we accept that the Bill needs to be clear as to the bodies that are subject to the duty to have regard to the development plan.

5.37 We consider that it should apply at least to those making decisions and determinations and formulating plans and proposals under the planning Acts. That will generally be planning authorities, strategic planning panels and the Welsh Ministers.

5.38 We have noted above that in some cases, where planning authorities are under a duty to have regard to the development plan, the Welsh Ministers are not under the same duty.[28] The Welsh Ministers will in practice pay considerable regard to the development plan, not just when determining called-in applications and appeals but also when exercising default powers, considering whether to approve article 4 directions, or to confirm discontinuance orders removing deemed consent for advertisements. But in relation to some of their other powers – notably those to make regulations prescribing various matters – the duty to have regard to the development plan would not be relevant.

5.39 NRW raised the point, in relation to all of our proposals relating to duties to take into account various matters (Consultation Questions 5-1 to 5-6), that such duties should apply only to decision-making bodies, and not to other public bodies whose role in the planning system is largely confined to responding to consultations on proposals.

5.40 As for bodies other than decision-makers, we accept that a duty laid upon "public bodies" generally (or "public authorities" or some other such term) is not helpful. It is noticeable that in the Countryside Act 1968, the earliest of the statutes considered above, the list of the bodies upon whom the duty under section 11 is imposed is not an exclusive list; and that some of the key terms (such as "public bodies") are defined

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27 And see now PPW (ninth edn), Chapter 2.

28 See **para 5.9** above.

in fairly general terms, whilst others ("statutory undertakers") are not defined at all. In more recent legislation, notably the Equality Act 2010, the bodies upon whom duties are laid are defined – at great length.

5.41 It would be possible to include in the Bill a schedule similar in character to Schedule 19 to the 2010 Act, including all the key stakeholders in the planning system. However, that would inevitably lead to problems with ensuring that all relevant bodies (and no irrelevant ones) were included, and that the list was kept up-to-date. It would also complicate the Bill. More significantly, it might be difficult to enforce such a widely applicable duty, possibly leading to unmeritorious litigation. We therefore do not recommend that approach.

5.42 Further, if those making decisions etc (principally planning authorities and the Welsh Ministers) were to be subject to the duty to have regard to the development plan, any other bodies involved in the planning process would in fact have to have regard to the plan as well, since to intervene on a basis that involved going against the plan would be unproductive and a waste of time. So, for example, a community council or a statutory undertaker, when making representations on a planning application or appeal, could either draw the attention of the decision-maker to policies of the plan that supported the case being promoted; or it could note the existence of such policies and explain why they should not be followed in this particular case.

5.43 We therefore consider that the duty only needs to be laid on those bodies making relevant decisions etc under the Act – in practice, planning authorities, strategic planning panels and the Welsh Ministers.

The functions to which the duty should apply

5.44 We have considered carefully the scope of the statutory functions to which the duty should apply, bearing in mind the desirability of avoiding unmeritorious litigation. There is thus already a considerable amount of litigation in relation to the duty as it currently applies; all that we are suggesting is extending it to all the functions under the Act to which it is relevant.

5.45 The functions to which the development plan is clearly relevant include the following:

1) decisions to make local development orders; or to make directions under general development orders restricting permitted development rights;

2) decisions relating to planning applications and appeals – including whether an application should be called-in for decision by the Welsh Ministers; the initial decision to grant of refuse permission; the imposition of conditions; the approval of matters required under conditions; the conduct of appeal proceedings;

3) decisions to modify or revoke planning permission, or to modify conditions; or to discontinue development;

4) decisions as to the response to purchase notices;

5) decisions as to enforcement proceedings – including the initial decision to take action; the choice of procedure to be followed; and whether to discontinue such action, and on what basis;

6) decisions relating to the amenity of an area – including the making of orders withdrawing deemed consent for advertising; the making and confirmation of tree preservation orders; the issue of unsightly land notices; action to deal with graffiti and flyposting; and the designation of conservation areas; and

7) decisions as to the acquisition and disposal of land for planning purposes.

5.46 As regards the formulation or modification or withdrawal of the NDF or a strategic or local development plan, it would be appropriate for the plan-making body to have regard to any other part of the development plan for the area in question, and any development plan for any adjacent area. However, there is already a carefully formulated scheme requiring the various authorities to have regard to certain development plans – for example, those of neighbouring authorities. We consider that the new duty need not apply so as to replace those duties.[29]

5.47 In relation to Part 3 of the TCPA 1990 (development management), Chapter 1 of Part 6 (purchase notices), and Part 7 (enforcement), we consider that the duty should apply to all functions, as they are all interlinked – the decision as to whether to take enforcement action, or to withdraw an enforcement notice, for example, should be just as much subject to the development plan duty as a decision whether to grant planning permission. Equally, the Welsh Ministers should be under the same duty as planning authorities.

5.48 The exercise of functions under Part 8 (trees, advertisements and untidy land) should be subject to the duty, insofar as there are any relevant development plan policies, as should those under Part 9 (acquisition of land for planning purposes). In particular, those determining applications for consents other than planning permission – that is, listed building consent or conservation area consent (if those consents are retained), consent for the display of advertisements or for the carrying out of works to protected trees – should have regard to the development plan insofar as the plan contains any relevant policies.

5.49 It would clearly not be relevant to have regard to the development plan when making a decision that is essentially a matter of law – such as a determination as to whether planning permission or any other consent is required for a particular proposal, or a decision as to whether or how to respond to a High Court challenge, nor to a determination of a claim for compensation. Nor would the plan be relevant to the application a statutory definition to a particular set of facts.

5.50 The plan would normally not be relevant to a decision by the Welsh Ministers as to whether to make regulations as to planning procedures or as to the need for permission. However, it could occur that a particular piece of secondary legislation was often frustrating the implementation of development plan policies, in which case it might be appropriate to take that into account in considering whether it should be

[29] Currently in TCPA 1990, Pt 2 and PCPA 2004, Pt 6 (development plans),

modified. So, for example, if a number of planning authorities were making Article 4 directions to avoid the result of a particular provision in the GPDO or the Use Classes Order frustrating development plan policies, the Welsh Ministers would no doubt take that into account when considering whether the provision should be modified or removed. We therefore consider that the development plan could be relevant, but we accept that there would be a real risk of unmeritorious litigation in relation to such action, outweighing the desirability of an express duty.

Conclusion

5.51 On balance, therefore, we consider that the extent of the duty should be limited by applying to the exercise by planning authorities or the Welsh Government of all functions under the Bill other than those relating to the formulation of the development plan, the determination of applications for certificates, or claims for compensation, and the making of subordinate legislation.

Recommendation 5-1.

We recommend that a provision should be included in the Bill, to the effect that, in the exercise of any of their functions under the Code, the planning authority, a strategic planning panel or, as the case may be, the Welsh Ministers:

(1) must have regard to the development plan, so far as relevant to the exercise of that function; and

(2) must exercise that function in accordance with the plan unless any other relevant considerations indicate otherwise

but that this duty should not apply to the exercise of functions relating to the formulation of the development plan, the determination of applications for certificates of lawfulness or claims for compensation, and the making of subordinate legislation.

THE GENERAL DUTY TO HAVE REGARD TO OTHER MATERIAL CONSIDERATIONS

Possible reforms

5.52 We noted in the Consultation Paper that a number of provisions in the TCPA 1990 imposed, alongside the duty to have regard to the development plan (considered above), a duty to have regard to all "any other material considerations". As with the development plan duty, the explicit duty to take into account other material considerations is laid on planning authorities, when determining planning applications and in the other circumstances set out at para 5.11 above,[30] and on the Welsh Ministers in relation to the determination of called-in applications and appeals.[31] Here

[30] TCPA 1990, ss 70(2)(c), 91(2), 92(6), 97(2), 102(1), 172(1)(b), Sched 9, para 1(1).

[31] TCPA 1990, ss 70(2)(c), 77(4)(a), 79(4)(a).

too, however, that leaves a number of functions under the Act that are not subject to the statutory duty.

5.53 We observed in the Consultation Paper that the duty in section 70 and elsewhere to have regard to any other material considerations is arguably no more than a statutory statement of a basic principle of administrative law.[32] However, it is of critical importance, as decision-makers must in many case take into account a whole host of factors that are only partially dealt with by the development plan, or as to which the plan is either out-of-date or totally silent.[33]

5.54 As to what can properly classified as a "material consideration", we touched on the relevant case law, and concluded that the principle outlined in *Stringer v Minister of Housing and Local Government*[34] still accurately summarised the position in law; but that it was not readily capable of being worded as a statutory provision. We also noted that the House of Lords and the Supreme Court on several occasions have confirmed that "material" in this context means "relevant". [35]

5.55 We therefore made a number of suggestions, highlighted below.

Inclusion in the Bill of a definition of "material considerations"

We suggested that to attempt to define relevant or material considerations in the Planning Code would cause as many problems as it would solve (Consultation Question 5-2(a)).

5.56 Twenty-four consultees responded to this suggestion, of whom 21 were in agreement. One consultee, the CMet Residents Group, disagreed.

5.57 Some of those responding to Question 5-3 (discussed below) also suggested particular matters that should be explicitly recognised as "material considerations", such as supplementary planning guidance, the public interest and the results of public participation; and crime and disorder. And one (Merthyr Tydfil CBC) suggested that some should be specifically excluded – such as health policies, the proximity of A3 uses[36] to schools etc. no doubt every user of the planning system could suggest something that should be included or excluded. However, it would be extremely difficult to compile a list that would be comprehensive.

5.58 The CMet Residents Group, in response to question 5-2, suggested a list of 19 items for possible inclusion in a list of "material considerations", based on an examination of the Planning Portal website. We are grateful to them for carrying out this useful

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32 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, CA, per Lord Greene MR at p.229; see also *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, HL, per Lord Reid at p 1030, and *R v Alconbury Developments Ltd v Secretary of State* [2003] 2 AC 295 at [50] (Consultation Paper, para 5.28).

33 Consultation Paper, para 5.29.

34 [1970] 1 WLR 1281, at p.1294.

35 *Tesco Stores v Secretary of State and West Oxfordshire DC* (1994) 68 P&CR 219, CA, per Lord Bingham at p.227; *R (Health and Safety Executive) v Wolverhampton CC* [2012] UKSC 34, 1 WLR 2264, per Lord Carnwath of Notting Hill at [26]. See Consultation Paper, paras 5.31, 5.32.

36 Restaurants, snack bars and cafes (Class A3 in the Use Classes Order).

exercise. However, the result highlights the problems involved: several items (such as access for people with disabilities, heritage considerations, and the development plan) are covered by other statutory duties; one (Government policy) we deal with below; one (supplementary planning guidance) was heavily qualified. The remaining items form a list that is far from comprehensive. In particular, it refers to a number of urban concerns (parking, traffic, noise, overlooking and so on) but does not mention effects on national parks, open space, or biodiversity. Any such list would almost inevitably be open to the same criticism.

5.59 We thus remain of the view that it would not be helpful to try to produce a definition of "material [or relevant] considerations", or to compile – even on a non-exclusive basis – a list of considerations that might be relevant.

"Material considerations" or "relevant considerations"?

We suggested that the term "relevant considerations" would be more appropriate than "material considerations" (Consultation Question 5-2(b)).

5.60 Forty consultees responded on this point; 17 agreed with our suggestion, 11 were equivocal, and 11 disagreed.

5.61 Keith Bush QC agreed that "material" is ambiguous and difficult for lay people to understand. He also pointed out that "relevant" is easier to convey bilingually, as "perthnasol" easily conveys the same meaning as "relevant". The Law Society agreed that the term "relevant considerations" is more appropriate, and better accords with present-day administrative law terminology. And the UK Environmental Law Association agreed that "one of the key problems with planning law in its current state is the unnecessarily confusing and outdated nature of the language used. Therefore, we would welcome the proposal to change this term to 'relevant considerations'."

5.62 Other respondents were more hesitant. Several, including PINS, made the point that the word "material" occurs in two significant contexts in the TCPA 1990 – "material change of use" (in section 55) and "material considerations" (in section 70 and elsewhere) – and questioned whether a change of the term in one context might cause a problem with its use in the other. Other respondents, largely local authorities and long-time users of the planning system, suggested that the term "material considerations" was well understood, and need not be changed.

5.63 We have accordingly considered carefully the meaning of the word material" in the TCPA 1990. We observed that, as well as sections 55 and 70, there are over 40 other places in the Act where the word "material" is used as an adjective. The Oxford English Dictionary offers seven different definitions of the adjective "material"; but its use in the Act generally falls into three of these, some slightly overlapping.[37]

5.64 First, in a number of places, the word "material" is used in the sense of "major", "not trivial" or "significant" (in Welsh, "sylweddol") – for example, a building operation that

[37] This not only causes problems for users of the English text, but it also causes significant difficulty for the Welsh translators. We are grateful for the assistance we have received on this point from the Welsh Government Translation Service.

materially affects the external appearance of a building; something that materially changes any condition or limitation; a material or non-material change to a planning permission; a material detriment to a house; an interest that would be materially affected by the taking of enforcement action; a material change in any of the matters relevant for determining lawfulness; being satisfied that a defect is not material; and a document that is legible in all material respects.[38] In each of these instances, the thing in question is material for the purposes of the statutory provision in question simply because it is not trivial – any building operation will affect the appearance of a house, but some are too minor to be taken into account.

5.65 Secondly, in a few places, "material" means "relevant" (in Welsh, "perthnasol"). The development plan thus only needs to be taken into account insofar as it is material, or relevant, to the application.[39] Similarly, decisions makers only need to have regard to other considerations – that is, considerations other than the development plan – only insofar as they are material, or relevant.[40] Thus, for example, the Courts have confirmed that personal circumstances of an applicant for planning permission may in some cases be "material" or "relevant" to the determination of the application. The definition of an "owner-occupier" refers to a person who at all times material for the purposes of [paragraph (a) or paragraph (b)] has been entitled to an owner's interest – that is, at all times that are relevant for the specified purposes.[41]

5.66 A notable example of the use of the first and second meanings in a single statutory provision is section 193(7) of the TCPA 1990, which is as follows:

> A local planning authority may revoke a certificate under section 191 or section 192 if, on the application for the certificate—
>
> (a) a statement was made or document used which was <u>false in a material particular</u>; or
>
> (b) any <u>material information</u> was withheld.

There are other provisions that are along similar lines. In the references to statements and documents that are "false or misleading in a material particular," the word "material" seems to mean "significant". But in the references to "withholding material information", it seems more likely to mean "relevant".

5.67 Thirdly, the provisions in section 56 of the TCPA 1990 dealing with the start of development refer to "material operation" and "material development".[42] Each term is used in a very specific sense, defined in the section itself. Attention was drawn to these provisions by PEBA. And the word "material" in the phase "material change of use" is arguably an example of the first of the above definitions ("major", "not trivial"

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38 TCPA 1990, s 55(1), (3), (5); s 55(2)(a)(ii); ss 61D(2),(3), 61DE(2); ss 69, 96A, 100A, 286; s 166(2); ss 65(6), 171D(5), 193(7), 194(1); ss 171BB(4), 173ZA; s 192(4); s 193(7); ss 217(4), 225B(4), 225D(3), 225I(3); s 329(3A).

39 TCPA 1990, ss 70(2)(a), 70A(1), 70A(6), 91(2), 92(6), 97, 102, 172, 177(2).

40 TCPA 1990, ss 62(4A), 70(2)(c), 70A(1), 70A(6), 91(2), 92(6), 97, 102, 172, 177(2).

41 TCPA 1990, s 168(2).

42 TCPA 1990, s 56(2), (4), (5).

or “significant”), but it is arguably also an example of the second (“relevant”). It is in any event a much-used legal term, which has come to have a reasonably well-defined meaning – albeit one that only emerges from a considerable volume of case law.

5.68 Against that background, we are not persuaded that the term “material considerations” is generally well understood. It may well be understood by those, such as planning authorities, planning consultants and lawyers, who have operated the planning system over many years. But there will be others – new entrants, third sector groups and individual land owners – who will not be familiar with the technical terms used. Whilst some may be unavoidable, the number of such terms should be minimised. We remain of the view that the phrases “development plan, so far as relevant” and “other relevant considerations” are likely to be more widely understood amongst users of the planning system generally. And guidance can emphasise that the term “relevant”, in this context, is identical to the old term “material”.

5.69 We therefore consider that the word “material” in the first sense identified above should be replaced with “significant” (“sylweddol”); when used in the second sense, it should be replaced with “relevant” (“perthnasol”). But we do not suggest any change to the use of the word “material” in section 56, as this is an entirely self-contained provision; nor to the phrase “material change of use”, as a well-recognised legal term of art.

5.70 In particular, we continue to recommend that the word “relevant” (or “perthnasol”) is used in place of “material” in the provisions of the Bill corresponding to sections 62(4A), 70(2), 70A(1), 70A(6), 91(2), 92(6), 97, 102, 172 and 177(2) of the TCPA 1990. We consider that this would clarify the effect of the law.

Functions to which the duty should be applied

We provisionally proposed that a provision be included in the Bill, to the effect that a public body exercising any function under the Code must also have regard to any other relevant considerations (Consultation Question 5-3)

5.71 Thirty-four consultees responded, of whom 29 agreed, 4 were equivocal or raised other points, and 1 disagreed.

5.72 For the same reasons as underlie our conclusion in respect of the development plan, we consider that the duty to have regard to other relevant considerations should apply to any functions performed by bodies that make planning decisions. Moreover, since the duty to have regard to all relevant considerations already applies under the common law to the making of any administrative decision, it would be unsatisfactory to specify explicitly some functions but not others.

5.73 Newtown and Llanllwchaiarn Town Council disagreed, on the basis that it would like to see a definition of the words “any function”, particularly by reference to the position of community councils in the planning process. This issue would not arise, however, if the duty were confined to functions under the Planning Code carried out by a planning authority, a strategic planning panel, or the Welsh Ministers.

5.74 Given the existing general duty at common law to have regard to relevant considerations, this would amount to a clarification of the law.

Recommendation 5-2.

We recommend that:

(1) **the Bill should not include a definition of the term "relevant [or material] considerations" or a list of examples; and**

(2) **the word "relevant" should be used in place of "material" in the provisions of the Bill corresponding to sections 62(4A), 70(2), 70A(1), 70A(6), 91(2), 92(6), 97, 102, 172 and 177(2) of the TCPA 1990.**

Recommendation 5-3.

We recommend that a provision should be included in the Bill, to the effect that, in the exercise of any of their functions under the Code, a planning authority, a strategic planning panel or, as the case may be, the Welsh Ministers must also have regard to any other relevant considerations.

SPECIFIC MATERIAL CONSIDERATIONS (1): LISTED BUILDINGS AND OTHER HISTORIC ASSETS

We provisionally proposed that a provision or provisions be included to the effect that a body exercising any statutory function must have regard to the desirability of preserving or enhancing historic assets, their setting, and any features of special interest that they possess; and a body exercising functions under the Planning Code and the Historic Environment Code must have special regard to the those matters (Consultation Question 5-4(a)).

We also suggested that "heritage assets" be defined so as to include world heritage sites, scheduled monuments, listed buildings, conservation areas, registered parks and gardens, and such other categories of land as the Welsh Ministers may prescribe (Consultation Question 5-4(b)).

The existing law

5.75 We have summarised the existing duties regarding historic assets, and the limitation of their scope.[43] We also noted the illogical variations in their scope.

5.76 We provisionally proposed that that the duties relating to listed buildings and conservation areas should be widened so as to apply equally in relation to any historic asset (including world heritage sites, scheduled monuments, and registered parks and gardens). And we suggested that it would be appropriate to insert a power to

[43] Consultation Paper, paras 5.41 to 5.56. See also discussion above, at **paras 5.15 to 5.17**.

enable the Welsh Ministers to add other categories of land to the definition of "historic asset", as to enable the inclusion of, for example, registered battlefields.

General duty to have regard (or special regard) to historic assets

5.77 As to the widening of the general duty, 45 consultees responded. 34 were in agreement – the Society for the Protection of Ancient Buildings (SPAB) and the Chartered Institute for Archaeologists, for example, "strongly agreed", and the Law Society "welcomed the clarity this would bring". And two consultees were equivocal.

5.78 Pembrokeshire Coast NPA, National Parks Wales and Carmarthenshire CC agreed in principle, but sought clarity as to the extent of the functions to which the duty would apply. They and others also pointed out that different categories of assets require differing levels of protection.

5.79 Two consultees disagreed with the proposal, suggesting that it was too wide and would result in ambiguity about the scope of the proposed power. Rhondda Cynon Taf CBC suggested that the duty should be limited to circumstances where "a decision affects the historic asset or its setting". Newtown and Llanllwchaiarn Town Council also suggested that the breadth of the definition created uncertainty about the position of town and community councils.

5.80 We disagree. In order to identify instances where decisions "affect the historic asset or its setting", a public body must necessarily consider all the decisions which come within its jurisdiction. The duty to have regard to consider issues relating to historic assets must therefore necessarily be wide, in order to allow authorities to incorporate such issues as part of their wider decision-making powers. We also consider the definition to be sufficiently broad as to include town and community councils, where they participate in the determination of planning decisions which relate to the historic environment.

5.81 We would envisage that the wider duty would apply to the exercise of any functions under any legislation, as with the duties relating to national parks, AONBs etc.[44] This would achieve parity between the various special designations. This does not mean that all of those designations are of equal importance in every case, any more than that all listed buildings are of equal significance. But it would ensure that decision-makers and bodies putting forward proposals in connection with land that falls within any of the relevant categories will at least have regard to the desirability of preserving or enhancing it, as appropriate.

5.82 At present, the duty relating to listed buildings, such as it is, refers to the "preservation" of the buildings themselves, their setting and their features. The duty relating to conservation areas refers to the "preservation and enhancement" of their character or appearance. It would be possible to specify the duty differently for each class of historic asset – or, for example, extend the listed building duty to encompass scheduled monuments. However, we consider that would lead to much semantic argument, and consider that it would be preferable, if possible, to have a single duty relating to all classes of historic assets.

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[44] See **paras 5.19 to 5.25** above.

5.83 Several consultees suggested that the word “conservation” be used in place of “preservation” – the Historic Houses Association (HHA) and the CLA, for example, suggesting that this would be “essential”.

5.84 The House of Lords has considered the term “preservation”, in the context of the conservation area duty. It upheld the decision of the Court of Appeal that:

> Neither 'preserving' nor 'enhancing' is used in any meaning other than its ordinary English meaning. The court is not here concerned with enhancement, but the ordinary meaning of 'preserve' as a transitive verb is 'to keep safe from harm or injury; to keep in safety, save, take care of, guard'.[45] In my judgment character or appearance can be said to be preserved where they are not harmed. Cases may be envisaged where development would itself make a positive contribution to preservation of character or appearance. A work of reinstatement might be such. … The statutorily desirable object of preserving the character or appearance of an area is achieved either by a positive contribution to preservation or by development which leaves character or appearance unharmed, that is to say, preserved.[46]

5.85 The phrase “the preservation of a listed building” would no doubt be interpreted similarly. And the duty is not to achieve the preservation (as defined above) of the building in all circumstances, but merely to have regard to the desirability of doing so. It is also surprising that the duty to consider the desirability of “enhancing” the asset applies only in the case of a conservation area, and not a listed building.

5.86 Finally, it may be noted that the Welsh word “cadwraeth” can be translated as either “conservation” or “preservation”.

5.87 We consider that the general duty should be phrased in terms of having regard to the desirability of preserving or enhancing the asset in question, and its special features, and its setting.

Categories of historic assets to which the duty should apply

5.88 In the Consultation Paper, we suggested that the new duty should apply in relation to “historic assets”, defined to include world heritage sites, scheduled monuments, listed buildings, conservation areas, conservation areas, registered parks and gardens, and such other categories of land as the Welsh Ministers may prescribe.

5.89 Thirty-two consultees responded on this point; all agreed in whole or part. Several (including the Theatres Trust, several archaeological trusts, and the SPAB) suggested that the definition was too tightly drawn, in that it included statutorily recognised categories, but not other categories such as buildings or sites recognised by local authorities to be of interest. Others suggested that it was too loose; PEBA, for example, observed that “it is important that the definition of ‘historic assets’ is clearly limited to those that have been recognised for their value through a formal

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45 *Oxford English Dictionary*, 2nd ed. (1989), vol. XII, p. 404.

46 *South Lakeland DC v Secretary of State [1991] 1 WLR 1322*, (Mann LJ) at 1326-1327; upheld in the House of Lords at [1992] 2 AC 141 at p 150F.

designation. Otherwise the scope of the special duty will be uncertain and it will be seen to lack justification."

5.90 The Law Society agreed that categories of assets could be augmented by ministers; the HHA and the Mineral Products Association considered otherwise.

5.91 We understand the desire to enable the duty to be extended to encompass less formally designated assets; but we consider that a provision such as this should only relate to categories of assets that are recognised by or under statute. Including a category such as "conflict sites, historic landscapes, other areas or sites which local authorities or the Welsh Ministers consider to be of local historic, archaeological or architectural interest", as urged by two consultees, would leave the position too open-ended. On the other hand, as perceptions change over the years as to the value of particular categories of assets, it should be possible for the Welsh Ministers to introduce a formal register – for example, of battle sites – without the need to amend primary legislation.

5.92 We therefore consider that the definition of "historic asset" should remain as suggested in the Consultation Paper.

Duty to have consider historic assets: other points

5.93 In the Consultation Paper, we suggested a twofold duty –

1) a general duty to have regard to the preservation of historic assets [etc], applicable to any public body (undefined) carrying out any of its functions; and

2) a more specific duty to "have special regard" to the preservation of assets, applicable to any such body carrying out any function under the Planning Code or the Historic Environment Code.

5.94 In relation to the first of these, what we had in mind was a general duty equivalent to those discussed at the start of this Chapter relating to national parks and AONBs, applicable to all bodies whose operations do bring them into contact with historic buildings and areas. This is the duty that is conspicuously absent at present. The second duty was to be applicable in the specific context of performing functions under the planning Acts. This duty exists at present, under the Listed Buildings Act 1990, but only in a somewhat attenuated form, as noted above.

5.95 Few consultees made any comment on the distinction between these; and we remain of the view that a twofold duty is appropriate.

5.96 As to the bodies to whom the more general duty should apply, it is noticeable that each of the duties discussed earlier in the Chapter – both those in the planning Acts and those in other legislation – is applied to a specific group of public bodies. We do not think it appropriate that the general duty relating to historic assets should be applied to the very large collection of bodies specified in Schedule 19 to the Equality Act – most of whom will have no involvement with such matters. But it should apply to bodies whose operations do bring them into contact with historic assets.

5.97 Rather than create a new grouping, we think that it would be most straightforward for the duty to be applicable, as far as possible, to bodies within the categories specified in one of the statutes identified earlier – notably section 11 of the Countryside Act 1968, section 11A of the National Parks and Access to the Countryside Act 1949,[47] and section 85 of the Countryside and Rights of Way Act 2000. The categories of bodies specified in those three provisions are very similar, but we consider that the most appropriate formulation is that contained in section 85 of the 2000 Act – namely, Ministers, those holding public office, local authorities (including community councils), national park authorities and statutory undertakers (defined as in Part 11 of the TCPA 1990). Strategic planning panels should be added to that list.

5.98 We thus consider that there should be a general duty – located within the Historic Environment Bill – for any such body, when carrying out any of its functions so as to affect a historic asset or its setting, to have regard to the desirability of preserving or enhancing the asset, its setting, and any features of special interest that it possesses. And if that were to be done, there would be no need for that general duty to be signposted in the Planning Bill – as with the sustainable development duty, considered below.[48]

5.99 As to the more specific duty relating to the performance of planning functions (currently under the TCPA 1990), for the reasons discussed above in relation to the duty to have regard to the development plan and any other material considerations[49], we consider that it should be applicable to planning authorities, strategic planning panels and the Welsh Ministers. Others with functions under planning legislation, such as statutory undertakers and community councils, would of course still be subject to the less demanding general duty.

5.100 If our recommendation to unify planning permission with LBC and CAC is accepted[50], the more specific duty should be located within the Planning Bill, to emphasise the continuing importance of the historic environment in planning decisions. If that recommendation is not accepted, both duties could be located within the Historic Environment Bill.

5.101 We realise that this expansion of the duties currently found in the Listed Buildings Act 1990 is a change in the law. But we consider that it would not involve significant new policy, or give rise to significant controversy; and that the change would be appropriate to make at the same time as consolidating the existing law.

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47 Introduced by Environment Act 1995, s 62; applied in Wales by section 4A of the 1949 Act.

48 See **paras 5.143 to 5.146** below.

49 See **paras 5.36 to 5.43 and 5.72** above.

50 Se **Recommendation 13-1**.

Recommendation 5-4.

We recommend that:

(1) **a provision should be included in the Historic Environment Bill to the effect that a public body exercising any function in relation to any historic asset or its setting must have regard to the desirability of preserving or enhancing the asset, its setting, and any features of special interest that it possesses; and**

(2) **a provision should be included in the Planning Bill to the effect that planning authorities, strategic planning panels and the Welsh Ministers, when exercising any function under the Planning Code and the Historic Environment Code must have special regard to the those matters so far as relevant to the exercise of that function;**

(3) **"public body" should include:**

- **the Welsh Ministers;**
- **any Minister of the Crown;**
- **any public body (including a local authority, a national park authority, a strategic planning panel, and a joint committee);**
- **any statutory undertaker (as defined in Part 11 of the TCPA 1990),**
- **any person holding public office (as defined in section 85 of the Countryside and Rights of Way Act 2000);**

(4) **"heritage assets" should include world heritage sites, scheduled monuments, listed buildings, conservation areas, registered parks and gardens, and such other categories of land as the Welsh Ministers may prescribe.**

SPECIFIC MATERIAL CONSIDERATIONS (2): THE USE OF THE WELSH LANGUAGE

We provisionally proposed that a provision be included in the Bill, to the effect that the relevant considerations, to which a body must have regard when exercising any function under the Code, should include the likely effect, if any, of the exercise of that function on the use of the Welsh language, so far as that is relevant to the exercise of that function; but that the duty to consider the effect on the use of the Welsh language was not to affect whether regard is to be had to any other consideration when exercising that function or the weight to be given to any such consideration in the exercise of that function (Consultation Question 5-5).

5.102 In the Consultation Paper, we noted that the P(W)A 2015 had inserted into the PCPA 2004 provisions requiring the sustainability appraisal produced in connection with the

National Development Framework and strategic and local development plans to include "an assessment of the likely effects of the policies in the draft Framework on the use of the Welsh language".[51] And section 31 of the P(W)A 2015 inserted into the TCPA 1990 section 70(2)(aa), requiring those determining planning applications (and appeals) to have regard to "any considerations relating to the use of the Welsh language, so far as material to the application."

5.103 But there is no duty in relation to any other function under the TCPA 1990, or any functions under the Listed Buildings Act 1990, to have regard to the effect of the exercise of that function on the Welsh language.

5.104 As will be apparent from the commentary above in relation to other considerations, any consideration – whether explicitly mentioned in the relevant statute or not – must be taken into account if it is relevant in law to the exercise of a particular statutory function, and must be ignored if it is irrelevant.[52] That applies, in principle, to the effect of a decision on the use of the Welsh language just as to any other consideration. However, it is not always clear whether a particular matter is indeed relevant, in this general sense, which is why the Act makes specific reference to certain matters, to remove any doubt.

5.105 We accepted that it would be desirable that there should be on this basis some mention in the Planning Bill of the effect of planning decisions on the use of the Welsh language. We therefore accepted that this is an exception to the principle, noted above, of generally not mentioning specific relevant considerations.[53] However, there seemed to be no reason to limit the range of functions to which the duty applies. we accordingly proposed the inclusion of a provision to the effect that such considerations would include the effect of the exercise of the function in question on the use of the Welsh language, where relevant.

5.106 But we accepted that it would also be appropriate to include in the Bill a provision equivalent to section 31(4) of the P(W)A 2015, to the effect that the duty to have regard to the Welsh language should not affect whether regard was to be had to any particular consideration, or the weight to be given to any such consideration.

5.107 Of the 37 consultees responded to this proposal, 30 were in agreement. Keith Bush QC observed that

> the WG's language strategy *Cymraeg 2050* has important implications for land use, especially on the effect of development patterns on the sustainability of natural Welsh communities. Effective consideration of these implications must be secured as an integrated part of the planning process.

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51 PCPA 2004, s 60B(2), inserted by P(W)A 2015, s 3 (NDF); s 60I(8), inserted by P(W)A 2015, s 6 (strategic development plans); PCPA 2004, s 62(6A), inserted by P(W)A 2015, s 11 (local development plans); see also PCPA 2004, s 61(2)(a).

52 See **para 5.28** above.

53 See **para 5.59** above.

5.108 Huw Williams also agreed, commenting that the proposal maintained the present position, but in clearer terms. Several consultees agreed but only on the basis that the caveats as to the weight to be given to other considerations would be included.

5.109 Substantial responses to this proposal were received from Ms Meri Huws (the Welsh Language Commissioner) and from Mr Owain Wyn (Chairman of the Eryri (Snowdonia) National Park Authority).

5.110 Ms Huws suggested that the requirement to have regard to the likely effect, if any, of the exercise of a function on the use of the Welsh language, is too limited; and that the wording of the duty should be aligned more closely with the wording of the requirements as to policy-making standards in the Welsh Language Standards (No 1) Regulations 2015, made under section 29 of the Welsh Language (Wales) Measure 2011.

5.111 The 2015 Regulations prescribe ten standards to guide the commissioning of research, the publication of consultation documents, and the formulation of new policies, and apply to such activities when undertaken by, amongst others the Welsh Ministers and local authorities[54] – which could include the formulation of the development plan. But they do not relate to the making of discretionary decisions by such bodes – including decisions on applications for planning permission and other consents. We consider that it is helpful for guidance to be produced by the Welsh Government as to the proper interpretation of the requirement to have regard to the effect of decision-making on the Welsh language; and the production of Technical Advice Note TAN 20, *Planning and the Welsh Language* – most recently updated in October 2017 – is helpful in this regard. A future edition of TAN 20 may include advice framed in terms similar to those to be found in the 2015 Regulations; but to prescribe such standards in legislation specifically applying to planning decisions seems inappropriate.

5.112 Ms Huws also drew attention to the lack of evidence as to the effect of planning decisions on the use of the Welsh language. We understand that concern, but consider that such monitoring should be encouraged by guidance and as a matter of good practice, rather than required by legislation.

5.113 Mr Wyn commented that the role of the planning system in securing a flourishing Welsh language will vary as between different areas. He drew attention to the guidance in TAN 20 acknowledging the concept of "areas of linguistic sensitivity", and argued that the Bill should give statutory force to such a concept, requiring "special" consideration to be given to language issues in such areas. We consider that this, too, is a matter more suitable for guidance than legislation – not least because the boundaries of such areas would need to be precisely drawn for such a requirement to be capable of implementation, which would no doubt be far from straightforward.

5.114 Some consultees drew particular attention to potential problems if the control of outdoor advertising were to be subject to the proposed duty. However, what is proposed is merely a requirement to have regard to the effect of a decision on the

[54] Welsh Language (Wales) Measure 2011, Sched 6.

use of the Welsh language.[55] It is thus a long way short of the position that applies in the Gaeltacht (the Irish-speaking area of the Republic of Ireland), where deemed consent for advertisements only applies if they are in Irish, or bilingual with prominence given to the Irish text.[56]

5.115 The Institute of Civil Engineers Wales disagreed, on the basis that the proposal might have undesired consequences, including possible discrimination.

5.116 We have already recommended that the duty to have regard to the development plan and to any other material considerations should apply only to planning authorities, strategic planning panels and the Welsh Ministers, and not to public bodies generally. The same point would apply in relation to this proposal.

5.117 A similar approach also applies in relation to the functions to which the Welsh language duty should be attached, to avoid unmeritorious litigation. We thus consider that the duty should apply to the exercise of all functions under the Bill other than those relating to the determination of applications for certificates, or claims for compensation.

Recommendation 5-5.

We recommend that a provision should be included in the Bill to the effect that:

(1) the relevant considerations, to which a planning authority, a strategic planning panel or, as the case may be, the Welsh Ministers must have regard (in accordance with Recommendation 5-3) when exercising any function under the Code – other than those relating to the determination of applications for certificates, or claims for compensation – should include the likely effect, if any, of the exercise of that function on the use of the Welsh language, so far as that is relevant to the exercise of that function; but

(2) the duty to consider the effect of the exercise of a function on the use of the Welsh language is not to affect:

- **whether regard is to be had to any other consideration when exercising that function or**
- **the weight to be given to any such consideration in the exercise of that function.**

Such a provision would replace section 70(2)(aa) of the TCPA 1990 and sections 60B(2), 60I(8), 62(6A) of the PCPA 2004.

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55 And see TAN 20, section 4.

56 Planning and Development Regulations 2001, art 6(2)(b)(v) (advertisements as "exempted development").

SPECIFIC MATERIAL CONSIDERATIONS (3): WELSH GOVERNMENT POLICY

We provisionally proposed that a provision be included in the Bill, to the effect that the relevant considerations, to which a public body must have regard when exercising any function under the Code, should include the policies of the Welsh Government relating to the use and development of land, so far as they are relevant to the exercise of that function; but that the duty to consider Welsh Government policies should not affect whether regard is to be had to any other consideration when exercising that function, or the weight to be given to any such consideration in the exercise of that function (Consultation Question 5-6).

5.118 Alongside the Wales Spatial Plan and the Framework, the published policies of the Welsh Government, and in particular *Planning Policy Wales* – regularly updated, most recently in November 2016 – and the technical advice notes (TANs) are hugely influential in providing the policy basis for both plan-making and decision-taking.

5.119 As to the status of Government policy in plan-making, the PCPA 2004 requires that, in preparing a local development plan, a planning authority in Wales must have regard to "current national policies" (a phrase that is not defined).[57] But there is no equivalent duty in relation to the determination of planning applications, nor to the exercise of any other functions under the TCPA 1990 or the Listed Buildings Act 1990.

5.120 However, the courts have stated clearly that the policy statements of the Secretary of State (in England) are material considerations to which regard should be paid in considering the outcome of a planning application or a planning appeal, even though they do not displace the primacy given by the TCPA 1990 to the statutory development plan.[58] The planning policies of the Welsh Government would similarly need to be taken into account in relation the exercise of any other planning function to which they are relevant.

5.121 In the Consultation Paper, we observed that, given that the planning policies of the Welsh Government are of such significance in the day-to-day operation of the planning system, it seemed surprising that they are not mentioned on the face of the TCPA 1990 as a consideration to be taken into account.

5.122 We therefore provisionally considered that, as with the Welsh language (above), the Bill should state explicitly that such policies, so far as relevant, should be amongst the matters to which public bodies are to have regard when exercising any functions under the Planning Code.

5.123 43 consultees responded to this question; 41 were in agreement.

5.124 Planning Aid Wales and the Law Society suggested that it would be helpful if the scope of the term "Welsh Government policy" were to be clarified. The former suggested that it should mean "PPW, TANs and Ministerial statements", but it would

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57 PCPA 2004, s 62(5). And see *R (Persimmon Homes Ltd) v Vale of Glamorgan Council* [2010] EWHC 535 (Admin), at [20], [118].

58 *Gransden (E C) Ltd v Secretary of State* (1987) 54 P&CR 86 per Woolf J at p 87; *Hopkins Homes v Secretary of State*; *Cheshire East BC v Secretary of State* [2017] UKSC 37, PTSR 623, at [21].

inevitably not be clear which statements would be included, and what weight should be given to statements made some while ago. That indeed highlights the problem inherent in any attempt to define the term.

5.125 We consider that the duty should be explicitly confined to the policies of the Welsh Government relating to the use and development of land, to make it plain that Government policy on other issues is not necessarily to be taken into account – although it might of course be relevant in a particular case. And such policies should only be considered insofar as they are relevant to the exercise of the function in question. Determining which policies are relevant will remain, as it is at present, an exercise for the decision-maker.

5.126 But we do accept, as with some of the other duties already considered, that the duty should be laid only upon planning authorities, strategic planning panels and the Welsh Ministers, rather than on public bodies generally.

5.127 Subject to that point, we consider that our proposal should be pursued. We consider that it does not constitute an expansion of the existing set of duties (currently in section 70 and elsewhere in the TCPA 1990) to have regard to material considerations, since the courts have already accepted that Government policies are to be taken into account in any event. But it would be a useful clarification of the existing law.

Recommendation 5-6.

We recommend that a provision should be included in the Bill, to the effect that:

(1) the relevant considerations, to which a planning authority, a strategic planning panel or the Welsh Ministers must have regard (in accordance with Recommendation 5-4) when exercising any function under the Code – other than those relating to the determination of applications for certificates and claims for compensation – should include the policies of the Welsh Government relating to the use and development of land, so far as they are relevant to the exercise of that function; but

(2) the duty to consider Welsh Government policies is not to affect:

- **whether regard is to be had to any other consideration when exercising that function, or**
- **the weight to be given to any such consideration in the exercise of that function.**

THE SUSTAINABLE DEVELOPMENT PRINCIPLE

We provisionally proposed that it is not necessary for the Bill to contain a provision, equivalent to section 2 of the P(W)A 2015, to the effect that any public body exercising some of the functions under the Code must do so as part of its duty under the Well-being of Future Generations (Wales) Act 2015 to carry out sustainable development (Consultation Question 5-7).

The existing law

5.128 In the Consultation Paper, we drew attention to section 3(1) of the Well-being Act 2015, which provides that each public body must "carry out sustainable development". That includes identifying well-being objectives that are designed to maximise its contribution to achieving each of the well-being goals specified in section 4 of that Act, and taking all reasonable steps to meet those objectives, but the duty is not limited to such objectives.[59] Section 3 does not confer upon public bodies a new function; rather, it lays upon them a new duty to exercise the functions that they already have as part of their duty to carry out sustainable development. And amongst those functions are all of their various powers and duties under the planning Acts.

5.129 We then noted that section 2 of the P(W)A 2015, which makes it clear that the new duties under the Well-being Act apply in particular to

1) the exercise by public bodies of functions under Part 3 of the TCPA 1990, relating to planning applications,

2) the exercise by them of functions under Part 6 of the PCPA 2004, relating to development planning.

5.130 Section 2 of the P(W)A 2015 adds nothing to the duty under section 3 of the Well-being Act. It states that the principle of sustainable development does not alter whether regard should be had as to whether a particular matter is "material" to a particular planning decision (see above), nor as to the weight to be given to any such matter. And the more general duty under section 3 of the Well-being Act 2015 applies equally to the performance of any planning functions under any Act – including the TCPA 1990, the Listed Buildings Act 1990, the Hazardous Substances Act 1990, and the PCPA 1990.

Proposed change

5.131 We considered that it was not helpful for there to be in the Planning Bill a specific provision linking only some of the functions to be performed under it to the Well-being Act, since the duty under section of 3 of that Act would apply to the exercise of such functions in any event.

5.132 It would be possible for the Bill to include a provision equivalent to section 2 of the P(W)A 2015, but enlarged in its application so as to apply clearly to the exercise by a public body of any function under the Code. We did not consider that such a change

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[59] For the definition of "public body" in the Well-being Act, see **para 5.xx** above.

would in practice lead to any extra burden on planning authorities or others, but it would clarify the legislation.

5.133 However, we also noted that a number of other statutes (for example, those relating to the natural environment) impose duties on public bodies, in the exercise of any of their functions, to have regard to various matters.[60] On balance, we concluded that would not be helpful for there to be a reference to each of those duties in the Planning Bill, in addition to the reference that already exists in the statute in question. Instead, we suggested that the existence of those duties should be referred to in guidance.

5.134 We saw no obvious reason why the duty under section 3 of the Well-being Act (albeit slightly differently phrased) was any different in principle from those other duties. We therefore provisionally found no reason for section 2 of the P(W)A 2015 to be restated in the Bill, either in its present form or extended so as to apply explicitly to the exercise of other functions under the Code.

Response

5.135 43 consultees responded to this question. 27 were in agreement with our proposal; seven were equivocal; and nine disagreed.

5.136 Allan Archer commented:

> I think, although it is bound to raise an eyebrow, being such a recent legislative provision, that you have presented a cogent rationale for not carrying forward the Well-being cross-reference.

5.137 However, he and others emphasised that the sustainable development duty must be adequately highlighted and underlined in national policy and guidance.

5.138 The Bar Council, on the other hand, observed:

> The rationale for this omission appears to be at odds with what we understand is one of the chief purposes of the Codification exercise, namely better presentation and simplification in order to enable the public to understand the planning system more readily as well as being comprehensive… The duty to carry out sustainable development is an important one, and may not be well-understood by members of the public… Given the importance of ensuring that the Code is comprehensive, we would suggest that there is real merit in re-stating the statutory duty.

5.139 A number of other consultees disagreed with the proposed omission, making the more general point that the concept of sustainable development is central to planning, such that the cross-reference to the duty under the well-being Act should be retained. Huw Williams, who was a member of the Independent Advisory Group whose report led to the enactment of the P(W)A 2015, observed that "sustainable development has been a feature of planning permission policy and plan preparation for many years.

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[60] See **paras 5.19 to 5.25** above.

As such it must be considered in the 'planning balance' when planning decisions, particularly decisions on planning applications, are considered."

5.140 We recognise that the sustainable development principle is central to the planning system. The opening paragraph of *Planning Policy Wales*, for example, states:

> *Planning Policy Wales* (PPW) sets out the land use planning policies of the WG…It translates our commitment to sustainable development into the planning system so that it can play an appropriate role in moving towards sustainability.[61]

5.141 But we note that section 2 of P(W)A 2015 does not elevate the importance of sustainable development above that of the development plan.

5.142 We thus accept that there is a case for an explicit reference to sustainable development on the face of the Bill. And we understand the argument that it would be helpful for users if all the duties relating to the operation of the planning system were to be referred to in a single place.

5.143 On the other hand, for the reasons explored below in relation to Recommendation 5-8, we have concluded that it is not appropriate for a list of such duties to be included in the Bill; and there is no reason for the sustainability duty to be treated differently. In particular, if only some duties are mentioned, it may be thought that others are less important; and if a particular duty is mentioned in one some statutes, it arguably might be thought to apply less in relation to others.

5.144 Further, although we have recommended that two specific considerations should be referred to explicitly in the Bill – impact on the Welsh language, and the policies of the Welsh Government – neither of those is the subject of a directly applicable provision in another statute. The same does not apply in relation to the sustainable development duty, which is and will remain the subject of the Well-being Act 2015.

5.145 We also note the routine practice of the Planning Inspectorate, noted by Mr Williams and by the Law Society, to refer to sustainability at the end of decisions on planning appeals. However, interestingly, the reference is directly to the duty under section 3 of the Well-being Act 2015, rather than to section 2 of the P(W)A 2015. That too suggests that a reference in planning legislation to the Well-being Act 2015 is not required.

5.146 On balance, therefore, we remain of the view that it is not necessary to have an explicit reference to sustainability and the Well-being Act 2015 in the Planning Bill, provided that it continues to be prominently referred to in Welsh Government guidance.

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61 PPW, Edition 9, November 2016, para 1.1.1.

Recommendation 5-7.

We recommend that it is not necessary for the Bill to contain a provision, equivalent to section 2 of the P(W)A 2015, to the effect that any public body exercising some of the functions under the Code must do so as part of its duty under the Well-being of Future Generations (Wales) Act 2015 to carry out sustainable development.

DUTIES UNDER OTHER STATUTORY SCHEMES

We provisionally proposed that a series of signpost provisions to duties in non-planning legislation that might be relevant to the exercise of functions under the Code should be included at appropriate points within Ministerial guidance (Consultation Question 5-8).

5.147 In the Consultation Paper, we noted that, in addition to the duties applying directly to the exercise of functions by decision-makers under the planning Acts, there were a number of other statutes that impose on public bodies duties that are directly relevant to the exercise of those functions. We have outlined them earlier in this Chapter.[62]

5.148 We observed that, given that many of those using planning legislation are unaware of some or all of those duties, it might at first sight seem appropriate to restate them in the Bill. However, to do so would add to the length of the Bill, and might lead to a number of problems, including the following:

1) it would initially duplicate the provisions in the non-planning statutes, but would lead to a risk that, when those statutes were updated, amended or replaced, the Planning Act would not be amended identically;

2) it might be difficult to know which duties to include in such a list, and which to exclude;

3) it would lead to a risk of one or more of such duties being omitted, inadvertently or otherwise, especially as further duties are added in future legislation – with the consequence that duties not mentioned might be come to be ignored or at least given less weight;

4) the order of any such list might be seen to imply greater weight being given to some duties than to others.

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62 Listed Buildings Act 1990, ss 16, 66, 72 (listed buildings and conservation areas); Well-being Act 2015, s 3 (sustainable development); Countryside Act 1968, s 11 (countryside); National Parks and Access to the Countryside Act 1949, s 11A (national parks); Countryside and Rights of Way Act 2000, s 85 (AONBs); Environment (Wales) Act 2016, s 6(1) (biodiversity and resilience of ecosystems); Conservation of Habitats and Species Regulations 2010, reg 9; Waste (England and Wales) Regulations 2011, reg 18; Water Environment (Water Framework Directive) (England and Wales) Regulations 2017; Crime and Disorder Act 1998, s 17; Equality Act 2010, s 149 ; see **paras 5.18 to 5.27**.

5.149 It would, secondly, be possible not to repeat the wording of each duty, but simply to include a "signpost" provision as to where the duty is to be found ("section 70 is subject to the provisions of section 11 of the Countryside Act 1968 [etc]"). That would still give rise to most of the above problems, and would in addition require users of the Planning Act to look at another Act to find the precise wording of the duty.

5.150 On balance, therefore, whilst we considered (and suggested in our Scoping Paper) that there might be merit in the second approach outlined above, we considered on reflection that the inclusion of such a list in the Bill might cause as many problems as it would solve.

5.151 We therefore considered that it would be more appropriate for consideration to be given to the inclusion of a series of signpost provisions to duties in non-planning legislation be included within the guidance forming part of the Code – possibly along with appropriate commentary outlining the likely relevance of each category to various types of planning functions.

5.152 Of the 37 consultees who responded to this question, 36 agreed. The Association of Local Government Ecologists (Wales) made the sensible comment that it would be helpful if the Welsh Government were to maintain an up-to-date list of the duties in question on their planning website and via the Planning Portal.

5.153 The Bar Council commented that this approach would make the provisions vulnerable to changes in Ministerial guidance, and suggested that the list of relevant duties be contained in a document with formal permanence, such as a Schedule to the main Planning Bill.

5.154 For the reasons stated above, we remain of the view that guidance, not legislation, is the most appropriate place for signposting in this instance, which also enables commentary to be provided as to the relevance of the duty in question to the exercise of planning functions.

Recommendation 5-8.

We recommend that references to the duties in non-planning legislation that may be relevant to the exercise of functions under the Code should be included at appropriate points within Ministerial guidance, and be made available on the Welsh Government and Planning Portal websites.

COAL MINING

5.155 Section 53(3) of the Coal Industry Act 1994 – which was enacted at the time the coal industry was being privatised – requires that those who formulate proposals for inclusion in a planning application for coal mining, land restoration following mining, and incidental operations must:

1) have regard to the desirability of preserving natural beauty, conserving flora and fauna and geological or physiographical features of special interest, and protecting sites, buildings, structures and objects of architectural, historic or archaeological interest; and

2) mitigate any adverse effects of their proposals on flora, fauna [etc].

5.156 Further, when a planning authority is considering a planning application for such mining etc proposals, it is required by section 53(2) of the 1994 Act to have regard to the desirability of preserving natural beauty etc., and to whether the applicants have complied with their duties under section 53(3).

5.157 We noted in the Consultation Paper that a planning authority will generally be required by other legislation – including the Well-being Act – to have regard to the matters mentioned in section 53 of the 1994 Act. Even where it is not explicitly under such a duty, it will be under the general duty, already noted, to take into account everything relevant – which is likely to include those matters. Further, it is inconceivable that the development plan will not have relevant policies on those matters – which the planning authority will of course have to take into account.

5.158 We accordingly considered that section 53(2) (the duty on the planning authority) added nothing. Further, we suggested that, if the authority was required to take those matters into account when assessing proposals, those formulating the proposals would equally have to take them into account – either avoiding any adverse impacts or mitigating them as far as possible. Section 53(3) would therefore be unnecessary. We therefore suggested that none of section 53 needed to be reproduced in the new Bill.

5.159 Of the 32 consultees who responded to this question, 23 agreed to the omission of section 53; six agreed with omitting section 53(2) (the duty on planning authorities) but not section 53(3) (the duty on mineral operators).

5.160 In addition to the duties on a planning authority referred to above, any planning application for a significant mining operation is subject to the requirements of the TCP (Environmental Impact Assessment) (Wales) Regulations 2017, which implement in UK law the requirements of EEC Directive 85/337/EEC. These classify as Schedule 2 development, requiring an assessment, all proposals for open-cast mining and underground mining that are likely to have significant effects on the environment by virtue of their nature, size or location. Schedule 4 to those Regulations specifies the matters to be contained in an assessment, which include all those referred to in section 53 of the Coal Industry Act 1994, and others, in significantly greater depth.

5.161 It follows that any proposal and planning application that are subject to the requirements of section 53 of the 1994 Act will also be subject to the much more detailed requirements of the 2017 Regulations – both as to the preparation of an assessment of the effects of the proposal and as to the consideration of those effects by the planning authority. We therefore remain of the view that section 53 of the 1994 Act is wholly redundant, and need not be reproduced.

Recommendation 5-9.

We recommend that section 53 of the Coal Industry Act 1994 (environmental duties in connection with planning) should be repealed.

A STATUTORY PURPOSE FOR PLANNING CONTROL

5.162 In the light of the previous proposals in Chapter 5 of the Consultation Paper, we provisionally proposed that there is no need for the Bill to contain a provision explaining the purpose of the planning system in Wales.

5.163 We suggested in the Scoping Paper that it might be appropriate for the Bill to contain a provision setting out a statutory purpose for the planning system in Wales.[63] However, in the Consultation Paper we considered that such a provision would not be necessary, in the light of the collection of other statutory duties that we were proposing and that to include a statutory purpose alongside such those various duties would possible cause unnecessary and unhelpful duplication and possible conflict.

5.164 Of 35 consultees who responded to this question, 26 were in agreement; a number of planning authorities pointed out that a statement of the purpose of the planning system could be the subject of much debate and differences of opinion both as to the principles and as to the detailed wording; and governments of different political persuasions might have different views, so there could be scope for regular changes. The Law Society observed that further clarity would be introduced if the Code has an overview section at the start (as with most modern Assembly legislation) – although we note that such a provision usually sets out the content of the piece of legislation rather than its overall purpose.

5.165 Some disagreed. Cardiff and Caerphilly Councils and POSW South West Wales suggested that the purpose of planning could be "the management and delivery of development in the public interest in a sustainable manner that takes account of its impact on people, heritage and natural assets, and other material considerations". This echoes the formulation suggested by the Chartered Institute for Archaeologists: "the achievement of sustainable development in the public interest, which involves balancing environmental, social and economic interests". The Bar Council drew attention to Art L 101-2 of the French *Code de l'Urbanisme* and s II-1-1 of the German *Baugesetzbuch*; each of which is a statement of the principles that are to guide public authorities, set out in considerable detail.

5.166 We have concluded that any statement of purpose that went into any detail would stray into making statements of the policy to be followed by the planning control system – as the French and German Codes do. Formulations that avoided making statements of policy, such as the first of those referred to above, would not be at all informative. In the UK system, policy is set in policy documents rather than frozen in legislation. Earlier in this chapter we have recommended the inclusion of duties to

[63] Consultation Paper, paras 5.4 to 5.8, 5.119 to 5.121.

have regard to such policies, either in the development plan or other policy documents which amount to relevant considerations.

5.167 We therefore do not recommend the inclusion in the Bill of a formal statement as to the purpose of the planning system.

Recommendation 5-10.

In the light of the previous proposals in this Chapter, we do not recommend that the Bill should contain a provision explaining the purpose of the planning system in Wales.

THE ADMINISTRATION OF THE PLANNING SYSTEM

The Planning Inspectorate

We provisionally proposed that persons appointed by the Welsh Ministers for the purpose of determining appeals, conducting inquiries and other similar functions should be referred to in the Planning Code as "inspectors" or "examiners", but in either case in such a way as to make it clear that this was not to prevent the Welsh Ministers appointing for a particular purpose a person other than an employee of the Planning Inspectorate (Consultation Question 5-11).

5.168 Schedule 6 to the TCPA 1990 is titled somewhat obliquely "Determination of certain appeals by persons appointed by the [Welsh Ministers]"; and there are other references, particularly in secondary legislation, to "appointed persons". But there is at present no other provision in primary legislation relating to the role of the Planning Inspectorate in the planning system. This might seem surprising, in view of its critically important role.

5.169 In the Consultation Paper, we considered briefly whether there should be a brief provision in the Bill, perhaps following the model of section 203 of the Planning Act (Northern Ireland) 2011, recognising the existence and role of the Planning Inspectorate ("yr Arolygiaeth Gynllunio"). The Inspectorate had suggested that the legislation does not need to refer to the Inspectorate explicitly; the only desirable change would be to refer to "an inspector appointed by the Welsh Ministers", rather than "a person appointed".

5.170 We noted that the Planning Inspectorate is an executive agency funded jointly by the relevant departments of central Government in England and Wales. We noted too that in exceptional cases the Welsh Ministers might wish to appoint as an inspector someone other than an employee of the Inspectorate, and that in due course it might be considered appropriate to create an equivalent body or agency operating only in relation to Wales.

5.171 We accordingly suggested that those persons appointed by the Welsh Ministers to discharge various functions – whether employees of the Inspectorate, independent contractors or others – should be referred to in primary and secondary legislation not

as “persons appointed” but as “inspectors”, so as to conform to current practice[64], or possibly as “examiners”; but that otherwise no changes should be made.

5.172 Of the 35 consultees responded to this question, 34 were in agreement that “persons appointed” should be referred to either as “inspectors” or “examiners”. 24 preferred “inspectors”, largely on the basis of that being the well-established term; one preferred “examiner”; the Law Society suggested “assessor”; and 11 had no preference.

5.173 The Inspectorate, however, disagreed – principally on the basis that amending the wording to “an inspector [or examiner] appointed” could remove its ability to appoint planning officers to conduct some types of casework (such as non-validation appeals).

5.174 We consider that it would be perfectly possible for the interpretation section of the Bill to include a definition of “inspector” or “examiner” along the lines of “a person appointed by the Welsh Ministers for the purpose of carrying out the function in question”. Such a change would not hinder the appointment of a planning officer, or indeed an independent person. As for which term should be used, we tend to agree with those who supported the use of the term “inspector”, as it is the established term that is likely to be universally understood.

5.175 An example of such a provision is section 77(5) of the TCPA 1990, which currently states:

> Before determining an application referred to him under this section, the Secretary of State shall, if either the applicant or the local planning authority wish, give each of them an opportunity of appearing before, and being heard by a person appointed by the Secretary of State for the purpose.

This would then become:

> Before determining an application referred to them under this section, the Welsh Ministers shall, if either the applicant or the planning authority wish, give each of them an opportunity of appearing before and being heard by an inspector.

5.176 Similar provisions are to be found in a number of other places in the TCPA 1990.[65]

5.177 We consider that this would be a modest but useful simplification of the legislation, so that it accords with current practice.

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64 And see, for example, PCPA 2004, s 59(2).

65 Including TCPA 1990, ss 62ZC, 76D, 76E, 95, 98, 99, 100, 103, 104, 106B, 140, 175, 196, 208, 217, 278, 303A, 322, 322A, 323 and 323A; and Schs 4D, 6, 7, 9, 14 and 15.

Recommendation 5-11.

We recommend that persons appointed by the Welsh Ministers for the purpose of determining appeals, conducting inquiries and other similar functions should be referred to in the Planning Bill as "inspectors".

Local planning authorities other than local authorities and national park authorities

We provisionally proposed that the Bill should not include the provisions currently in the TCPA 1990 enabling enterprise zone authorities, urban development corporations and housing action trusts to be designated as local planning authorities (Consultation Question 5-12).

5.178 Enterprise zone authorities, created under powers in the Local Government, Planning and Land Act 1980, can be designated as local planning authorities for the purposes of the TCPA 1990. We noted in the Consultation Paper that no enterprise zone has been created under the 1980 Act for over 30 years, and that no enterprise zone authority in England or Wales has ever been designated as a local planning authority (other than one which was a planning authority already). We accordingly proposed to repeal the power to designate enterprise zones and the provision (in section 6 of the TCPA 1990) enabling an enterprise zone authority to be designated as a planning authority.[66]

5.179 We noted that only one urban development corporation (Cardiff Bay) had ever been created in Wales, in 1987, and that it had not designated as the local planning authority. We therefore proposed the repeal of the power to create an urban development corporation and the provision (in section 7 of the TCPA 1990) enabling such a corporation to be designated as a planning authority.[67]

5.180 Thirdly, we noted that, although six housing action trusts were constituted in the 1990s, all were in England, and none of those was designated as the local planning authority. Here too, we considered that it was unlikely that the provision enabling a housing action trust to be designated as a planning authority (in section 8 of TCPA 1990) would ever be used in the future, and we propose that it should not be included in the new Code.

5.181 The remainder of section 1 of TCPA 1990, and Schedule 1, apply only to local authorities in England. Sections 2A to 2E, 3 and 7A apply only to London. Section 5 relates to the Norfolk and Suffolk Broads. Section 8A applies to the Homes and Communities Agency, which only operates in England. It follows that none of those provisions need be restated in a Planning Code for Wales.

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66 See **paras 5.xx and 16.xx**.

67 See **paras 5.xx and 16.xx**.

5.182 Section 9 of TCPA 1990 (consequential and supplementary provisions about planning authorities), as amended by section 42 of P(W)A 2015, would need to be adjusted accordingly.

5.183 Of the 33 consultees responded to this question, 29 agreed. A number of planning authorities, for example, observed that the various authorities are not used; and enterprise zones are now duplicated by zones designated under the Capital Allowance Act 2001. A few disagreed, on the basis that these designations might be useful at some time in the future.

5.184 We accept that it must be theoretically possible that the Welsh Ministers might wish to use one or more of these designations in future. However, we remain of the view that it is more likely that they (or planning authorities) could use local development orders, or that the Assembly would introduce entirely new powers. We therefore still consider that these various categories of "special" planning authorities are not required, and that the power for the Welsh Ministers to designate the various types of bodies as planning authorities can therefore be removed.

Recommendation 5-12.

We recommend that the Bill should not include the provisions currently in Part 1 of the TCPA 1990 enabling enterprise zone authorities, urban development corporations and housing action trusts to be designated as local planning authorities.

Planning authorities: terminology

We provisionally proposed that the term "planning authority" should be used in the Planning Code in place of the terms "local planning authority" and "minerals planning authority" in existing legislation (Consultation Question 5-13).

5.185 We observed that the term "local planning authority" appears throughout the 1990 Planning Acts, the PCPA 2004, the Planning Act 2008, the P(W)A 2015, and the Historic Environment (Wales) Act 2015 – all of which are to be incorporated into the Planning Code or the Historic Environment Code. It is in essence a hangover from the TCPA 1947, which provided for local planning authorities, minerals planning authorities, waste planning authorities, district planning authorities and county planning authorities. However, in Wales, there can now be only one planning authority in any area – which may be a local authority or a national park authority or a joint planning board.

5.186 By contrast, "local authorities", as defined in the Local Government Act 1972, the Local Government (Wales) Act 1994[68] – as opposed to "local planning authorities" – are referred to in the TCPA 1990 only in very limited contexts, generally outside the main scheme of the planning Acts.[69] These references to local authorities should not

[68] See TCPA 1990, s 336.

[69] TCPA 1990, s 178, 190, 207, 219.

simply be translated into references to "local planning authorities" when the provisions in question are incorporated into the Planning Code.

5.187 However, we noted that when a unitary system of local government was introduced in Scotland, in 1974, the term "local planning authority" was replaced by "planning authority".[70] We suggested that that seemed to be a helpful change, as it made it clearer that a planning authority would not always be a local authority – as well as being a simpler (and shorter) term. We also observed that every "local planning authority" is also a "minerals planning authority" – so that phrase is not required either.

5.188 It is true that a number of statutes other than those directly relating to planning also refer to "local planning authorities".[71] It would be relatively straightforward for those to be amended accordingly.

5.189 We accordingly suggested that the term "planning authority" should be used in place of both "local planning authority" and "minerals planning authority".

5.190 44 consultees responded to this question; 33 of whom agreed. Two were equivocal; and four disagreed. Carmarthenshire CC said: "stick with Local Planning Authorities – shows they are 'local' bodies, not national etc." Bridgend CBC suggested that the existing term should be retained for continuity and to differentiate between the body responsible for the planning function at a local level and any bodies responsible for strategic planning in the future. As to the latter point, we were not suggesting any change to the term "strategic planning panel", responsible for formulating strategic development plans. [72]

5.191 We remain of the view that the term "planning authority", as in Scotland, would be simpler – although obviously such a change would not alter the substance of the legislation at all.

Recommendation 5-13.

We recommend that the term "planning authority" should be used in the Planning Code in place of the term "local planning authority" and "minerals planning authority" in existing legislation.

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70 Local Government (Scotland) Act 1973, s 172(2).

71 The phrase "local planning authority" occurs in 21 other environmental, local government and related statutes (of which one third apply only in Wales), most if not all of which will need to be amended as a result of the introduction of the Planning Code in any event – National Parks and Access to the Countryside Act 1949, Countryside Act 1968, Land Compensation Act 1961, Local Government Act 1972, Welsh Development Agency Act 1975, Local Government, Planning and Land Act 1980, Wildlife and Countryside Act 1981, Environmental Protection Act 1990, Transport and Works Act 1992, Leasehold Reform, Housing and Urban Development Act 1993, Coal Industry Act 1994, Local Government (Wales) Act 1994, Environment Act 1995, Public Audit (Wales) Act 2004, Government of Wales Act 1998, Countryside and Rights of Way Act 2000, Clean Neighbourhoods [etc] Act 2005, Local Government Byelaws (Wales) Act 2012, Mobile Homes (Wales) Act 2013, Environment (Wales) Act 2016 – and once or twice in around 35 other statutes. The phrase also occurs in 50 other statutes, applying only in England or Scotland, but they would not need to be amended.

72 See Consultation Paper. paras 6.19 to 6.21.

Chapter 6: Formulation of the development plan

INTRODUCTION

6.1 The Town and Country Planning Act ("TCPA") 1990 originally contained (in Part 2) all of the primary legislation relating to the formulation of the development plan. The PCPA 2004 then introduced new systems for England and Wales; Part 6 of that Act contained the development plan system for Wales. More recently it has been significantly amended by the Planning (Wales) Act ("P(W)A") 2015.

6.2 The development plan includes national, regional and local policies and proposals for land use within the relevant area. In Wales, it consists of

1) the national development framework (the NDF) (the successor to the Wales Spatial Plan),[1]

2) strategic development plans (where they exist),[2] and

3) local development plans.[3]

6.3 Each of these is used to help guide planning authorities and inspectors when making determinations of planning applications, and in a number of other situations (see Chapter 5).

6.4 Each of the components of the development plan listed above relates to a different tier of governance. The national development framework is a statement of the Welsh Government's national policies as to the use and development of land, and developments of national significance. Strategic development plans contain the working out of those policies at a regional level, while local development plans refer to the policies and plans of local planning authorities.

INCLUSION IN THE CODE

We provisionally proposed that Part 6 of the PCPA 2004 (development plans), as amended by the PWA 2015, be restated in the Planning Code, subject to any necessary transitional arrangements relating to the Wales Spatial Plan and to the proposals in the remainder of the Chapter (Consultation Question 6-1).

6.5 In Chapter 6 of the Consultation Paper, we noted that changes had only recently been made by way of P(W)A 2015, some of which had not yet come into effect. We therefore suggested that it would be premature to make recommendations as to any

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1 Sections 60 to 60C of the PCPA 2004, amended by section 3 of the P(W)A 2015.

2 Sections 60D to 60J of the PCPA 2004, amended by sections 4 to 6 of the P(W)A 2015.

3 Sections 61 to 72 of the PCPA 2004, amended by sections 11 to 15 of the P(W)A 2015.

further major changes; and that very little reform is required for this area of the law at this stage.[4]

6.6 We also noted that the final text of the NDF is likely to be published in 2020, and that no strategic development plans have yet been produced;[5] and that the Welsh Government was undertaking a review of the law relating to regional governance. Each of those might lead to further pressure for legislative change, but to consider possible changes now would be inappropriate.[6]

6.7 Consultation questions therefore focused on the restatement of the current law, or made recommendations for amendments of a more detailed nature. And our principal proposal was thus that the statutory provisions relating to the formulation of the development plan should once again be integrated into the main planning Act.

6.8 All 42 consultees who provided a response to this consultation question were in principle supportive of this approach. Many urged us to review the expiry date for local development plans, with Sirius Planning recommending a requirement be inserted for local development plans to be reviewed every five years. Cardiff Council suggested that "the expiry date…should be deleted". Huw Williams (Geldards LLP), on the other hand, suggested that an additional requirement that local plans are no more than 100 pages "would help focus policy planner's minds".

6.9 We understand the desire for a statutory requirement as to the duration of a plan. However, it is unlikely to be suitable for primary legislation. If such requirements are (at least on paper) too restrictive, they have to be accompanied by a mechanism to enable out-of-date plans to be "saved"; such procedures are used all too often, so that the requirement is ineffective. We therefore consider that strongly-worded guidance is more appropriate.

6.10 We note that the Welsh Government is currently undertaking a review of its local development plan manual. This document is likely to contain detailed guidance about the desirable duration and size of a local development plan, and it would therefore be more appropriate for these matters to be addressed directly in that context.

6.11 We therefore still consider that the new Bill should contain the provisions of the PCPA 2004 relating to the formulation of development plans, as amended or substituted by the P(W)A 2015, subject to appropriate formatting changes to bring them into line with the remainder of the Bill. This will be simply a restatement of the existing law, but their inclusion in the main Planning Bill will be a significant improvement.

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4 Consultation Paper, para 6.6.

5 The areas for which strategic development plans were predicted included Cardiff, Swansea, and the A55 corridor in North Wales.

6 Consultation Paper, paras 6.12 to 6.26.

Recommendation 6-1.

We recommend that Part 6 of the PCPA 2004 (development plans), as amended by the P(W)A 2015, should be restated in the Bill, subject to any necessary amendments relating to the Wales Spatial Plan and to the proposals in the remainder of the Chapter.

DEVELOPMENT PLANS: OTHER PROVISIONS

We provisionally proposed that the provisions currently in the Planning and Energy Act 2008 should not be restated in the Bill; and that consideration should be given in due course to including equivalent provisions in guidance, and making appropriate amendments to the Building Regulations (Consultation Question 6-2).

6.12 The Planning and Energy Act 2008 provides planning authorities with powers to include "reasonable requirements" in their local development plans, in relation to the usage of local renewable energy or low carbon sources, and compliance with energy efficiency standards.[7]

6.13 In the Consultation Paper, we suggested that these provisions should be classified as guidance, as they encourage and permit the inclusion of such policies, rather than to impose any stricter obligations on planning authorities. Of the 33 consultees who submitted a response to this consultation question, 31 agreed with this suggestion.

6.14 Amongst those in agreement, there was a difference of view between those, like Carmarthenshire CC, who suggested that the provisions were of no remaining value whatsoever, and others, like Newport City Council, who suggested that they had some remaining value, but should be included in the form of guidance.

6.15 Carmarthenshire CC suggested that the duties within the Planning and Energy Act "no longer appear to be needed…in view of the evolution of the national planning policy context and building regulations in Wales". The Law Society and Huw Williams agreed, noting that "such considerations now fall to be considered…in the discharge of the duties under the Well-Being [of Future Generations] Act 2015".[8]

6.16 Several consultees, including the Planning Officers' Society Wales ("POSW"), Monmouthshire CC and Pembrokeshire Coast National Park Authority suggested that "planning authorities [would] struggle…if expectations are not enshrined". This suggests that some continuing value is obtained from the provisions. They also described the provisions as "potential requirements", which needed to be debated on a national platform, using a national evidence base in order to progress them.

6.17 The content and scope of the Welsh Government's guidance is beyond the scope of this project; but we consider that the matters that are the subject of the Planning and Energy Act 2008 would be more appropriately dealt with there, rather than in

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7 Section 1, Planning and Energy Act 2008.

8 Sections 3(2)(a) and 4, Well-being of Future Generations (Wales) Act 2015.

legislation. As noted above, the WG is currently undertaking a review of the local development plan manual. We therefore remain of the view that the provisions of the 2008 Act should not be included in the Planning Bill, but should simply be repealed.

Recommendation 6-2.

We recommend that:

(1) the provisions currently in the Planning and Energy Act 2008 should be repealed; and that

(2) consideration should be given in due course to:

- **including equivalent provisions in guidance; and**
- **making appropriate amendments to the Building Regulations.**

Strategic environmental assessment

In the light of the existence of duties to carry out sustainability appraisals of the NDF and strategic and local development plans (currently under Part 6 of the PCPA 2004), we invited views as to whether there is a continuing requirement for a separate appraisal to be carried out of their environmental impact, as currently required by the Environmental Assessment of Plans and Programmes (Wales) Regulations 2004; whether the 2004 Regulations are still required in relation to plans and programmes other than development plans; and whether the 2004 Regulations need amendment or simplification in any way (Consultation Question 6-3).

6.18 In our Consultation Paper, we highlighted the overlap between strategic environmental assessments ("SEA") and sustainability appraisals ("SA"). We asked consultees about the value of having two separate procedures, and invited views as to the possibility of eliminating the SEA requirement, subject to ongoing negotiations regarding the United Kingdom's impending departure from the European Union.

6.19 Seven of the 36 consultees responding to this question argued in favour of removing the requirement for SEAs, largely for the reasons we set out in the Consultation Paper.

6.20 However, nine of our 36 respondents submitted lengthy responses highlighting the continued value of SEAs. Among these, the Royal Society for the Protection of Birds ("RSPB"), Pembrokeshire Coast National Park Authority and National Parks Wales all argued that eliminating the procedure would create the "perception of weakening the primary or importance" of environmental considerations. They suggested that SAs, which involve multiple streams of considerations (social, economic and environmental), have less of a direct focus on environmental issues and concerns.

6.21 The RSPB also argued that SEAs are prepared for a wider range of plans and programmes than SAs,[9] and therefore enable a more "joined up" approach. It argued that "it is essential that [the] broader application is retained so the environmental effects of different types of plans (including key Government plans) are fully considered". And similar arguments were raised in the equivocal responses submitted by 20 other consultees.

6.22 Several consultees also noted that the description of the two procedures as being entirely separate do not reflect what occurs in practice. Several respondents, including the Planning Inspectorate, PEBA and Rhondda Cynon Taf CBC, suggested that the two assessments are "essentially undertaken under a combined process". The same evidence base, information, consultees and report are used to satisfy the statutory requirements both in relation to the preparation of local development plans and the national development framework.

6.23 Further, it is likely that the SEA Regulations will be considered in more detail in due course, as part of the review of secondary legislation following the UK's departure from the European Union.

6.24 In the light of these considerations, we make no recommendation to remove the requirement for SEAs in Wales; nor as to any changes to the SEA Regulations.

6.25 However, we note that the relevant EU Directive, from which the requirement for SEAs is derived, states that requirements should either be integrated into existing procedures…or incorporated in specifically established procedures…with a view to avoiding duplication".[10] Several consultees noted that they were unaware that they were able to submit integrated SEA/SA plans, or that they had found it difficult to undertake both plans concomitantly. We therefore encourage the WG to draft any future changes to the development plans manual in such a way as to minimise the regulatory burden of producing SAs.

Recommendation 6-3.

We recommend that the requirement in the PCPA 2004 as to the sustainability appraisal of development plans should be carried forward into the Bill, but that:

(1) the guidance on the implementation of that requirement be drafted so as to minimise the burden in practice; and

(2) the position as to that requirement be reviewed in the light of any forthcoming review of the SEA Regulations.

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9 SEAs are required for all "plans and programmes prepared or adopted at national, local or regional levels" for projects prepared for "agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use", while SAs are only required during the preparation of local development plans and the national development framework.

10 Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (27 June 2001).

Inquiries

We provisionally proposed that section 114 of the PCPA 2004 (responsibility for procedure at local plan inquiries) should not be restated in the Planning Bill (Consultation Question 6-4).

6.26 Section 114 of the Planning and Compulsory Purchase Act 2004 sets out that examinations of local development plans are within the remit of the Council on Tribunals (later replaced by the Administrative Justice and Tribunals Council, itself abolished by the Public Bodies Act 2011). We noted that in practice, however, procedural rules for such examinations are made by the Welsh Ministers.[11]

6.27 All of 24 consultees who responded on this point unanimously agreed with the suggestion that section 114 of the 2004 Act should not be restated in the Planning Bill, as being no longer of practical utility or effect.

Recommendation 6-4.

We recommend that section 114 of the PCPA 2004 (responsibility for procedure at local plan inquiries) should not be restated in the Planning Bill.

Planning blight

We provisionally proposed that Chapter 2 of Part 6 of the TCPA 1990 (blight notices) and Schedule 13 to the Act should be restated in the Planning Bill in broadly their present form (Consultation Question 6-5).

6.28 Blight notices arise in circumstances where a proposal for a public project or development – possibly not due to be implemented for some while – renders the land involved virtually unsaleable. One of the qualifying circumstances is where the land in question is indicated or allocated in a development plan. Chapter 2 of Part 6 of the Town and Country Planning Act 1990 permits landowners to compel local authorities to purchase land in the circumstances set out in detail in Schedule 13 to the Act.

6.29 We noted in the Consultation Paper that these provisions are only rarely used in practice; but suggested that they needed to remain on the statute book. The 25 consultees who responded to this consultation question unanimously agreed with the proposal to carry forward the law relating to blight notices in its present form.

6.30 The CLA, whilst agreeing with our proposal in principle, provided two additional suggestions:

1) that the scope of blight notices be extended to include vacant properties, or those used as office blocks, impacted by statutory schemes; and

2) that the upper limit on the annual value be removed or increased.

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11 SI 2005/2839.

6.31 Blight notices were initially introduced by the Town and Country Planning Act 1959, with the intention of providing relief to "owner-occupiers, whether residential, agricultural or commercial, and in the case of commercial owner-occupiers only the 'small men'".[12] While owners of larger non-residential properties are equally affected by depreciation of land values arising from public projects, extending the scope of local authorities' obligations could be prohibitively expensive and prevent public developments from being pursued.

6.32 The limit on the annual value of non-residential property in respect of which a blight notice can be served is set by order – currently the TCP (Blight Provisions) (Wales) Order 2011.[13] That is updated from time to time.

6.33 We therefore consider that the proposal that was the subject of our consultation question should go forward as it stands, as a restatement of the current law.

Recommendation 6-5.

We recommend that Chapter 2 of Part 6 of the TCPA 1990 (blight notices) and Schedule 13 to the Act should be restated in the Planning Bill in broadly their present form.

12 Davies, '*Law of compulsory purchase and compensation*' (5th Ed.) (Butterworths, 1994).

13 SI 2011 No 435. This will no doubt be updated, in line with the corresponding Order applying in England (SI 2017 No 472).

Chapter 7: The need for a planning application

INTRODUCTION

7.1 The planning system provides that:

1) planning permission is needed for "development";[1]

2) minor development in certain categories is normally permitted automatically, without the need for an application;[2]

3) development in any other category needs to be the subject of a planning application – usually to the planning authority, but occasionally to the Welsh Ministers.

7.2 The question of whether any particular proposal needs to be the subject of a planning application ought to be simple to answer. Unfortunately, that is often not the case. As noted in the Consultation Paper, the relevant law is not always entirely straightforward and it has become more complex in recent years.

7.3 In Chapter 7 of the Consultation Paper, we outlined briefly the definition of "development", currently in section 55(1) of the TCPA 1990. We noted that it had remained broadly unchanged since its first appearance 70 years ago, and put forward no suggestions for reform. However, the remaining provisions of section 55 have been modified on various occasions, to include or to exclude certain matters from the scope of the definition. They have also been the subject of much litigation during that period.

7.4 There have also been various attempts to introduce new means of granting planning permission, or authorising development in other ways. These have largely been unsuccessful in practice.

7.5 We put forward a number of relatively modest changes, designed to clarify the legislation in relation to various specific issues. These were generally supported by those responding to the Consultation Paper, with two exceptions (see Consultation Questions 7-3, 7-12).

BUILDING OPERATIONS

7.6 "Building operations" are defined as including:

1) demolition of buildings;

2) rebuilding;

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1 This broadly includes the carrying out of building, engineering, mining or other operations, and the making of any material change in the use of land.

2 Generally referred to as "permitted development".

3) structural alterations of or additions to buildings; and

4) other operations normally undertaken by a person carrying on business as a builder.[3]

Demolition

We provisionally proposed that the power of the Welsh Ministers to remove certain categories of demolition from the scope of development, currently in TCPA 1990, section 55(4)(g), should not be restated in the new Bill, but that the same result be achieved by the use of the General Permitted Development Order ("GDPO") (Consultation Question 7-1).

7.7 As noted above, the TCPA 1990 includes "demolition" within the scope of the works that are defined as "development" within section 55(1). We noted in the Consultation Paper that section 55(2)(g) enables the Welsh Ministers to exclude certain categories of demolition by making a direction.[4]

7.8 The direction under section 55(2)(g) that is currently in force, issued in 1995[5], was partly quashed by the Court of Appeal.[6] It now excludes from the definition of development only the following categories of demolition:

1) the demolition of all or part of a gate, fence or wall outside a conservation area; and

2) the demolition of a building of a volume less than 50 cubic metres.

7.9 All other categories of demolition are therefore development, and require planning permission.

7.10 At present, the general permitted development order ("GPDO") grants permission for almost all demolition – save where the demolition is made necessary by the action or inaction of the owner; or where the works are on such a scale as to require environmental impact assessment. The demolition of a listed building currently requires listed building consent, and the demolition of an unlisted building in a conservation area requires conservation area consent.

7.11 In the Consultation Paper, we suggested that this was an unnecessarily complex legislative scheme, and that the same result could be achieved by simply using the GPDO. That would mean that section 55(2)(g) would not be restated; the present Ministerial direction would be cancelled; the two categories of demolition noted above would therefore be included within the definition of "demolition"; but they would be permitted by the GPDO. It would be possible in the future for Ministers to control particular categories of demolition simply by amending the GPDO from time to time.

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3 TCPA 1990, s 55(1A), inserted by Planning and Compensation Act 1991, s 13.

4 Following the decision in *Cambridge CC v Secretary of State* (1992) 64 P&CR 257, CA.

5 TCP (Demolition – Description of Buildings) Direction 1995, in Appendix A to Welsh Office Circular 31/95 (*Planning Controls over Demolition*).

6 *R (SAVE Britain's Heritage) v Secretary of State* [2011] EWCA Civ 334; see also *Planning Controls over Demolition*, letter to chief planning officers, 18 April 2011.

7.12 Thirty-seven consultees responded to this suggestion, with 34 in agreement. Huw Williams (Geldards LLP) found the proposed simplification "most welcome". A further three respondents, whilst also agreeing, made it clear that the new legislation should be clearly drafted. One respondent asked that the demolition of buildings in a particular category be automatically included within the scope of development; but that would be the inevitable outcome of our proposal, and does not require a further change to the law.

Recommendation 7-1.

We recommend that the power of the Welsh Ministers to remove certain categories of demolition from the scope of development, currently in TCPA 1990, section 55(4)(g), should not be restated in the new Bill, but that the same result should be achieved by using the GPDO.

Building operations other than demolition

7.13 As to the erection of a new structure, we noted that the Court of Appeal had suggested that, in considering whether a particular operation is "development" for the purposes of planning legislation, a useful starting point is to ask first whether what has been done has resulted in the creation of a building.[7] We reiterated in the Consultation Paper the view we had expressed in the Scoping Paper, namely that it might be better to leave the approach to interpreting the term "building" to case-law. No consultee disagreed with that approach.

We provisionally proposed that the extent of minor building operations that are not excluded from the definition of development by TCPA 1990, s 55(2)(a) be clarified with a single provision to the effect that the carrying out of any works to increase the internal floor space of a building, whether underground or otherwise, is development (Consultation Question 7-2).

7.14 Where an existing structure is to be altered, section 55(2)(a) excludes from the definition of "development" the carrying out, for the maintenance, improvement or other alteration of any building, of works which affect only the interior of the building, or which do not materially affect the external appearance of the building.

7.15 We noted that this exclusion is critically important in practice, as it takes out of planning control all internal building works and trivial external works. However, it is subject to three exceptions:

1) the carrying out of works for the making good of war damage;[8]

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7 *Barvis Ltd v Secretary of State for the Environment* (1971) 22 P&CR 710.

8 Proviso to TCPA 1990, s 55(2)(a) (originates from TCPA 1947).

2) the carrying out of works begun after 5 December 1968 for the alteration of a building by providing additional space in it underground;[9] and

3) the carrying out of works which have the effect of increasing the floor space of a building by such amount as may be specified in a development order.[10]

7.16 In the Consultation Paper, we noted that the first of those exceptions is no longer required, and could simply be omitted. No-one challenged that view.

7.17 We also suggested that the legislation could be simplified by providing that the carrying out of any works to increase the internal floor space of a building, whether underground or otherwise, is always development. That would leave scope for the GPDO to be amended to provide for cases in which such works should be permitted development. In practice, it would be likely that the present position would be maintained, which could be achieved simply by the GPDO permitting all internal works other than the second and third categories of works referred to in paragraph 7.14 above.

7.18 Of the 32 consultees who responded to this question, 29 agreed. Two disagreed, but on the basis that, as a matter of principle, permission should never, or only rarely, be required for internal works.

7.19 We agree that permission should only rarely be required for internal works – as is the position at present. Our suggestion was merely to adjust the legislative mechanism by which that result is achieved. And it would enable the Welsh Ministers to make a further change to the law to bring within control some other category of internal works, if that should seem to be justified on a policy basis, no doubt following further consultation.

Recommendation 7-2.

We recommend that the extent of minor building operations that are not excluded from the definition of development by TCPA 1990, s 55(2)(a), currently in the proviso to s 55(2)(a) and in s 55(2A) and (2B), should be clarified with a single provision to the effect that the carrying out of any works to increase the internal floor space of a building, whether underground or otherwise, is development.

ENGINEERING OPERATIONS

We suggested that it would be possible to incorporate in the Bill a definition of "engineering operations", to the effect that they are operations normally supervised by a person carrying on business as an engineer, and include the formation or laying out of means of access to a highway, and the placing or assembly of any tank in any

9 Proviso to TCPA 1990, s 55(2)(a) (originates from TCPA 1968).

10 TCPA 1990, s 55(2A),(2B), inserted by PCPA 2004, s.49; the restriction currently applies to works begun after 22 June 2015 which have the effect of increasing the floor space by more than 200 sq m, in circumstances where that the building is used for the retail sale of goods other than hot food (TCP (Development Management Procedure) (Wales) Order 2012, art 2A).

part of any inland waters for the purpose of fish farming there (Consultation Question 7-3).

7.20 The phrase "engineering operations" is not defined in the Act, save to note that it includes

1) "the formation or laying out of means of access to a highway";[11] and

2) "the placing or assembly of any tank in any part of any inland waters for the purpose of fish farming there".[12]

7.21 The Courts have suggested (in *Fayrewood Farms v Secretary of State*[13]) that an engineering operation could be an operation that would generally be supervised by an engineer (including a traffic engineer as well as a civil engineer) – which echoes the definition in the Act of a building operation.

7.22 We noted both in the Scoping Paper and in the Consultation Paper that that the lack of any discernible confusion with regard to understanding engineering operations militates towards leaving the definition in case law, and that here too a UK-wide definition would be desirable. However, we suggested that it would be possible to combine the three elements highlighted in the previous paragraph into a single definition, which might clarify the existing position without amending the substance of the law significantly. We invited the views of consultees.[14]

7.23 Of 36 consultees who responded to this question, four agreed with the suggested approach. 18 submitted equivocal responses, generally highlighting categories of development, currently considered to be engineering operations, that would be inadvertently excluded – notably works that are often carried out or supervised by persons other than engineers. And 14 disagreed that the phrase should be defined in the Act.

7.24 We had sought to resolve the problem of works supervised by non-engineers through the use of the word "normally", by analogy with the definition of "building operations" in section 55(1A)(4) (see above). However, we recognise that the suggested definition might confuse rather than assist; and there seems to be no particularly satisfactory alternative on offer. We therefore do not make any recommendation in this regard.

Recommendation 7-3.

We recommend that the Bill should not include a definition of "engineering operations".

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11 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 7.20.

12 TCPA 1990, s 55(4A), inserted by PCPA 2004.

13 [1984] JPL 267.

14 Consultation Paper, paras 7.28 – 7.30.

CHANGES OF USE

General principles

7.25 The second limb of "development" is the making of any material change in the use of any buildings or other land. We noted in the Consultation Paper that this leads to significantly more uncertainty, and consequentially litigation, than operational development.[15]

7.26 We also noted that there are a number of terms and concepts that could in theory be defined, notably "planning unit".[16] The Law Society, in its response to the Consultation Paper, noted that it is no longer correct to categorise as always development any material change in the of "any buildings or other land" (especially as "building" is defined to include part of a building). It is more accurate to describe development as a material change in the use of any planning unit. However, the assessment of what is the correct unit to consider in any particular case will inevitably be a matter of fact and degree.[17] Although the courts do from time to time provide helpful guidance on how this is to be done, we did not consider that it would be either appropriate or helpful – or even possible – to seek to translate such guidance into a concise statutory formula.

7.27 The same applied to the determination of the primary and ancillary uses of a particular planning unit, and to the concept of intensification of use – both of which have also been the subject of a great deal of judge-made law that is almost inevitably specific to the facts of particular cases. Here too, we did not suggest seeking to encapsulate the principles from case law within the wording of the Bill.[18]

7.28 Those who responded to the Consultation Paper agreed that our approach was correct in principle; and no-one put forward a definition of any of the relevant terms.

7.29 More generally, the Act contains no definition of "material change of use" itself, and the nature of the relevant litigation over the last 70 years suggests that no general definition is realistically possible.[19] But the Act does specifically include some matters, and exclude others. We made some suggestions in relation to those provisions.

Use classes regulations

We provisionally proposed that there should be an explicit provision as to the approval of use classes regulations by the negative resolution procedure (Consultation Question 7-4).

7.30 Firstly, we noted The Use Classes Order – made under section 55(2)(f) of the TCPA 1990 – is an extremely useful tool, to eliminate the need for the planning system to

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15 Consultation Paper, paras 7.34 – 7.40. And see, for example, Goodall, *A Practical Guide to Permitted Changes of Use*, Bath Publishing, 2016.

16 Consultation Paper, para 7.35.

17 *Burdle v Secretary of State* [1972] 3 All ER 240, per Bridge J at p 244.

18 Consultation Paper, para 7.36.

19 There is a definition in reg. 5 of the Building Regulations 2010; but that would not be appropriate in the present context.

be involved in relation to changes of use that are likely to be of no consequence in planning terms.[20] The Order prescribes certain classes of uses which are considered to be broadly similar in their characteristics and the Act then provides that a change from one use in a particular class to another use in the same class is not a material change of use, even if it otherwise would be.

7.31 However, whilst section 333(4) of the TCPA 1990 provides that an order under section 55(2)(f) providing for use classes (as with a development order) is to be a statutory instrument, section 333(5)(b) omits such an order from the list of those that are to be made by the negative procedure.[21] The present exercise is a useful opportunity for this omission to be rectified. In addition, in line with our general approach to secondary legislation, we suggested that the new power refers to use classes regulations, rather than to an order.

7.32 All 26 consultees who responded to this suggestion were in support. We recommend accordingly.

Recommendation 7-4.

We recommend that the Planning Bill should provide for the approval of use classes regulations by the negative resolution procedure.

Change of use involving a change in the number of dwellings

We provisionally proposed that section 55(3)(a) be clarified by providing that the use as one or more dwellings of any building previously used as a different number of dwellings shall be taken to involve a material change in the use of the building and of each part of it which is so used (Consultation Question 7-5).

7.33 Section 55(3)(a) of the TCPA 1990 makes it clear that a subdivision of one residential unit into two – either one house to two flats or one flat to two smaller flats – is a "material change of use", regardless of whether it might otherwise be considered as such. But it is not clear whether a change in the other direction – two flats to one house, or two small flats to one larger flat – is also a material change of use. Nor is it clear whether carrying out of an internal refurbishment scheme to change the use of a building from, for example, five flats to seven (or seven flats to five) would necessarily amount to a material change in the use of the building as a whole, or of any part of it.

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20 SI 1987 No 764, amended by SIs 1991 No 1567, 1992 Nos 610, 657, 1994 No 724, 1995 No 297 2002 No 1875, 2016 No 28.

21 The negative procedure provides that, after the Welsh Ministers have exercised their power to make subordinate legislation, they must lay the subordinate legislation before the Assembly. The Assembly then has a period of 40 days to object to it. If the Assembly does not object, then it continues to have effect. If the Assembly does object, then the subordinate legislation is annulled and nothing further can be done under it. Most subordinate legislation made by the Welsh Ministers follow this procedure.

7.34 The courts have held that such a change may be material, depending on its planning consequences.[22] In practice, however, that seems to be confusing the question of whether a particular change is desirable, as a matter of policy, with the prior question of whether permission is required; it thus leads to considerable uncertainty on the part of applicants.

7.35 We accordingly suggested in the Consultation Paper that it would remove uncertainty to make it plain that any change in the number of residential units in a building – up or down – should be considered to be a material change in the use of the building, and thus development.

7.36 Of 36 consultees who responded to this question, 30 agreed with our suggestion; three of those suggested that a change from flats to a single dwelling should normally be permitted development. And three asked whether the same approach should also apply to a change in the number of bedrooms in hotels, hostels and self-catering accommodation.

7.37 Six consultees disagreed, largely on the basis that a decrease in the number of residential units in a building should rarely if ever cause a problem, and should not be subject to planning control.

7.38 We agree that such a change would only rarely need to be the subject of planning control. However, just as an increase in the number of units in a building can cause parking and other environmental problems, so in certain areas a decrease in the number of units may cause a loss of affordable small housing units, which may be of concern to planning authorities. It is true that the areas where this has been a problem have so far been largely the more affluent parts of London;[23] but the same problem could in due course arise in residential suburbs in Wales.

7.39 If our proposed change to primary legislation were to be implemented, we would imagine that, at least initially, the GPDO would be amended so as to grant planning permission for any decrease in the number of units in a building. That would maintain the current position in law. But it would leave open the possibility of the Welsh Ministers at a future date requiring permission to be obtained for such changes, or some of them, within certain areas, as seems appropriate at the time.

Recommendation 7-5.

We recommend that section 55(3)(a) of the TCPA 1990 should be clarified by providing that the use as one or more dwellings of any building previously used as a different number of dwellings is a material change in the use of the building and of each part of it that is so used.

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22 *Richmond-upon-Thames v Secretary of State* [2000] 2 PLR 115, recently upheld in *R (Kensington and Chelsea RBC) v Secretary of State* [2016] EWHC 1785 (Admin).

23 Including Kensington & Chelsea and Richmond-upon-Thames.

Other changes of use that are not material

We provisionally proposed that section 55(2)(d) to (f) of the TCPA 1990 be clarified by providing that certain changes of use should be taken for the purposes of the Act not to involve development of the land, rather than the new uses themselves (Consultation Question 7-6).

7.40 Section 55(2)(d) to (f) of the TCPA 1990 provides that certain uses of land are not to be taken to involve development of land – use for purposes ancillary to a dwelling; use for agriculture or forestry; and use for another use in the same use class. We noted in the Consultation Paper that the present exercise is an opportunity to clarify that the focus of enquiry should be on whether a particular *change* of use is material, and thus development, rather than on the resulting use itself.

7.41 This is a purely technical change. Not surprisingly, all of the 31 responses to this question raised no objection. We therefore propose to carry it forward as a recommendation.

Recommendation 7-6.

We recommend that section 55(2)(d) to (f) should be clarified by providing that the following changes of use should be taken for the purposes of this Act not to involve development of the land:

(1) the change of use of land within the curtilage of a dwelling to use for any purpose incidental to the enjoyment of the dwelling as such;

(2) the change of use of any land to use for the purposes of agriculture or forestry (including afforestation) and the change of use for any of those purposes of any building occupied together with land so used;

(3) in the case of buildings or other land which are used for a use within any class specified in regulations made by the Welsh Ministers under this section, the change of use of the buildings or other land or, subject to the provisions of the regulations, of any part of the buildings or the other land, from that use to any other use within the same class.

WAYS IN WHICH PLANNING PERMISSION MAY BE GRANTED

We provisionally proposed that section 58 of the TCPA 1990 (ways in which planning permission may be granted) should not be restated in the new Planning Bill in its present form (Consultation Question 7-7).

7.42 "Development", as defined by section 55, covers everything from massive development projects to small domestic extensions; and planning permission will be required for all of them. The Planning Acts have therefore always provided for permission to be granted in a number of ways, so that in many cases no application has to be submitted – thus saving time and money for all concerned.

7.43 Section 58(1) of the TCPA 1990 thus provides that planning permission can be granted in five specific ways. And section 90 provides that permission can be deemed to be granted for development benefitting from government authorisation.[24]

7.44 We noted in the Consultation Paper that section 58 is entirely declaratory and non-exhaustive;[25] there are many other ways in which planning permission may be granted or deemed to be granted.[26] It does not seem to serve any useful purpose, and is indeed somewhat misleading in its present form. We accordingly suggested that it is not restated in the new Bill – although we acknowledge that the Bill may include "signpost" provisions summarising other provisions in it.

7.45 Twenty-five consultees responded to this proposal. All supported it, with the exception of Keith Bush QC, who observed that, if the Code is to be comprehensive, it should include a provision that fully lists the means of obtaining planning permission.

7.46 We have some sympathy for Keith Bush QC's position. And we consider that, if there is to be in the Bill what appears to be a list of ways to obtain planning permission, it should be comprehensive. However, apparently comprehensive lists all too often inadvertently omit particular items; and a provision in primary legislation is difficult to amend. We therefore remain of the view that it is not appropriate to include such a list in the Bill.

7.47 But it might be appropriate for the *Development Management Manual* to include such a list, perhaps with a brief note on the significance of each of the procedures referred to. That could then be updated and amended from time to time, as appropriate.

Recommendation 7-7.

We recommend that section 58 of the TCPA 1990 (ways in which planning permission may be granted) should not be restated in the new Planning Bill in its present form, but that a comprehensive list, regularly updated as required, should be included in guidance.

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24 TCPA 1990, s 58(2).

25 As is acknowledged in s 58(3) of the TCPA 1990.

26 Others include permission granted by a discontinuance order (under TCPA 1990, ss 102 or 104), in response to a purchase notice (TCPA 1990, s 141(2) or Listed Buildings Act, s 35(5)), in response to enforcement action (TCPA 1990, ss 173(11),(12), s 177), in response to an application for a lawful development certificate (TCPA 1990, s 196), or by Act of Parliament; and permission deemed to be granted for development authorised by a Government department (TCPA 1990, s 90) and for advertising (TCPA 1990, s 222) (see Consultation Paper, para 14.5). Permission may also be granted by mayoral development orders (TCPA 1990, s 61DA) and neighbourhood development orders (s 61J), but only in England.

PERMISSION GRANTED BY DEVELOPMENT ORDER

7.48 We noted in the Consultation Paper that it might seem to be desirable to exclude certain categories of operation – and indeed changes of use – from the scope of "development", and thus from the need for planning permission, but we suggested that this would be better achieved by their inclusion within the categories of permitted development (development permitted by the GPDO), rather than by further amendments to primary legislation.[27] No respondent to the Consultation Paper disagreed with that general approach.

7.49 We observed that the production of the new Planning Code will be a useful opportunity to bring together the provisions as to the grant of permission by a general development order – sections 59(2)(a), (3), 60 and 61D(1),(2) of the TCPA 1990. But we recommended no change to the substance of those provisions.

7.50 We also observed that it seems likely that local development orders (LDOs) – which are still of relatively recent origin – may be more successful than the previous similar initiative from central Government, simplified planning zones (see below). We accordingly recommended no changes, although here too the production of a new Code is an opportunity for the relevant provisions in primary development – sections 61A to 61C and 61D(1),(3) and Schedule 4A of the TCPA 1990 – to be consolidated as a set of more easily understandable provisions regulating the procedure.

7.51 No-one has suggested any changes to these provisions.

We provisionally proposed that section 61 of the TCPA 1990 (largely relating to the applicability of pre-1947 legislation) should not be restated in the new Planning Bill (Consultation Question 7-8).

7.52 In the Consultation Paper, we noted that section 61(1) of the TCPA 1990 – enabling a general development order to apply differently in different areas – is no longer required, as it is now duplicated by section 333(4B).

7.53 Subsections (2) and (3) of section 61 enable a development order to provide for the way in which pre-1947 legislation is to be applied. They are of no longer of any continuing utility, as they duplicate other provisions and are no longer relied upon by planning authorities. As such, neither of the two general development orders currently applying in Wales[28] contain any provisions relying on section 61(2) or 61(3).

7.54 30 consultees responded to this question; all were in favour, albeit with two consultees expressing a slight note of caution. Huw Evans expressed support for the proposal in principle, but both warned that the removal of the provisions should not negatively impact any associated or related legislation. We do not consider that removing the provision, which has no practical utility or effect, will do so, and therefore continue to recommend that section 61 should not be restated in the new Bill.

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27 Consultation Paper, para 7.65.

28 The GPDO 1995 and the TCP(DMP)(W)O 2012.

Recommendation 7-8.

We recommend that section 61 of the TCPA 1990 (largely relating to the applicability of pre-1947 legislation) should not be restated in the new Planning Bill.

OTHER FORMS OF PLANNING PERMISSION

Enterprise zones

We provisionally propose that sections 88 and 89 of the TCPA (planning permission granted by enterprise zone scheme) should not be restated in the new Planning Bill (Consultation Question 7-9).

7.55 Planning permission can be granted by an enterprise zone scheme, under the Local Government, Planning and Land Act 1980. A scheme under that Act lasts ten years. No enterprise zone (EZ) has been created under this procedure in Wales since 1985.[29] A similar result could be achieved by the use of a local development order (LDO).

7.56 In **Chapter 16**, we recommend that the provisions of the 1980 Act, and associated provisions under planning and related legislation, should no longer apply to Wales.[30] It would follow that sections 88 and 89 of the TCPA 1990, providing for planning permission for development in enterprise zones, need not be restated in the new Bill.

7.57 34 consultees responded to our question. Almost all agreed, although Accessible Retail suggested that it might be desirable to retain the EZ procedure for possible use in the future. And three authorities in West Wales, whilst noting that the LDO procedure could achieve the same outcome, also questioned whether the EZ procedure should be retained as an alternative.

7.58 It is of course always possible to retain unused legislation on the grounds that it might be used in the future. However, no-one has drawn attention to any beneficial outcomes that can *only* be achieved through the use of the EZ procedure. We remain of the view that it is highly likely that any new policy initiative to encourage development will either use the LDO procedure, or will introduce new legislation. We therefore still recommend that the EZ provisions should not be restated.

Recommendation 7-9.

We recommend that sections 88 and 89 of the TCPA (planning permission granted by enterprise zone scheme) should not be restated in the new Planning Bill.

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29 The eight zones that currently exist in Wales were created under a different procedure, in the Finance Act 2012 (see **paras 16.75, 16.79**).

30 See **paras 16.71 to 16.80**.

Simplified planning zones

We provisionally proposed that sections 82 to 87 of and Schedule 7 to the TCPA (simplified planning zones) should not be restated in the new Planning Bill (Consultation Question 7-10).

7.59 Simplified planning zones (SPZs) were introduced by Part 2 of and Schedule 6 to the Housing and Planning Act 1986. An SPZ scheme grants planning permission for development within the categories specified in it. Every planning authority is to keep under review the question of whether a scheme would be desirable for any part or parts of its area, and to prepare schemes accordingly.[31]

7.60 Notwithstanding that strongly-phrased duty, and the existence of Government guidance in Wales,[32] it appears that in the 31 years since 1986, only three simplified planning zones have ever been created in England, two in Scotland, and one in Wales.[33] That is possibly because, as we noted in the Scoping Paper, there were significant limitations in practice on the setting up of such zones. And a planning authority can now achieve the same end by making a local development order, which is subject to fewer restrictions (as noted earlier).

7.61 Over the last twenty years, no further guidance has been produced in Wales; and all relevant guidance in England has been cancelled. It therefore seems extremely unlikely that simplified planning zones will ever be used. We accordingly suggested that the relevant statutory provisions (sections 82 to 87 of and Schedule 7 to the TCPA 1990) should no longer apply in Wales.[34]

7.62 Of 34 consultees responding to this suggestion, all but two agreed. Accessible Retail opposed it, for the reasons noted above in relation to EZ schemes; and one authority suggested retaining SPZ procedures for flexibility.

7.63 For the same reasons as outlined above in relation to Enterprise Zones, we recommend that the power to designate SPZs be abolished.

Recommendation 7-10.

We recommend that sections 82 to 87 of and Schedule 7 to the TCPA (simplified planning zones) should not be restated in the new Planning Bill.

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31 See now TCPA 1990, s 83; PCPA 2004. S 45 has been prospectively repealed s 83, but s 45 has not yet been brought into force.

32 TAN 3, *Simplified Planning Zones*, 1996. There is now no guidance on simplified planning zones in England.

33 It is difficult to be certain as to precise figures; the existence of one in Wales (in Flint; long since expired) only emerged during the present consultation exercise.

34 Consultation Paper, paras 7.76 to 7.79.

APPLICATIONS FOR CERTIFICATES OF LAWFULNESS

We provisionally proposed that the provisions relating to time limits and certificates of lawfulness, currently included in TCPA 1990, sections 171B and 191 to 196, be included in the new Planning Bill alongside the other provisions relating to the need for planning permission – drafted along the lines of TCPA 1990, s 64(1) (Consultation Question 7-11).

7.64 As we noted in the Consultation Paper, in view of the complexity of the primary and secondary legislation, including the ever more elaborate rules as to permitted development, it is not surprising that it is sometimes far from clear whether planning permission (or, under the present system, listed building consent) is required for a particular project – and whether, if permission is required, it is granted by a development order.[35]

7.65 There is a procedure by which it is possible to obtain a legally binding certificate to the effect that planning permission is or is not required – a certificate of lawfulness of existing use or development (CLEUD) or a certificate of lawfulness of proposed use or development (CLOPUD) as appropriate. The provisions as to applications for certificates of lawfulness are currently located within the enforcement provisions of TCPA 1990 (as sections 191 to 196). They were introduced into the TCPA 1990 by the Planning and Compensation Act 1991, which was an Act dealing principally with enforcement.

7.66 Prior to that there was a procedure, under section 64 of the TCPA 1990, whereby anyone could ascertain whether planning permission would be required for proposed works.

7.67 We indicated that, as a matter of principle, anyone should be able to ascertain whether an operation or change of use (either one that has already occurred or one that is proposed) requires planning permission, entirely independently of any possible enforcement action.[36]

7.68 We therefore suggested that the production of the Planning Bill is an opportunity to include provisions equivalent to sections 191 to 196 of the TCPA 1990 alongside those referred to earlier in this Chapter, along the lines of the old section 64(1) (including a reference to local development orders but not to enterprise zones or simplified planning zone schemes) – rather than within the part of the Bill dealing with enforcement.

7.69 At present, sections 191 to 196 are drafted by reference to enforcement action; but it might be better to restructure them so that the starting point is to define what is a "lawful operation" and "lawful use" – as was achieved by the old section 64(1). This would not change the substance of the law, but would change the emphasis.

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35 Consultation Paper, paras 7.4 to 7.13.

36 Presumably if a CLEUD is not forthcoming, it will be up to the applicant to decide whether to seek retrospective planning permission, and up to the planning authority to decide whether to take enforcement action. But they may both decide to take no further action, and let the matter rest.

7.70 The TCPA 1990 also includes (in section 171B) provisions about the time after which enforcement action cannot be taken – generally either four years or ten years. Those provisions are closely linked to those relating to certificates, and should be included at the same point as them.

7.71 Further, in view of the increasing use being made of granting permission by development order, it is the need for an application that is in many cases more complex to determine than whether a proposed project is development. It was helpful that the original section 64(1)(b) referred to the need for an application; and unfortunate that this provision was lost in the 1991 amendments. The present exercise provides an opportunity for it to be reintroduced.

7.72 30 consultees responded to this question; all agreed; the Law Society, for example, indicated that the change of emphasis would be welcome. We remain of that view.

Recommendation 7-11.

We recommend that the provisions relating to time limits and certificates of lawfulness, currently included in TCPA 1990, ss 171B and 191 to 196, should be included in the new Planning Bill alongside the other provisions relating to the need for planning permission. They should be drafted along the lines of TCPA 1990, s 64(1) (including a reference to the need for a planning application to be submitted, in the light of general and local development orders, but not to enterprise zone or simplified planning zone schemes).

Planning application deemed to include an application for a certificate of lawfulness

We provisionally proposed that a provision be included to the effect that an application for planning permission for an operation or change of use should be assumed to include an application for a CLOPUD; and that an application for planning permission to retain an operation or change of use already carried out without permission be assumed to include an application for a CLEUD (Consultation Question 7-12).

7.73 We noted in the Consultation Paper that landowners and others – particularly risk-averse householders and small builders – sometimes apply for planning permission for projects that are not development, or that are permitted by a development order. It used to be considered (in line with the decision of the majority of the Court of Appeal in *Wells v Ministry of Housing and Local Government*) that:

> Unless a written application for a determination is made, then there is, of course, no duty on the planning authority to make any such determination. But in a planning application there must be taken to be an implied invitation to the planning authority to determine, if they are of that opinion, that planning permission is not required.[37]

[37] [1967] 1 WLR 1000, CA, per Davies LJ at p 1010.

7.74 We suggested that it would be possible for a provision to be introduced whereby an application for permission is automatically deemed to include an application for a certificate – thus in effect making statutory the rule in *Wells*.[38]

7.75 Forty-two consultees responded to this suggestion – the highest number to any of the questions in this Chapter. Eighteen agreed; twenty disagreed; four were equivocal. We have accordingly reconsidered this suggestion carefully.

7.76 Those who agreed with our suggestion did so largely on the basis that it would be "a pragmatic approach to regularising development without consent".

7.77 However, those disagreeing pointed out, firstly, that the issues to be determined in response to an application for a certificate of lawfulness are quite different from those falling to be considered in response to an application for planning permission.

7.78 The need for permission is straightforwardly a matter of law and fact. For example, a proposal to construct an extension at the rear of a house is clearly a building operation, and thus "development" requiring permission. It may or not be permitted by the GPDO, depending on its dimensions, its location, its proximity to the boundary of the property, whether or not it is in a conservation area, and a range of other factors. On the other hand, matters such as whether the materials to be used match those of the main house, or whether the size of the extension matches others nearby, are irrelevant. The question whether permission is needed is answered regardless of the merit of the proposed development. On the other hand, whether permission, if required, should be granted is a matter of policy.

7.79 Torfaen CBC summarised the problem as follows:

> The two applications are completely different – one is fact-based, and the other merit-based. They should not be confused…However, there could be non-legislative guidance advising LPAs that, in circumstances where it is obvious at the outset that a development may be lawful, then they may advise an applicant to withdraw their planning application and submit an LDC application instead.

7.80 This point was made by Russell LJ, in his dissenting judgment in *Wells*.[39] And more recently, the House of Lords (in *R (Reprotech (Pebsham) Ltd v East Sussex CC*) doubted the conclusion of the majority in *Wells*, Lord Hoffmann observing that the observations of Russell LJ were "very powerful".[40]

7.81 Secondly, a number of consultees pointed out that the evidence required to support an application for a certificate may be very different from the evidence to support a planning application. To take the example of the domestic extension, referred to above, an application for a certificate of lawfulness may require evidence as to the history of the property, previous permissions granted, and enforcement notices issued; an application for planning permission will need to be accompanied by

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38 Consultation Paper, para 7.94.

39 [1967] 1 WLR 1000, CA, per Russell LJ at p 1011.

40 [2003] 1 WLR 348, HL, at [30].

photographs, drawings, and a statement of design and access. The two applications may of course overlap, but they will be quite distinct.

7.82 Section 64(2) of the TCPA 1990 used to provide that "An application under subsection (1) [for a certificate] may be made either as part of an application for planning permission or without any such application." But that begs the question of what is meant by "part of" a planning application.

7.83 On reflection, we consider that the concerns raised were reasonable, and we therefore do not make any proposal as to legislative change. In short, we have come to the view that it would be unduly onerous to require an applicant for permission routinely to provide, in addition, evidence relating to the lawfulness of the development or proposed development. On the other hand, our suggested new provision would achieve little without it.

7.84 However, it could be helpful for guidance to applicants to emphasise that, in cases where there is doubt as to the need for a planning application, they may be well-advised to submit both an application for a certificate and an application for permission. And guidance to authorities should emphasise that an applicant for a certificate should be advised at the earliest possible opportunity if it seems likely that an application for permission will be required, so that it can be submitted without further ado; and conversely an applicant for permission should be advised as soon as it becomes apparent that an application for a certificate would be more appropriate.

Recommendation 7-12.

We recommend that the Bill should not include a provision to the effect that an application for planning permission should be assumed to include an application for a CLOPUD or a CLEUD; but that Welsh Government guidance should remind planning authorities to consider, when validating applications, whether planning permission is actually required for the proposal in question and, if it is, whether it is granted by a development order.

Chapter 8: Applications to the planning authority

INTRODUCTION

8.1 Development proposals can be authorised in a number of ways:

1) by permission granted by a development order, with no need for any details to be approved (usually for minor proposals such as small extensions to dwellings);[1]

2) by permission granted in principle by a development order, subject to the approval of the relevant planning authorities (such as in relation to agricultural buildings or pipelines);[2]

3) by permission granted in response to a specific application, with no need for the approval of details (either because there are no details to be approved, or because sufficient details have been supplied with the application such that the planning authority is satisfied that they are acceptable);

4) by full permission, granted subject to a condition that details are to be approved subsequently (because the details submitted were unsatisfactory or because certain details were omitted);

5) by outline permission, granted subject to certain reserved matters and other details being approved subsequently (usually used for larger developments).

8.2 In England, a further type of permission, known as a "permission in principle", was introduced by the Housing and Planning Act 2016; there is no equivalent in Wales.

8.3 In our Consultation Paper, we noted that the statutory scheme underpinning the different types of authorisation is neither coherent nor consistent.[3] The TCPA 1990 is drafted by reference to the various types of permission, consent, approval or authorisation that may be granted, but makes no reference to the types of application that can be made,[4] which renders the system unnecessarily complex.

8.4 In Chapter 7, we considered the approval of development in principle by a development order. In this Chapter, we consider the process of applying for approval by means of an application to the planning authority, including the process of seeking planning permission; the application procedure; the determination of planning applications, including the imposition of conditions; the approval of details required by conditions; and the variation of planning permissions.

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1 TCP (General Permitted Development) Order 1995, Sched 2, Part 1, Class A (SI 1995/418).

2 TCP (General Permitted Development) Order 1995, Sched 2, Parts 6 (agriculture) and 24 (telecommunications) (SI 1995/418).

3 See Consultation Paper, para 8.3.

4 Consultation Paper, para 8.3.

APPLYING FOR PLANNING PERMISSION

We provisionally proposed that the law as to planning applications be simplified, by (1) abolishing outline planning permission; (2) requiring every application for planning permission for development – whether proposed, underway, or completed – to be accompanied by sufficient plans, drawings and information to describe the development; (3) enabling the items to accompany applications to be prescribed in regulations; (4) providing applicants with the ability to invite the planning authority to grant permission subject to conditions reserving for subsequent approval one or more matters not sufficiently particularised in the application; (5) providing authorities (whether or not invited to do so) with the ability to grant permission subject to such conditions; and (6) enabling authorities to notify the applicant that it is unable to determine an application without further specified details being supplied (Consultation Question 8-1),

Possible simplification

8.5 In the Consultation Paper, we noted that there were three types of application for planning permission:

1) an application for "full" permission, under section 62 of the TCPA 1990;

2) an application for permission to authorise development that has already been carried out, under section 73A;

3) an application for outline permission, under section 92, reserving certain matters for subsequent approval.

8.6 In the first and third situations, permission may be granted subject to conditions requiring certain details to be approved prior to the start of development.

8.7 We observed that there was no obvious distinction in law or policy – or principle – between the grant of full permission, followed by the approval of matters required by one or more conditions, and the grant of outline permission followed by the approval of the reserved matters (and, possibly, other matters required by conditions). In either case, the principle of the proposed development is approved by the initial grant of permission, but it may not lawfully proceed until the details have all been approved.[5]

8.8 We noted that the days of outline applications simply identifying the site ("red line boundary" applications) have long gone; the DMP(W)O 2012 now sets a minimum standard as to the information that must be submitted with any application, full or outline.

8.9 We observed too that there seemed to be no obvious reason why five specific matters may be reserved in an application for outline planning permission, but not any others. And one of these – landscaping –is regularly the subject of conditions in full permissions as well.[6]

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5 Consultation Paper, para 8.20.

6 Consultation Paper, paras 8.20 – 8.22.

8.10 We accordingly suggested that it might be simpler for there to be a single procedure whereby anyone proposing to carry out development that is not permitted by a development order – or seeking to authorise development that has already been carried out – needs to make an application for planning permission (or, more simply a "planning application"). Every application would need to be accompanied by plans, drawings and information necessary to describe the development – including any matters specified in regulations.

8.11 Under this arrangement, an applicant would be able to invite the planning authority to grant permission subject to one or more conditions reserving for future approval certain matters not particularised in the application, apart from matters specified in the regulations. And the authority would be able to impose such conditions of its own volition.

8.12 Equally, an authority would be able in any case to notify the applicant within a short period of receiving an application that it is not able to determine the application without the submission of more details of certain matters. The procedure is currently available only in relation to applications for outline planning permission.[7]

Responses in favour

8.13 There were 65 responses to this proposal – more than almost any other proposal[8] – of which roughly half were in agreement and half disagreed.

8.14 Those who agreed did so on the basis that the merger of detailed and outlined permissions in effect recognises existing practice, and would simplify the legislation. Douglas Hughes Architects, for example, observed:

> We were initially surprised by the proposal to abolish outline planning permission. However, in reflection, we see this as a positive outcome. In recent years, the supporting information that we have had to submit as part of an outline planning application has closely resembled that of a full planning application. The only difference between the two is that, more often than not, outline applications are made with all matters reserved apart from Highways. … we see the abolition of outline planning as a simplification of the planning process and one that we would support.

8.15 The Law Society and Huw Williams (Geldards LLP) expressed a slightly more nuanced view:

> We agree with the analysis of the existing law and the view that the day of "red line boundary" applications is long gone. That said, developers may be reluctant to see the disappearance of the outline permission as it still enshrines in the planning system the notion that a "bankable" permission can be secured without designing a scheme in full.

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7 Consultation Paper, paras 8.23 – 8.25.

8 The proposed unification of planning permission and listed building consent attracted more responses (see **Chapter 13**).

8.16 In addition to saving the developer time and money, there may also be legitimate practical reasons why full details are undesirable. For instance, a large scheme taking many years and consisting of several phases will almost inevitably change as market conditions and tastes change. It is a waste of the scarce resources of planning departments assessing full details too soon and in the knowledge that they will probably be replaced or varied significantly in due course.

8.17 As a result of such concerns, they suggested a complex system for approving development to be implemented in stages.

8.18 Many of those supporting the proposal recognised that there is a balance to be struck between:

1) enabling developers to submit limited information initially, and to incur the cost of working up the details of a scheme only once the principle has been approved; and

2) enabling planning authorities and other stakeholders to have enough detail at the outset to enable them to make an informed decision as to whether the development should be approved in principle.

8.19 Unsurprisingly, some emphasised the desirability of the first, others the second. A number referred to the difficulty of determining what was "sufficient" information to enable a proper decision to be made.

8.20 The Mineral Products Association also observed that the development plan process, leading to the allocation of sites, routinely required levels of information tantamount to outline applications.

Responses disagreeing

8.21 The Planning and Environmental Bar Association ("PEBA") summed up the concerns expressed by many as follows:

> Outline planning permission is an important investment tool for landowners and developers. Its abolition would run the risk of unintended adverse consequences on development and investment in Wales. Such risks have not been assessed. There is no evidence that the availability of outline planning permission under the current law has resulted in adverse effects or undermined effective development management in Wales. Whilst, therefore, we understand the appeal to simplification, we consider that the current arrangements work satisfactorily and the need to avoid unnecessary concern to developers and their investors should prevail.

8.22 Similar points were made, in some cases in strong terms, by a number of planning authorities. Pembrokeshire CC, for example, commented as follows:

> Whilst outline applications on allocated sites appear to be of little benefit, an outline application seeking to establish the principle of development on an unallocated site has the benefit of reducing costs for a developer where the acceptability of principle is a matter of contention. Whilst outline applications

> contain more detail than previously, the majority are far from the detail associated with full applications.[9]

8.23 A number of consultees broadly representing landowners and developers – the Home Builders Federation, Redrow Homes, the Country Land and Business Association ("CLA"), the Historic Houses Association, the Farmers' Union of Wales, Central Association of Agricultural Valuers, Canal & River Trust, Arup, Boyer Planning, Sirius Planning – also objected. Sirius Planning observed:

> We disagree with the proposal to remove outline planning permission, in favour of a single route to full planning; this will result in higher planning fees for applicants who are unable to fund a full application, and therefore creates a barrier to new sites coming forward. There is a further risk that planning authorities will impose onerous information requirements on applicants - on the basis that the application is for full planning permission - driving up the cost of applying for planning permission.

Consideration

8.24 The competing factors identified at paragraph 8.18 above will always be in play. The process of identifying sites in the development plan is, at least in theory, one way to reduce uncertainty; but the delay in the production of local plans means that this is not a satisfactory solution in practice. Outline planning permission, and the English system of permission in principle, is another. Another is the increasingly common practice of planning authorities granting permissions described as full but subject to numerous conditions requiring approval of details.

8.25 On reflection, we recognise that the right to reserve matters by making an outline application is valued by developers. It seems to us likely that, even if the law were to be simplified in the manner we have suggested, a similar mechanism would emerge again in due course, to meet the clearly expressed desire for landowners and developers for certainty as to the principle of development.

8.26 We therefore do not recommend that outline permission is abolished. However, at present the provisions of the TCPA 1990 relating to outline planning permission (in sections 91 and 92) are towards the end of Part Three. We consider that the law would be significantly clearer if the provisions as to outline permission – and applications for such permission – were to be brought into the same part of the Act as those relating to the making and determination of applications for detailed permission (in sections 62 and 70). It is noteworthy that this is the approach taken in the DMP(W)O.

8.27 We also consider that, if outline permission is to be retained, there seems to be no particular reason to limit the categories of matters that may be reserved to the five that have been specified for many years. We therefore suggest that, when the DMP(W)O is next updated, consideration should be given to including other

[9] Similar points were made by Blaenau Gwent, Caerphilly, Cardiff, Ceredigion, Merthyr Tydfil, Neath Port Talbot, Newport and Torfaen Councils.

categories alongside the traditional five – no doubt following a consultation exercise in the usual manner.

Recommendation 8-1.

We recommend that:

(1) the provisions of the TCPA 1990 relating to outline planning permission should be retained in the Bill, but made clearer, and brought into the same part of the Act as those relating to detailed planning permission, currently in sections 62 and 70; and

(2) when the DMP(W)O is next updated, consideration should be given to whether additional categories of matters should be added to the list of those that are currently capable of being reserved for subsequent approval.

APPLICATION PROCEDURE

Material to be submitted with applications

We provisionally proposed that section 327A of the TCPA 1990 – providing that planning authorities must not entertain applications that do not comply with procedural requirements – should not be restated in the Planning Code (Consultation Question 8-2).

8.28 Section 327A of the TCPA 1990 provides that planning authorities "must not" entertain applications that do not comply with prescriptions as to the form or manner in which the application must be made or the form or content of any document or other matter which accompanies the application.[10]

8.29 In our Consultation Paper, we noted the concern that had been expressed by the editors of the *Encyclopedia of Planning Law*, that section 327A could open up a new route of challenge by third parties to the validity of planning permissions;[11] and we shared that concern. The note in the *Encyclopedia* was considered in *R (O'Brien) v West Lancashire BC*,[12] where the court held that the approach to be taken to establishing the validity of a planning permission, even following the enactment of section 327A, is the same as had applied previously, following the decision of the Court of Appeal in *Main v City of Swansea*.[13]

8.30 That decision laid down a more discretionary test, whereby regard was to be had to all the circumstances; and the Court in *O'Brien* considered that a court retained a discretion as to whether to grant a remedy where a planning application had been

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10 Consultation Paper, paras 8.35 – 8.47.

11 Consultation Paper, para 8.40.

12 *O'Brien v West Lancashire BC* [2012] EWHC 2376 (Admin), at para 42.

13 (1985) 49 P&CR 26.

found to be invalid. We observed that in the light of the mandatory language of section 327A, it was by no means certain that the approach of the Court in *O'Brien* would be upheld in the event of any future dispute.[14] We accordingly suggested that section 327A should not be included in the Bill.

8.31 Thirty-three out of the 40 consultees who answered this question supported our proposal. The Law Society described the provision as having "no continuing utility", and suggested that "it should have been repealed by the Planning (Wales) Act 2015". Barratt & David Wilson Homes (South Wales) Ltd also suggested that this "unhelpful provision" undermined the capacity for "constructive dialogue between applicants and planning authorities".

8.32 Three consultees disagreed with the proposal. Allan Archer, an independent planning consultant, suggested that our concerns about collateral challenges by third parties "may not be so great as imagined", and are likely to have been mitigated by the courts' interpretation of the provision as containing a discretionary, rather than mandatory power.

8.33 It is true that the courts have not adopted a strict interpretation of section 327A. The approach in *O'Brien* has more recently been followed by *R (Bishop) v Westminster Council,*[15] in which the deputy judge held that discretion could still be exercised in assessing whether an error rendered a grant of permission void.[16] Thus, a mere clerical error or an incidental omission would not necessarily render a planning decision void.

8.34 However, both *O'Brien* and *Bishop* are first instance decisions, and there is a risk that different courts will take a different approach to interpreting section 327A. A strict reading of the provision could lead to a more rigid approach whereby all mistakes and omissions, even if insignificant, invalidate a grant of planning permission, leaving scope for collateral challenge by third parties on the basis of formal defects in planning applications.

8.35 Allan Archer also disagreed with the proposal on the grounds that the removal of section 327A would undermine other aspects of the statutory framework. He suggested that it would limit the effectiveness of sections 62ZA to 62ZD, which confer upon planning authorities a power to serve on applicants a notice that their application has failed to comply with the necessary requirements.

8.36 We suggested in our Consultation Paper that sections 62ZA to 62ZD ("notice provisions") contradict the requirements of section 327A.[17] Those provisions serve to bring mistakes and omissions to applicants' attention, allow authorities to refer applications back to them; and prevent applications from "[sitting] on the books waiting for additional information to be received" (Ceredigion CC). They allow

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14 *O'Brien* is notably a first-instance decision.

15 [2017] EWHC 3102 (Admin), which follows the court's decision in *O'Brien*.

16 [2017] EWHC 3102 (Admin), at p 37.

17 Consultation Paper, paras 8.44 to 8.46.

planning authorities to accept amended applications even if they are originally submitted with errors or omissions.

8.37 Allan Archer took a different view of the statutory scheme, arguing that both provisions are interoperable. He cited section 62ZA(7), which directly refers to section 327A, as proof that the notice provisions are intended to provide formal indications that planning authorities do not intend to entertain an application, rather than an alternative power which can be exercised to bring omissions or errors to the applicant's attention.[18]

8.38 We tend to the view that the statutory framework is not used in the way that Allan Archer suggests. Planning authorities have indicated that they have interpreted the notice provisions as warning mechanisms, rather than signals that a final decision to reject the application pursuant to section 327A has been taken. Notices are served to applicants as a means of opening up a dialogue about any omissions or mistakes within an application.

8.39 Eliminating the duty to reject applications under section 327A could give rise to concerns that planning authorities' powers to dismiss incomplete applications might be undermined. This concern was expressed by Welsh St. Donat's Community Council, which disagreed with our proposal on the grounds that it would "[erode] the robustness and integrity of the planning approval process" if such powers were "watered down".

8.40 We do not consider that omitting section 327A will have the effect of reducing planning authorities' ability to reject incomplete or defective applications. The existing law (following the decision in *Main*) confers upon authorities a power (rather than a duty) to refuse permission, on multiple grounds, including failures to provide sufficient documentation or information. It is important that the law should reflect the reality of the planning system. This includes the practice of authorities and the decisions of the courts, which suggest that the section 327A duty has very limited effect in practice.

8.41 We consider that the Bill should not include provisions which probably have limited or no effect – and are in any event uncertain in their application. We have therefore decided to maintain our proposal not to include section 327A in the Bill.

Recommendation 8-2.

We recommend that section 327A of the TCPA 1990 – providing that planning authorities must not entertain applications that do not comply with procedural requirements – should not be restated in the Bill.

[18] Section 62ZA(7) sets out that "A requirement imposed under section 62 is a validation requirement in relation to an application for planning permission if the effect of the application failing to comply with the requirement is that the local planning authority must not entertain the application (see section 327A)".

Ownership certificates

We provisionally proposed that section 65(5) of the TCPA 1990 – providing that planning authorities must not entertain applications that are not accompanied by ownership certificates – should not be restated in the Planning Code (Consultation Question 8-3).

8.42 Section 65(5) of the TCPA states that "a local planning authority shall not entertain an application for planning permission…unless any requirements imposed by this section have been satisfied". These requirements include the requirement that applicants for planning permission provide certification that either they are the owner of the land that is the subject of the application, or that they have notified (or taken steps to notify) those who are the owners.[19]

8.43 In our Consultation Paper, we suggested that this provision provided an unhelpful bar to planning authorities considering applications.[20] As with Recommendation 8-2, we considered that the operation of such a rigid rule was unlikely to reflect what occurs in practice, or to provide planning authorities with the requisite flexibility when considering applications.

8.44 Of the 33 consultees who responded to this proposal, 26 agreed. Pembrokeshire Coast National Park Authority and National Parks Wales described the provision as "more of a legal requirement", while Blaenau Gwent County Borough Council suggested that land ownership certificates "remain a constant source of confusion for applicants".

8.45 However, several consultees expressed concern about the removal of section 65(5). Both the Planning Inspectorate (PINS) and Bridgend CBC suggested that removing the provision could result in planning authorities (or the inspectorate) making decisions on the basis of incorrect information. While Newport City Council agreed with the proposal in principle, they also suggested that problems could arise where "landowners are unaware that applications are being made and are unable to make representations on a proposal".

8.46 This concern is illustrated by the case of *Hanily v Minister of Local Government and Planning*,[21] in which the court recognised that the absence of an express statutory provision regulating those who could apply for planning permission meant that "anybody who genuinely hopes to acquire the interest in the land can properly apply for planning permission", with or without the owner's knowledge and consent.[22] The applicants in that case were a firm of metal workers who had obtained planning permission, without the knowledge of the landowner, for land which they were in negotiations to purchase. As a result, the landowner was subjected to a compulsory purchase order, despite having a second, more lucrative offer.

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19 TCP (Development Management Procedure) (Wales) Order (SI 2012/801), arts 9, 10, 11, 13.

20 Consultation Paper, para 8.50.

21 [1952] 2 QB 444.

22 [1952] 2 QB 444, at p 451.

8.47 PINS referred to our comment in the Consultation Paper that it is important that an authority is able to rely on ownership certificates being accurate. It asked:

> if it is important to be able to rely on them being accurate, why do we no longer want to make them mandatory? If there is no compulsion to produce one, and it's an offence to falsify one, then the incentive is not to bother producing one.

8.48 These concerns and objections have led us to conclude that section 65(5) of the TCPA 1990 should be restated in its present form in the new Planning Code. We were persuaded by those who argued that removing the requirement could exclude or limit the participation of landowners or long-term occupiers in the application process, which we consider to be undesirable. We therefore do not recommend omitting section 65(5) from the Bill.

Recommendation 8-3.

We recommend that section 65(5) of the TCPA 1990 (ownership certificates) should be restated in the Bill in its present form.

Notification of applications to agricultural tenants and mineral owners

We provisionally proposed that the requirements of section 65(2) of the TCPA 1990 and secondary legislation made under that provision as to the notification of planning applications to agricultural tenants and the notification of minerals applications be clarified so as to ensure that the provisions are only drawn to the attention of applicants in relevant cases (Consultation Question 8-4).

8.49 We noted in our Consultation Paper that some applicants (and planning authorities) were confused by the provisions relating to the requirement under section 65(2) to notify planning applications to agricultural tenants and owners of mineral rights. We suggested that the relevant provision in the Bill should be drafted so as to make it clear that the requirement only applies – and should be drawn to the attention of applicants –in relevant cases (which will not arise often).[23]

8.50 All 32 consultees who responded to this question agreed with the proposal. Carmarthenshire CC noted that the provision "has always been an area of confusion [because of] the way it is written". Blaenau Gwent CBC also agreed, as they suggested that clarification would eliminate the need to submit agricultural holdings certificates for "the majority of applications, where it is clearly not an issue".

8.51 We consider that the proposal should be maintained.

[23] Consultation Paper, para 8.55.

Recommendation 8-4.

We recommend that the requirements of section 65(2) of the TCPA 1990 and secondary legislation made under that provision as to the notification of planning applications to agricultural tenants and the notification of minerals applications be redrafted to make clear the limited circumstances in which they apply.

DETERMINING PLANNING APPLICATIONS

The power to decline to determine applications

We provisionally proposed that section 70A of the TCPA 1990 (power to decline similar applications) be restated in the Planning Code as its stands following amendment by PCPA 2004 (Consultation Question 8-5).

8.52 Section 70A of the TCPA 1990, as first introduced by the Planning and Compensation Act 1991, provided planning authorities with the power to decline to determine applications that are "the same or substantially the same" as an application or appeal that has been dismissed by the Welsh Ministers in the previous two years, if there has been no significant change in the development plan or in any other material considerations.

8.53 The provision was designed to prevent developers from trying to wear down opposition to a proposal by repeatedly submitting similar applications, but not to prevent the applicant from revising a proposal in an attempt to meet objections.[24]

8.54 This provision has subsequently been amended by the Planning and Compulsory Purchase Act (PCPA) 2004 and by the Planning Act 2008, so as to allow a planning authority to decline to determine an application where:

1) it has refused more than one similar application and there has been no appeal against any such refusal (or any such appeal has been withdrawn); or

2) the Secretary of State has refused an application (in England) deemed to have been made in response to an enforcement notice.

8.55 The version of section 70A amended by the 2004 Act has been in force in England since 2009, but is not in force in Wales. And the amendments introduced by the 2008 Act only apply in England. Further amendments have been made by the P(W)A 2015.

8.56 We suggested in our Consultation Paper that these provisions should be introduced in Wales, arguing that they provide a clear solution to a practical problem faced by planning authorities.

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[24] *R (Harrison) v Richmond-upon-Thames LBC* [2013] EWHC 1677 (Admin).

8.57 We received 34 responses to this proposal, all of whom were supportive of the proposal in principle. The Royal Town Planning Institute (RTPI) suggested that it would "deal appropriately with a current omission" in the law.

8.58 Two consultees expressed concern about the scope of the proposal. Huw Evans suggested that the power should be limited to applications "with no detail or information…[addressing] matters which led to a refusal of planning permission". Conversely, the Llandaff Conservation Area Advisory Group suggested that it should be widened to include other applications submitted by vexatious developers, including applications for material changes to applications.

8.59 While there are arguments to support shifts in both directions, we consider that the current framework as it stands strikes an appropriate balance between the needs of planning authorities and applicants. Limiting or extending the power, in the ways suggested above, might render it too difficult for developers to submit successive applications or for planning authorities to avoid the costs associated with assessing multiple applications. And it should be borne in mind that section 70A only provides a power for an authority to decline an application in any of the specified circumstances, not a duty to do so.

8.60 We therefore consider that the section should be included in the Planning Code in the form in which it applies in England following amendment by the PCPA 2004 and the Planning Act 2008, and as amended by the P(W)A 2015.

Recommendation 8-5.

We recommend that section 70A of the TCPA 1990 (power to decline similar applications) should be restated in the Bill in the form in which it applies in England following amendment by the PCPA 2004 and the Planning Act 2008, and as amended by the P(W)A 2015.

Twin-tracking

We provisionally proposed that section 78A of the TCPA 1990, enabling a period of dual jurisdiction between the planning authorities and the Planning Inspectorate, be restated in the Planning Code (Consultation Question 8-6).

8.61 The process of "twin-tracking" applications involves the submission of duplicate applications to a planning authority. It allows an applicant to appeal to the Inspectorate against the deemed refusal of one application, while continuing to negotiate with the planning authority over the other.

8.62 The practice has both advantages and disadvantages. It allows developers to gain leverage over planning authorities, and encourage them to speed up the decision process, resulting in fewer costs and less uncertainty. It also provides an opportunity for constructive dialogue to continue between the parties. On the other hand, it can place substantial burdens on planning authorities by forcing them to respond to an appeal at the same time as negotiating.

8.63 In an attempt to curb such practices, two provisions were introduced into the 1990 Act:

1) section 70B of the TCPA 1990 (introduced by section 43 of the PCPA 2004), providing planning authorities with the power to decline to determine overlapping applications; and

2) section 78A of the TCPA 1990, introduced by Section 50 of the PCPA 2004, which introduced a period in which dual jurisdiction can be exercised, allowing the planning authority to issue a decision even if an appeal has been lodged.

8.64 Section 70B is in force in England, but not in Wales; whereas section 78A is now in force in Wales but not in England.[25]

8.65 We suggested in our Consultation Paper that the introduction of section 70B in Wales was undesirable, as it effectively undermined the legitimacy of the twin-tracking procedure itself, which can be helpful in some cases. [26] We also suggested that the procedure under section 78A was preferable, as it allows the benefits of twin-tracking to be realised without the need for a second, identical application to have been submitted at the outset. We therefore proposed that section 78A, but not section 70B, should be restated in the Bill.

8.66 We received 39 responses to this proposal, 38 of which expressed support for our proposal. Sirius Planning said twin-tracking helps to "speed up the planning process where there are more than one development options" and "encourages applications and planning authorities to work together to find agreeable solutions". Accessible Retail also noted that twin-tracking "offers potential benefits to all parties".

Recommendation 8-6.

We recommend that section 78A of the TCPA 1990, enabling a period of dual jurisdiction between the planning authorities and the Planning Inspectorate, should be restated in the Bill, but not section 70B (which effectively prevents twin-tracking).

Consultation and publicity

We provisionally considered that it would be helpful to include a provision in the Code, requiring each planning authority to prepare a statement specifying those within the community whom it will seek to involve in the determination of planning applications (Consultation Question 8-7).

8.67 Community consultation requirements currently require that a planning authority creates a "community involvement scheme", specifying the "general and specific

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25 2015 SI 340, art 2. Similar provisions were inserted into the Listed Buildings Act in relation to applications for Listed Building Consent and Conservation Area Consent and consequential appeals (Listed Buildings Act 1990, ss 81A, 81B (inserted by PCPA 2004, s 43(2)); Listed Buildings Act 1990, s 20A (inserted by PCPA 2004, s 50(2)). Those too are partially in force in Wales.

26 Consultation Paper, paras 8.65 to 8.68.

consultation bodies" to be consulted during the formulation of the local development plan.[27] In England, but not in Wales, such scheme will also specify those who are to be consulted in the determination of planning applications.[28] In Wales, the only statutory requirements as to consultation in relation to planning applications are those contained in the DMP(W)O, which prescribes a list of nationally-determined authorities, bodies or persons to be consulted in relation to different categories of development.[29]

8.68 In our Consultation Paper, we suggested that the provisions relating to "community involvement schemes" could usefully be extended to the determination of planning applications. Planning authorities would create a list of groups and individuals within the community, for example neighbours or community councils, who must be consulted in respect of developments in a particular area or of a particular type.[30]

8.69 We received 55 responses to this proposal, of which 17 were in agreement. The Institution of Civil Engineers suggested that it would allow planning authorities to "achieve the confidence of the public in their decision making" and "openly demonstrate that submitted concerns from the community have been duly considered". Planning Aid Wales also considered that it would "allow interested people and communities to notify the planning authority of their interest in being consulted on applications in a particular area and/or of a particular type".

8.70 The Theatres Trust suggested that the obligation would result in "greater regard being given to those with whom the authority should consult", noting that there was a degree of non-compliance with the requirements of the DMP(W)O. Accessible Retail suggested that the statement would "assist developers in engaging in consultation", while the National Trust suggested that it "would help to provide certainty over the extent and consistency of neighbour consultation".

8.71 Some 21 consultees (including 15 planning authorities, POSW and POSW South-East Wales) disagreed with our proposal. Criticism ranged from those who argued that it would be overly onerous to place such a requirement on planning authorities, to those who believed that the current statutory framework as to those who should be consulted in relation to applications was sufficient, particularly when considered alongside existing non-statutory guidelines.

8.72 The additional work required by planning authorities is likely to include:

1) preparing and amending the statement;

2) complying with the requirements to consult those listed in the statement, and responding to any resulting representations; and

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27 Section 63, PCPA 2004 and reg 6, Town and Country Planning (Local Development Plan) (Wales) Regulations 2005 provide a duty for planning authorities to create a community involvement scheme and indicate its contents in relation to consultation, respectively.

28 Compare PCPA 2004, s 18 (England); and s 63 (Wales).

29 DMP(W)O 2012, Sch 4.

30 Consultation Paper, paras 8.69 – 8.75.

3) responding to any additional litigation arising from the new requirement.

8.73 We do not consider the process of preparing and amending the statement to be a significant task. Planning authorities are already required to have a similar list in relation to the formulation of the local development plan, so that they are likely to have an idea of the groups or persons whose views could be usefully canvassed. Additionally, as five planning authorities noted in their responses, planning authorities generally have a policy on consultation which includes those with rights of audience at planning committees. The preparation of the statement itself is therefore unlikely to require significant resources.

8.74 The creation of a statement is also likely to increase the number of those who must be consulted by planning authorities. The process of consultation includes a number of duties, which were set out as follows by McCullough J in *Cran & Others v Camden LBC*:

> Consultation must take place while the proposals are still at a formative stage; those consulted must be provided with information which is accurate and sufficient to enable them to make a meaningful response; they must be given adequate time in which to do so; there must be adequate time for their responses to be considered; the consulting party must consider the responses with a receptive mind and in a conscientious manner when reaching its decision.[31]

8.75 As to possible additional litigation, we noted in our Consultation Paper that the preparation of a formal statement can create a legitimate expectation of consultation.[32] Those specified on the list could therefore bring an action for judicial review where they expect to be consulted as a result of the statement, but are not. However, that is likely to be less intractable than litigation brought by those who, in the absence of a formal statement claim that they should have been consulted.

8.76 Moreover, increased consultation could avoid some work that would otherwise be required at a later stage. By providing certain stakeholders with the opportunity to contribute to the decision-making process, planning authorities could limit opposition arising at a later stage and gather more information about the site and the likely effects of a development proposal. Furthermore, by providing authorities themselves with the power to include or exclude groups from the statement the authorities can amend or expand the list, in line with the resources available to them.

8.77 One specific point, raised by several community councils, was as to the involvement of such councils in the planning process. Under the present law, a planning authority must notify a community council of all applications within any category specified by the community council in a formal request.[33] That provision could be subsumed into the general requirement for the planning authority to produce a statement of community involvement.

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31 [1995] RTR 346, at p 374.

32 Consultation Paper, para 8.71.

33 TCPA 1990, Sched 1A, para 2, inserted by Local Government (Wales) Act 1994, Sch 4.

8.78 On balance, we consider that a requirement to prepare such a statement of involvement would in most case do no more than formalise existing best practice, and we therefore maintain our proposal. But we accept that such a requirement should be formulated so as to incorporate the current right of community councils to be involved where they so wish.

Recommendation 8-7.

We recommend that the Bill should include a provision requiring each planning authority to prepare a statement specifying those categories of people and organisations within the community (including community and town councils) whom it will seek to involve in the determination of planning applications.

8.79 A further point made by several planning authorities in response to Consultation Question 8-7 was as to the need for applications in certain categories to be advertised in the local press. Such publicity can be surprisingly expensive, especially bearing in mind that every such notice needs to be in both languages; and in practice it results in very few, if any, responses. The suggestion is that it would be more effective for applications to be advertised on the Planning Portal or on the authority's own website. We have some sympathy with this, but note that the requirement for such publicity is in the DMP(W)O, and therefore consider that it is a matter that should be addressed when the DMP(W)O is next amended or replaced.[34]

We provisionally proposed that the DMP(W)O be amended to make it clear that representations as to a planning application received after the end of the 21-day consultation but before the date of the decision should be taken into account if possible, but that there should be no requirement to delay consideration of the application (Consultation Question 8-8).

8.80 Article 21 of the DMP(W)O provides that a planning authority "must, in determining an application for planning permission, take into account any representations made… within 21 days beginning with the date when the notice was first displayed".[35] The *Development Management Manual* suggests that representations made after this date should also be taken into consideration, if the application has not yet been determined.[36]

8.81 Respondents to the Scoping Paper suggested that the provision was unclear as to whether representations made after the end of the 21-day consultation period can be considered. We therefore proposed that the position currently set out in the *Development Management Manual* should be clarified by including it in the GDM(W)O 2012.

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34 DMP(W)O 2012, art 12.

35 SI 2012/801.

36 Welsh Government, *Development Management Manual* (May 2017), para 8.2.9.

8.82 We received 41 responses to this proposal, 19 of which were in agreement. The National Trust described it as "formalising current practices", allowing the practice to be brought to the attention of consultees and members of the public. Torfaen CBC also suggested that "embodying [the practice] in law could help provide consistency, and provide reassurance to applicants".

8.83 Eight consultees agreed in principle, but expressed concern about its capacity to be misused in order to incur delays or ensure that additional weight is placed on a particular response. Blaenau Gwent CBC described how late submissions were used as

> a tactic for objectors to deliberately submit late correspondence as this is often read out at the meeting and therefore assumes greater significance than earlier correspondence that is paraphrased in the body of a lengthy report.

8.84 PINS suggested that some might argue that if later representations can be taken into account at the application stage, they should also be accepted at the appeal stage – which may undermine the tight (and rigidly enforced) statutory timetable.

8.85 A further 14 consultees disagreed with the proposal. The Canal & River Trust asked whether it could lead to an increase in the number of legal challenges if the term "if possible" is not sufficiently defined. Pembrokeshire Coast NPA described the proposal as seeking to "formalise the impossible", and argued that the principle "should remain as a best practice approach rather than forming part of any legislation". A notable feature of consultees' concern about the suggested amendment is that the proposal could result in planning authorities being held to ransom by late representations.

8.86 We recognise that the status of late representations is always going to be problematic. At one extreme, a relevant and helpful representation will have to be ignored if it is received a day after the decision has been made; at the other, a relevant and helpful representation should not be ignored merely because it arrived a few hours after the 21-day deadline. On reflection, we consider that a duty to do something "if possible" is not capable of enforcement; and is likely to lead to allegations of impropriety if some late representations are taken into account and others ignored. And we share the concern expressed by PINS.

8.87 We therefore consider that the statutory duty to take representations into account should only apply to those received before the deadline; the obligation to consider late representations where possible should only be a matter of good practice, as at present.

Recommendation 8-8.

We recommend that no amendment should be made to the DMP(W)O in relation to representations relating to a planning application that are received after the end of the 21-day consultation period; any obligation to take into account later representations should remain, as at present, a matter of good practice.

CONDITIONS ON THE GRANT OF PLANNING PERMISSION

Distinction between conditions and limitations

We provisionally proposed that the distinction between conditions and limitations attached to planning permissions should be minimised, either by defining the term "condition" so as to include "limitation" or making it clear that planning permission granted in response to an application or an appeal (as opposed to merely permission granted by a development order, as at present) may be granted subject to limitations or conditions (Consultation Question 8-9).

8.88 Planning permission may be granted by a planning authority (or in response to an appeal) subject to conditions, under sections 70(1)(a), 72 and 79(4)(a) of the TCPA 1990. Permission for development granted by development orders may be subject to conditions or limitations.[37] Conditions or limitations may apply to the application site, land outside the application site but under the applicant's control, or other land, provided that the applicant can reasonably comply with the condition.

8.89 In our Consultation Paper, we noted that some distinctions are being drawn between conditions and limitations. Under section 57(3) of the TCPA 1990, where permission has been granted by a development order subject to a limitation (but not a condition), further permission is not required if the applicant owner decides to revert the use of the land to its normal use.

8.90 We provided two alternative proposals for consultees, suggesting either that "conditions" should be defined as including "limitations" (Option 1), or that planning authorities should be empowered to grant permission subject to conditions or limitations (Option 2).

8.91 The majority of the 38 consultees who responded to this proposal did not express a view as between Option 1 and Option 2. Andrew Ferguson, a senior planning officer writing in a personal capacity, argued that it is "not clear what the distinction between conditions and limitations is", and therefore suggested that both definitions should be integrated. Caerphilly CBC also adopted this view, arguing that

> Most practitioners use, and understand, any requirement imposed upon a consent to be a condition, whether it requests the submission and agreement of additional information, limits the site area or scale of the development, or imposes an ongoing limitation such as hours of operation.

8.92 PEBA drew attention to the decision in *I'm Your Man Ltd v Secretary of State* – which suggests that there is no power for a planning authority to grant permission subject to a limitation.[38] But we note indications in sections 62ZA(1)(b) and 71ZA of the TCPA 1990 that, in Wales at least, planning permission may be granted subject to limitations. And section 74A, which relates to permission granted either by a development order or in response to an application – but which applies only in England – provides that, for that section, "condition" includes "limitation".

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37 TCPA 1990, ss 56(5)(a), 57(3), 60(6), 61C(1)(b).

38 [1999] 4 PLR 107 (CA).

8.93 We remain of the view that the distinction between "conditions" and limitations" serves no useful purpose. It would seem that the simplest way to do away with the unnecessary technicalities arising from the supposed distinction is simply to provide that "condition" includes "limitation", and then do away with all references to limitations.

Recommendation 8-9.

We recommend that the term "condition" should be defined so as to include "limitation".

General requirements as to conditions

We provisionally proposed that the Bill should contain a general power for planning authorities to impose such conditions [or limitations] as they see fit, provide that they are: (1) necessary to make the development acceptable in planning terms; (2) relevant to the development and to planning considerations generally; (3) sufficiently precise to make it capable of being complied with and enforced; and (4) reasonable in all other respects (Consultation Question 8-10).

8.94 We noted in the Consultation Paper that there is a general power to impose conditions on planning permissions, under sections 70(1)(a) and 72 of the TCPA 1990. The scope of this apparently unfettered power has been considered on a number of occasions by the courts, notably in *Newbury District Council v Secretary of State*,[39] in which the House of Lords put forward three tests that must be complied with by any condition if it is to be valid. This has been elaborated by Welsh Government guidance; Circular 016/2014 puts forward six tests for the validity of planning conditions, similar to those outlined in *Newbury*.

8.95 We suggested that it would be helpful for the Bill to contain a provision relating to the power to impose conditions, in terms similar to those used in the judgment in *Newbury* and in guidance.

8.96 Forty-six consultees responded to this suggestion, none of whom disagreed with it; several made other comments or suggestions in relation to conditions generally. The RTPI and Mr Allan Archer questioned the use of the phrase "as they see fit"; but this has been in the statute for many years.[40] PINS queried the phrase "sufficiently precise". The test in Circular 016/2014 simply says "precise"; our intention was to clarify what was meant by that. The HBF expressed concern as to the phrase "relevant to planning considerations generally". We intended by this to summarise the phrase in *Newbury* "for a planning purpose and not for an ulterior one"; and that in the Circular "relevant to planning".

8.97 Some consultees (in response either to this question or one of those following) emphasised the desirability of particular types of condition; but we consider that this

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39 [1981] AC 578 at 607 – 608 (see Consultation Paper, para 8.91). See also *Brent LBC v Secretary of State* [1998] JPL 222; and *M J Shanley Ltd v Secretary of State* [1982] JPL 380.

40 See, for example, TCPA 1947, s 14(1).

is a matter for guidance rather than statute. Redrow Homes suggested that a schedule of conditions attached to a particular permission that require further information to be approved should make clear when the information is to be submitted (that is, whether it is pre-commencement, pre-building works, or pre-occupation). This is an eminently sensible approach, but again would be best encouraged in guidance, rather than required by statute.[41]

Disclosure of draft conditions

8.98 The Law Society and Huw Williams made a further suggestion in relation to conditions generally, as follows:

> Making the disclosure of draft conditions mandatory would be problematic (see CP, para 8.133). However, I suggest that making requests for draft conditions is a matter for the applicant as this may delay an application coming before the decision-maker. If an applicant thinks that seeing the draft conditions is worth the delay then that should be their prerogative. I would therefore support a power to make regulations to enable an applicant to elect to request draft conditions and to specify a period for comments and a duty on the planning authority to consider the comments. Five working days should be a sufficient consultation period. I would also suggest a power to limit the right to specific types of development, for example "major developments" as defined in DMP(W)O.

8.99 The Mineral Products Association, Sirius Planning and others also made similar points.

8.100 We consider that this is a sensible suggestion; and we note that an element of negotiation as to the wording of conditions is normal practice at appeals and inquiries – and results in each side putting forward schedules of draft conditions, which the inspector may or may not accept.

8.101 It might seem attractive to suggest that the desirability of such an approach is achieved simply by issuing suitable guidance. However, it is already recognised as best practice, and that does not avoid authorities granting permissions subject to unsatisfactory conditions without negotiating. We therefore consider that any right to see draft conditions needs to be contained in legislation.

8.102 We realise that to introduce such a procedure would add an element of delay. However, any such delay would be at the instigation of the applicant – who would be able to balance the desirability of an earlier decision against the chance of it being subject to unhelpful conditions that might be capable of being altered or removed by negotiation. Clearly the requirement as to performance targets would need to be adjusted, to ensure that authorities do not suffer as a result of applicants exercising their right to see draft conditions.

8.103 One way in which such a procedure could work would be:

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41 See, for example, NPPG, para 21a-023.

1) the planning authority to be under a duty to give five working days' notice of its intention to determine any application;

2) the applicant to have a right to see the proposed conditions at any time during that period;

3) the applicant to have the opportunity to submit a schedule of suggested conditions – with or without a meeting to discuss them – at any time in the following ten working days;

4) the authority to be under a duty to consider those conditions (but not necessarily to agree with them).

8.104 This would hopefully reduce the likelihood of appeals and, more importantly, the likelihood of poorly drafted conditions being imposed. If the applicant's suggested conditions (or some of them) are not accepted, the applicant could appeal against conditions in the normal way – with a costs application being presumably more likely in the event that the inspector imposes conditions similar to those originally proposed by the applicant.

8.105 We recognise that careful consideration, and consultation, would be needed to devise a satisfactory procedure. We therefore make a recommendation in very general terms, so that an appropriate enabling power can be included in the Bill, once a possible scheme has been worked out in more detail, to be introduced in regulations. The proposed procedure could initially be introduced on a trial basis only in relation to major development ("major" in this context to be defined), and possibly more widely, depending on how it is seen to work in practice.

Recommendation 8-10.

We recommend that:

(1) the Bill should contain a general power for planning authorities to impose such conditions [or limitations] as they see fit, provided that they are:

- **necessary to make the development acceptable in planning terms,**
- **relevant to the development and to planning considerations generally,**
- **sufficiently precise to be capable of being complied with and enforced, and**
- **reasonable in all other respects;**

(2) applicants should be afforded a right to see draft conditions proposed by a planning authority determining an application, with a limited period in which to respond, with a duty on the authority to have regard to any comments made.

Specific types of conditions

In addition to the general power to impose conditions and limitations, it would be possible to make explicit in the Code powers to impose specific types of conditions and limitations, considered in Consultation Questions 8-12, 8-15, 8-16 and 8-18.[42] We asked consultees whether the power to impose all or any of these types of conditions (or others) should be given a statutory basis – either in the Bill or in regulations – or whether they should they be incorporated in Government guidance on the use of conditions (Consultation Question 8-11).

8.106 In addition to the general power to impose conditions, we suggested in the Consultation Paper that certain specific types of conditions should be referred to in primary or secondary legislation; but that general advice as to conditions should otherwise be retained in guidance, as at present, rather than incorporated in the Bill.

8.107 We noted certain types of conditions, in Consultation Questions 8-12, 8-15, 18-16 and 8-18, which might be helpful to include in the Bill or in regulations. We also asked consultees whether such conditions (or others) should be highlighted in legislation, or whether they should be in guidance.

8.108 38 consultees responded to this question, of whom seven (including PEBA and the Law Society) considered that certain categories of conditions should have a statutory basis; and 25 considered they should be in guidance. We agree that, generally, detailed matters such as conditions should be in Government advice wherever possible – except where there is a clear reason for including a specific statutory power.

8.109 The most obvious reason for including a statutory power to impose a condition would be where it may be necessary to enforce the condition against someone other than the applicant. One example of this might be where a condition requires that a particular feature of a building to be preserved, after having been removed from it; there may be others. However, on reflection, we consider that this does not apply to any of the types of conditions discussed in the four Consultation Questions mentioned above.

Recommendation 8-11.

We recommend that, in addition to the general power to impose conditions referred to in Recommendation 8-10, the Bill should only include an explicit power to impose conditions of a particular type where statutory authority is required – for example, in order to enable such a condition to be enforced against a person other than the applicant – otherwise, advice as to conditions should be contained in guidance.

[42] Question 8-11 in the Consultation Paper erroneously referred to questions 8-11, 8-14 and 8-16. We are grateful to the consultee who pointed out the error.

Grampian conditions

We provisionally proposed that the Code include a provision enabling the imposition of conditions to the effect: (1) that the approved works are not to start until some specified event has occurred (a* Grampian *condition); or (2) that the approved works are not to be carried out until a contract for some other development has been made; and planning permission has been granted for the development for which the contract provides (Consultation Question 8-12).

8.110 Conditions can be imposed that require development to be delayed until a certain event has occurred. Where the acceptability of a development depends on an external factor, such as a nearby road having been improved, permission can be granted, but made subject to a condition that it cannot be started until the preliminary matter has been satisfactorily resolved.

8.111 The House of Lords has held that such conditions (known as *Grampian* conditions, following the decision of the House of Lords in *Grampian Regional Council v City of Aberdeen*) are valid.[43] This remains true, even where the likelihood of the specified event occurring was very low – subject to the test of unreasonableness.[44]

8.112 We suggested in our Consultation Paper that a provision should be included in the Planning Code which directly enables the imposition of *Grampian* conditions.[45] Out of the 37 consultees who responded to this question, 31 agreed that it should, with the Chartered Institute of Archaeologists describing *Grampian* conditions as "key mechanisms to secure public benefit". Friends of the Earth Cymru also agreed with the proposal, suggesting that it should be applied more widely, to include flood mitigation infrastructure or other similar infrastructure development, so as to "create a level playing field for developers".

8.113 We also mentioned a specific type of *Grampian* condition, currently to be found in section 17(3) of the Listed Buildings Act 1990, whereby works for the demolition of a building that have been permitted are not to be started until it is reasonably certain that an acceptable replacement building will be erected. We noted that such a condition might be attached to a planning permission as well as to a listed building consent; and might make the starting of development conditional on some other event actually occurring.

8.114 Four consultees disagreed with the proposal. Caerphilly CBC and Cardiff Council suggested that the law already sufficiently empowers planning authorities to attach *Grampian* conditions to permissions, and that the suggested provision was therefore unnecessary. This argument was also advanced by Redrow Homes, who "failed to see the requirement [for] this".

8.115 We agree that the courts have put beyond doubt the lawfulness of imposing *Grampian* conditions. It follows that, by the same logic, a condition of the kind envisaged in section 71 of the Listed Buildings Act would be equally lawful. On reflection, therefore, we consider that there is no need for a specific statutory power

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43 (1984) 47 P&CR 633 (HL).

44 *British Railways Board v Secretary of State* [1993] 3 PLR 125 (HL).

45 Consultation Paper, paras 8.102 to 8.105.

in either case. But we agree that it would be appropriate to provide appropriate examples of such conditions in Welsh Government guidance.

Recommendation 8-12.

We recommend that the Bill should not include a provision expressly enabling the imposition of conditions to the effect that:

(1) the approved works are not to start until some specified event has occurred (a *Grampian* condition); or

(2) the approved works are not to be carried out until:

- **a contract for some other development has been made; and**
- **planning permission has been granted for the development for which the contract provides,**

but that Welsh Government guidance should include advice as to the circumstances in which such conditions would be appropriate.

Pre-commencement conditions: the *Whitley* principle

We provisionally suggested that it would be helpful for: (1) planning authorities to be given a power (but not a duty) to identify from the outset the conditions attached to a particular planning permission that are "true conditions precedent", which go the heart of the permission, so that they must have been complied with before the permission can be said to have been lawfully implemented (the second category identified by Sullivan J in* Hart Aggregates v Hartlepool BC*), as distinct from other conditions precedent; (2) applicants to have the right to request an authority to identify which of the conditions attached to a particular permission that has been granted are true conditions precedent; and (3) applicants to have, in either case, a right to appeal against such identification, without putting in jeopardy the substance of the condition itself. We invited the views of consultees; and asked whether was any other way in which the status of pre-commencement conditions could be clarified (Consultation Question 8-13).

8.116 In the Consultation Paper, we drew attention to the increasingly common practice of planning authorities imposing "pre-commencement conditions" on planning permissions – that is, conditions to the effect that development may not start until certain specified events have occurred (such as the approval of details, or the erection of protective site fencing).[46] The courts have considered such conditions in a sequence of cases following the decision of the Court of Appeal in *Whitley v Secretary of State for Wales*[47] – including *Leisure Great Britain Ltd v Isle of Wight*

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46 Consultation Paper, paras 8.106 to 8.107.

47 (1992) 64 P&CR 296 (CA).

Council,[48] *R (Hart Aggregates) v Hartlepool BC*,[49] and *Greyfort Properties v Secretary of State*.[50]

8.117 We suggested that, in determining the status of such a condition and the effect of a failure to comply with it, the key issue is not the precise wording of the condition in question, but whether, to use the phrase of Sullivan J in *Hart Aggregates*, it "goes to the heart of the permission". If it does, and is thus what is sometimes described as a "true condition precedent", any purported start of works without having complied with the condition will not implement the permission. If it does not, non-compliance may not have the same consequences – although what is the status in law of a condition in the latter category must remain a matter of conjecture. How any particular condition should be categorised is a question that can only be determined in the light of all the relevant circumstances.

8.118 The resulting position in law is sometimes referred to as "the *Whitley* principle, although that is slightly misleading in view of the number of cases since *Whitley* itself in which the principle has been developed. But the stream of litigation has rendered the law very uncertain. We noted that, in an endeavour to alleviate the difficulties created, some planning authorities, (particularly in England) now identify all the conditions that they consider to be "true conditions precedent". We suggested that it might be possible for all authorities to adopt such an approach, where appropriate, and asked for views as to whether it would be helpful to introduce a power for them to do so.

8.119 This suggestion attracted 51 responses; it would be fair to say that few were enthusiastically in favour. Thirteen were generally in favour. Ten agreed with the first limb of the proposal (the power for an authority to categorise conditions), but not the second and third (the right to ask for a categorisation, and a right to appeal). A further 10 respondents were equivocal; and 13 disagreed.

8.120 A number of respondents doubted the need for the suggested reform, and many – both those generally supportive and those disagreeing – suggested that the use of guidance might be more appropriate.

8.121 Others drew attention to a more fundamental problem. PEBA commented as follows:

> If a planning authority is in a position to decide that a condition framed as a condition precedent is not actually one which they would say should render commencement of development unlawful if carried out in breach of it, then that condition should not have been expressed in those terms in the first place. The same applies to the suggestion that applicants should have a right to request such an identification.

8.122 Similar concerns underlay the responses of others – Neath Port Talbot CBC, for example, noted that a landscaping requirement should clearly not be the subject of a pre-commencement condition, but should require details to be improved and

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48 (2000) 80 P&CR 370.

49 (2005) 2 P&CR 31.

50 [2011] EWCA Civ 908.

implemented before the occupation of the development. Again, the role of guidance was emphasised, as was the desirability of applicants being able to review draft conditions if they wished.

8.123 Those who disagreed with the second and third parts of the suggested reform considered that it would be very burdensome and bureaucratic to have a right of appeal. However, in view of the legal difficulties in classifying conditions correctly, we consider that it would not be satisfactory for an authority to have an unfettered right to make a decision that is then binding without any right of appeal – the litigation makes it plain that, even if operated conscientiously and in good faith, any system is likely lead to some mistakes, and there must be some means to correct them. We therefore consider that partial implementation of this proposal is not an option.

8.124 On balance, we consider that the procedure we have outlined would indeed be burdensome and bureaucratic, and might lead to as much litigation as occurs under the current arrangements. We tend to agree with those who suggested that the problem arises because some authorities impose too many conditions, framed as "pre-commencement" conditions, which are not needed in that form, or in some cases at all. We therefore accept that the solution, insofar as there is one, is to discourage the imposition of any unnecessary conditions, and in particular to discourage the drafting of conditions by reference to commencement of development. And that is clearly a matter for guidance, not legislation.

8.125 We also note the suggestion made by PEBA in this regard, as follows:

> One unintended consequence of the *Whitley* principle is that development which has been carried out in breach of a condition precedent and subsequently becomes immune from enforcement action is able to continue free from any conditional controls also imposed under the planning permission itself.[51] We invite the Commission to consider whether this problem might be resolved through a new statutory provision that deems any such development to continue to be subject to the conditions imposed by the planning permission.

8.126 We consider this to be sensible, and so recommend.

8.127 On a related point, Community Housing Cymru commented as follows:

> The issue is of developers not receiving proof of planning permission, including confirmation that they have fully and correctly discharged the stated pre-commencement conditions at or towards the end of the development. This confirmation is often required for lenders to have proof of compliance of the planning process, and members have experienced problems with this; records such as current decision notices or a lack of action on non-compliance are not sufficient for lenders, and a lack of concrete confirmation of compliance can be a barrier to completion of a project.

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[51] See Consultation Paper, para 8.116.

8.128 Clearly some conditions relate to the carrying out of works; some to matters that must be resolved prior to occupation, or prior to the start of subsequent phases; and some to the occupation of the development following completion. But we can see that it might be helpful for developers to be able to seek a certificate stating in writing that they have at least complied with all the pre-commencement conditions (whether "true pre-commencement conditions" or others), and so are able to start work without fear of enforcement action. Such an application could be subject to the payment of a fee – no doubt calculated on a cost-recovery basis.

Recommendation 8-13

We recommend that:

(1) the Welsh Government should issue guidance discouraging the creation of any unnecessary burdens by the imposition of inappropriate conditions, and in particular by the drafting of conditions by reference to the commencement of development;

(2) no legislative change should be made to enable pre-commencement conditions to be definitely categorised (as per *Hart Aggregates*);

(3) where permission is granted subject to one or more conditions requiring that the development in question may not be commenced until certain matters have been resolved, an applicant should be able to apply for a certificate stating that all of those conditions have been complied with; and

(4) where development has commenced in breach of a condition precedent, and subsequently becomes immune from enforcement action, the permission that would otherwise have authorised it should be deemed to have been granted with the omission of the condition in question, such that the remaining conditions may subsist and be enforceable.

Conditions as to the period within which development may be started

We provisionally proposed that a provision be included in the Code setting out that: (1) development must be commenced by the date specified in any relevant condition; (2) any phases must be commenced by the date specified in any condition relevant to that phase; and (3) in the absence of any such condition the development must be commenced within five years of the grant of permission (Consultation Question 8-14).

8.129 Section 91(1) of the TCPA 1990 sets out that every permission is deemed to have been granted subject to the condition that the development in question must be commenced within five years of the grant of permission, unless the planning authority includes an explicit condition stating otherwise.[52]

[52] Planning authorities may amend the period where they consider it to be "appropriate, having regard to the provisions of the development plan and to any other material considerations" (TPCA 1990, s 91(2)).

8.130 The provision is silent as to the period in which phases of development must start. Where a major development is carried out in different stages, there is no provision requiring that phases be commenced by the date specified. For delays to projects which are due to commence at different stages, the permission remains "live" until the entire permission expires.

8.131 We noted in our Consultation Paper that the provision is often misinterpreted as a requirement that all development must be carried out within five years, without exception.[53] We proposed that a new provision be inserted in the Planning Bill, clarifying that development must be commenced by the date specified in any relevant condition; that any phases must be commenced by the date specified in any condition relevant to that phase; and that in the absence of any such condition the development must be commenced within five years of the grant of permission.

8.132 The proposal attracted responses from 36 consultees, 31 of whom supported it. These consultees were keen to emphasize that the five-year period should only be used as a default, where no commencement date is given. Consultees also generally considered the five-year period as being an appropriate length of time for which a permission should remain "live". The Law Society and Huw Williams suggested that the period should start on the discharge of the last pre-commencement condition, to be consistent with the general principle that a permission should remain "live" – capable of implementation, for a period of five years.

8.133 Three consultees expressed support in principle, but concern as to the second provision within the proposal, relating to the start of subsequent phases. The CLA and the HBF both argued that "developers must be able to respond to market forces and should not be bound to start by a specific date" in relation to the commencement of particular phases. The RTPI suggested that the timing of subsequent phases should be by reference to a period of time starting with the commencement of the first phase.

8.134 We accept that conditions relating to multi-phase developments raise different issues compared to more straightforward development. They should be the subject of negotiation between the planning authority and the developer, and should not be subject to a default period.

8.135 Subject to the above points, we consider that the proposal should remain.

[53] Consultation Paper, para 8.119.

Recommendation 8-14.

We recommend that a provision should be included in the Bill setting out that:

(1) development authorised by permission granted in response to an application must be commenced by the date or dates specified in any relevant condition; and

(2) in the absence of any such condition the development must be commenced within five years of the grant of permission.

Specific conditions: land under the control of the applicant (section 72(1)(a))

We provisionally proposed that the Code should include a provision empowering planning authorities to impose conditions providing that the development or use of land under the applicant's control (whether or not it is land in respect of which the application has been made) should be regulated to ensure that the approved development is and remains acceptable in planning terms (Consultation Question 8-15).

8.136 Certain types of condition are specifically provided for in the TCPA 1990 to avoid any doubt that might otherwise arise as to their lawfulness, or as to the powers of a planning authority to enforce it in the event of non-compliance.

8.137 Section 72(1)(a) is an example of such a provision. It enables planning authorities to impose conditions which regulate the development or use of any land under the applicant's control, whether it is included in the application or not, if the authority considers it necessary for the viability of the permission in general.[54] So, for example, an authority can require that land adjacent to a highway is to be kept free of buildings and vegetation above a certain height, in order to ensure that there will always be a visibility splay.[55] We noted in our Consultation Paper that the question of whether land falling within the scope of this provision is "under the control of the applicant" is not considered to require outright ownership, but is assessed as a matter of fact and degree.[56]

8.138 We suggested that this provision should be restated in the Bill, along with section 72(3). Thirty-two consultees responded to this proposal; 30 were in favour, largely without comment.

8.139 The CLA suggested that the lack of a requirement that there be "some relevant connection between the application site and 'other land'" rendered the provision overly broad, and open to abuse. However, the requirement that a condition must be

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54 Consultation Paper, para 8.123.

55 A visibility splay is a clear, unobstructed area surrounding a junction or access point that allows those exiting the connecting road to see oncoming traffic.

56 *George Wimpey & Co Ltd v New Forest DC* (1979) 250 EG 249.

relevant to the development being permitted would require there to be such a connection.

8.140 We consider that there is a need for a statutory power to impose (and therefore to enforce) such a condition, as it may require activities to take place (or, more often, not to take place) on land in perpetuity, long after the original applicant has ceased to have control over it.

Recommendation 8-15.

We recommend that the Bill should include a provision to the effect that planning authorities may impose conditions providing that the development or use of land under the control of the applicant (whether or not it is land for which the application has been made) should be regulated to ensure that the approved development is and remains acceptable in planning terms.

Specific conditions: time-limited permissions (Section 72(1)(b) TCPA 1990)

We considered that the Code should include a provision setting out that planning authorities can require that buildings or works authorised by the permission be removed, or the authorised use be discontinued where permission has been granted for a limited period, and that works be carried out at that time for the reinstatement of land (Consultation Question 8-16).

8.141 Section 72(1)(b) of the TCPA 1990 provides another example of a category of condition prescribed in primary legislation for the avoidance of doubt as to its legitimacy. It enables planning authorities to require the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period, and the carrying out of any works required for the reinstatement of land at the end of that period.

8.142 Section 72(2) goes on to define permissions granted subject to the conditions in section 72(1)(b) as "planning permission granted for a limited period".[57]

8.143 We proposed that this provision should be retained in the Bill, to ensure that there is no uncertainty as to the powers of a planning authority in relation to restoration requirements.[58] In particular, it may transpire that the applicant may no longer have any involvement with the land by the time the condition comes to be enforced, hence the need for a specific statutory power.

8.144 All 29 consultees who responded agreed, largely without comment.

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57 See **Recommendation 8-9**.

58 Consultation Paper, para. 8.128.

Recommendation 8-16.

We recommend that the Bill, or regulations under the Bill, should enable the imposition of conditions where permission has been granted for a limited period, to the effect that:

(1) at the end of the period the buildings or works authorised by the permission be removed, or the authorised use be discontinued, and

(2) works be carried out at that time for the reinstatement of land.

Specific conditions: time-limited permissions (Section 72(3)).

We provisionally proposed that a provision equivalent to section 72(3) of the TCPA 1990 (as to time-limited conditions) be retained in the Code, but drafted so as to make clear that it applies only in the case of (1) time-limited permissions issued under what is now section 72(1)(a), and (2) certain time-limited permissions issued between 1960 and 1968 (Consultation Question 8-17).

8.145 The provision that is now section 72(3) of the TCPA 1990 was originally enacted as section 41(3) of the Caravan Sites and Control of Development Act 1960, which came into force on 29 August 1960. It provides that a planning permission that is subject to a condition that operations be commenced by a specific date only applies so as to authorise development which is carried out before that date. Section 41(3) of the 1960 Act in due course became section 18(3) of the TCA 1962.

8.146 Sections 65 and 66 of the TCPA 1968, which came into force on 1 January 1969, then introduced the standard conditions as to the duration of a planning permission (now in sections 91 and 92 of the TCPA 1990). And section 67 of the 1968 Act provided that section 18(3) of the 1962 Act did not apply in relation to commencement conditions imposed by sections 65 and 66.

8.147 However, there are still in existence some permissions, granted between 29 August 1960 and 31 December 1968, that were subject to time-limiting conditions – particularly in relation to minerals. Section 72(3) therefore applies to such permissions.

8.148 Section 72(3) generally does not apply to permissions issued on or after 1 January 1969, as they will usually be subject to conditions imposed under what are now sections 91 or 92 of the TCPA 1990. But section 91 of the 1990 does not apply to planning permissions granted for a limited period.[59] And therefore section 72(3) does apply to such permissions.

[59] TCPA 1990, ss 72(1)(b) and 91(4)(c).

8.149 We therefore proposed that section 72(3) be retained, but clarified to ensure that it only applies to permissions in these two limited categories.[60]

8.150 Of the 29 consultees who responded to this question, all were in agreement, largely without comment.

Recommendation 8-17.

We recommend that a provision equivalent to section 72(3) of the TCPA 1990 (as to time-limited conditions) should be retained in the Code, but drafted so as to make clear that it applies only in the case of:

(1) permissions issued between 29 August 1960 and 31 December 1968; and

(2) time-limited permissions issued under what is now section 72(1)(b).

Other conditions that may be enforced against those other than the applicant

We provisionally proposed that the Bill, or regulations under the Bill, enable the imposition of conditions to the effect: (1) that particular features of the building or land to which the permission relates be preserved, either as part of it or after severance from it; (2) that any damage caused to the building or land by the authorised works be made good after those works are completed; or (3) that all or part of the building or land be restored following the execution of the authorised works, with the use of original materials so far as practicable and with such alterations as may be specified (Consultation Question 8-18).

8.151 We noted that section 17 of the Listed Buildings Act 1990 provides examples of certain types of conditions that may need to be enforced against persons other than the original applicant. We suggested that such conditions may be useful in circumstances other than those involving listed buildings. If the Code is to contain any explicit provision as the types of condition that may be imposed, these might usefully be included.

8.152 32 consultees responded to this question. All agreed with the suggestion in principle, but some questioned whether the conditions are precise enough to be enforced, so that they would fail to comply with the basic *Newbury* test.[61] Some also suggested that it would be more appropriate to deal with such matters by means of a method statement. We note the concerns, although the provision is already in statute, and has not apparently caused any problems.

8.153 It is likely that the works required by a condition of this kind will often need to be carried out by, or on behalf of, the applicant – and in effect as part of the permitted works. However, the land involved may be sold immediately on completion of the works, so that there could sometimes be a need to enforce the requirements of the

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60 Consultation Paper, para 8.130.

61 See **para 8.94** above.

condition against a new owner. It would therefore seem appropriate for the power to be statutory.

Recommendation 8-18.

We recommend that the Bill should enable the imposition of conditions to the effect that:

(1) particular features of the building or land to which the permission relates be preserved, either as part of it or after severance from it;

(2) any damage caused to the building or land by the authorised works be made good after those works are completed; or

(3) all or part of the building or land be restored following the execution of the authorised works, with the use of original materials so far as practicable and with such alterations as may be specified.

APPROVAL OF DETAILS

We provisionally proposed that the Bill should clarify the existing law and procedures as to the approval of details required by a condition of a planning permission, whether imposed at the request of an applicant (in relation to matters not sufficiently particularised in the application) or instigated by the authority itself (Consultation Question 8-19).

8.154 Full planning permission is often granted subject to one or more conditions requiring that certain details are subsequently approved by the planning authority. And outline permission is granted requiring the approval of one or more reserved matters; and either the initial permission or the subsequent approvals may be subject to conditions requiring matters to be approved. In response to such conditions and requirements, developers must make an application for the approval of the details in question.

8.155 We noted that some provisions in the TCPA 1990 relating to "applications for planning permission" may not extend to "applications for the approval of reserved matters", far less to "applications for the approval of details required by a condition". The present exercise provides an opportunity for the legislation to be clarified in regard to all such applications, to ensure that there is a statutory basis for the procedures that are currently operated.[62]

8.156 We emphasised that it could be made clear that the determination of such an application is not an opportunity to revisit the question of whether the development in question is acceptable in principle, but should be based solely on the acceptability of the details in question.[63]

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62 Consultation Paper, para 8.137 to 8.142.

63 As with s 73(2); and see *Thirkell v Secretary of State* [1978] JPL 844.

8.157 All 36 consultees who responded to this question were in agreement. Planning Aid Wales and Friends of the Earth Cymru underlined the importance of ensuring that the approval of such details is by way of a transparent process. We agree.

Recommendation 8-19.

We recommend that the Bill should clarify the existing law and procedures as to the approval of details required by a condition of a planning permission, whether imposed at the request of an applicant (in relation to matters not sufficiently particularised in the application) or instigated by the authority itself.

We provisionally proposed that a planning authority be able in an appropriate case to decline to determine an application for the approval of one detailed matter without at the same time having details of another specified matter (Consultation Question 8-20).

8.158 Linked to Recommendation 8-19, it may be that in some cases a planning authority is unwilling to approve one detailed matter without also having available the details of another, so that the approvals can be linked. We noted in the Consultation Paper that this could ensure that the details of the brickwork of a new house are not approved separately from the roofing materials.

8.159 We suggested that it might therefore be useful for an authority to decline to consider one detailed matter without at the same time having details of another specified matter.

8.160 This proposal received 36 responses, 33 of which agreed. Carmarthenshire CC, for example, noted that "a number of conditions may be interdependent and without details relating to those that are interrelated the other cannot be fully considered".

8.161 Two consultees expressed concern about the potential for planning authorities to use this power to delay developments. While the Home Builders Federation agreed with the proposal in principle, they suggested that an application should include "a specified time period in which to ask for the additional information and the right of appeal against any such request, similar to that in place at the application registration stage". The Mineral Products Association opposed the proposal entirely, suggesting that it was "clearly open to abuse" by planning authorities. And the RTPI, the Canal & River Trust and Huw Evans suggested that there should be a requirement for planning authorities that wish to exercise the proposed power to provide reasons for doing so. They suggested that this could help to mitigate any concerns about the proposal's potential misuse.

8.162 We can see the attraction of a requirement to provide reasons, and a right of appeal. However, an additional right of appeal would be cumbersome. We note the provision of article 3(2) of the DMP(W)O 2012, which provides that:

> Where the [authority] who are to determine an application for outline planning permission are of the opinion that, in the circumstances of the case, the application ought not to be considered separately from all or any of the

reserved matters, they must within the period of one month beginning with the receipt of the application notify the applicant that they are unable to determine it unless further details are submitted, specifying the further details they require.

8.163 The problem to which this Consultation Question relates could be the subject of an equivalent provision in the DMP(W)O, enabling an authority to decline to determine an application for the approval of details without further details being supplied – which could of course include the subject matter of another condition. And a failure to determine an application for the approval of details is already subject to a right of appeal.[64]

Recommendation 8-20.

We recommend that a provision should be included within the DMP(W)O enabling a planning authority to decline to determine an application for the approval of a reserved matter or an approval required by a condition unless further details are supplied, by a procedure analogous to that in article 3(2) of the DMP(W)O 2012.

Notification of development approved in principle by a development order

We provisionally proposed that the Bill should clarify the existing law and procedures as to the approval of details required by a condition of a permission granted by a development order; or by a requirement imposed by a planning authority following a notification of proposed works under a development order (Consultation Question 8-21).

8.164 Just as many planning permissions are granted subject to conditions requiring further details to be approved, so too the permission granted by a development order for certain categories of development is subject to a requirement that details are approved before the start of the works (the "prior approval" procedure). In some cases, all permissions in a particular category are subject to prior approval;[65] in others, every proposal must be notified to the authority so that it can consider on a case-by-case basis whether it wishes to have an opportunity to approve the details.[66]

8.165 In either case, where the details have to be approved by the authority, an application must then be submitted to it, broadly in accordance with the procedure outlined above.[67] We noted that any adjustments made to that procedure would need to be considered carefully in the light of any implications for the prior approval procedure.

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64 TCPA 1990, s 78(1)(b), (2).

65 GPDO 1995, Sched 2, Part 11 (development permitted by private Act etc); Part 17, Class F (gas pipelines), Class G (electricity cables); Parts 19, 20 (minerals).

66 GPDO 1995, Sched 2, Part 6 (agriculture); Part 7 (forestry); Part 23 (minerals); Part 24 (telecommunications); Part 30 (tolls); Part 31 (demolition).

67 See **paras 8.154 to 8.157**.

8.166 This was supported by all of the 30 consultees who responded to this question.

Recommendation 8-21.

We recommend that the Bill should clarify the existing law and procedures as to the approval of details required:

(1) by a condition of a permission granted by a development order; or

(2) by a planning authority following a notification of proposed works under a development order.

We provisionally proposed that the Code include a provision setting out a time limit within which the planning authority can respond to a notification of a proposal to carry out development in a relevant category (for example, buildings for agriculture and forestry), such that an applicant can proceed if no response has been received to the notification (Consultation Question 8-22).

8.167 Under the second of the two prior-approval procedures referred to above,[68] permission is granted by a development order for all development in a particular category (for example, agricultural buildings), and an authority is notified of a particular proposal in that category so that it can consider whether it wishes to have an opportunity to approve details. We suggested that it might be helpful if there were to be a statutory time limit within which the authority can respond.

8.168 Of the 38 responses to this question, 18 were in agreement, and 6 were equivocal. A number pointed out that there already exists such a time limit in many of the relevant Parts of Schedule 2 to the GPDO 1995, and no further reform is necessary in this regard. Fourteen disagreed, largely planning authorities concerned about possible abuses. Blaenau Gwent CBC, for example, observed that:

> the prior notification application procedure is confused, open to abuse and clear guidance on all forms of prior notification (from agriculture to telecoms to demolitions) should be issued or the entire approach to these sorts of applications re-thought.

8.169 We agree that the prior approval process, which is meant to assist landowners by avoiding the need for a full planning application, can appear complex in practice. Welsh Government guidance, currently in section 3.3 of the *Development Management Manual*, may need to be updated. And we do not recommend the more widespread use of this procedure, as has occurred in England. But we make no recommendation for a change to the existing time limits, as they seem to operate satisfactorily at present.

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68 See **para 8.164**, and **fn 66**.

Recommendation 8-22.

We recommend that no change should be made to the law regarding the time limits within which authorities should respond to notification of development permitted by certain Parts of the GPDO (for example, those relating to buildings for agriculture and forestry).

VARIATION OF PLANNING PERMISSION

The existing law

8.170 Where planning permission has been granted for development, three procedures exist to allow for it to be amended.

8.171 Firstly, the landowner (but not anyone else) may apply to the planning authority to make a non-material change to a planning permission under section 96A of the TCPA 1990. To determine whether or not a proposed change is material, the planning authority must "have regard to the effect of the change, together with any previous changes made under this section, on the planning permission as originally granted".[69] If the application is successful, the amended permission will replace (not supplement) the original permission.

8.172 Secondly, anyone may apply for the variation of a condition attached to a planning permission, under section 73. If the application is successful, the result will be an additional permission, alongside the permission as originally granted – either may therefore be implemented. Section 71ZA imposes a condition to the effect that a permission must be implemented in accordance with the specified drawings; so section 73 in effect allows the substitution of different drawings. Section 91 imposes a condition as to the time within which the permitted development must be started; section 73 therefore allows for a possible extension.[70]

8.173 Thirdly, anyone may invite the planning authority to modify a permission for development that has not yet been completed, under section 97. Or the authority may make such a modification of its own accord. Either way, such a modification will result in a new permission, rendering the original permission invalid.

8.174 We noted that it is not entirely clear why only landowners may apply under section 96A to make non-material amendments, given the inconsequential nature of the issues involved. And it is difficult to see why a planning authority would object to developers reverting back to their original permission, having previously granted it.

8.175 Section 96A does not deal with an amendment that is material, but still minor. And section 97 simply gives a power for an authority to modify a permission; there is no procedure for anyone to request it to consider doing so (and no provision for it to

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69 TCPA 1990, s 96A(2).

70 This is a provision that applies in Wales but not in England; TCPA 1990, s 73(5), amended by P(W)A 2015, s 35(7).

require the payment of a fee). If the authority is not willing to modify a permission under section 97, anyone seeking an amendment that is material (whether minor or otherwise) must therefore do so by making a completely new application.

Possible reform

We suggested that it might be helpful to bring together the procedures for seeking amendments to planning permissions, currently under section 73 and 96A of the TCPA 1990, into a single procedure for making an application for any variation of a permission – whether major or minor – which can be dealt with by the planning authority appropriately, in the light of its assessment of the materiality of the proposed amendment. We envisaged that the authority would be able to choose to permit either (1) both the original proposal and a revised version, with the applicant able to implement either; or (2) only the revised version, which would thus supersede the original (Consultation Question 8-23).

8.176 In our Consultation Paper, we suggested that the limitations placed on each procedure are irrational, and do not necessarily correspond with the needs of applicants.[71]

8.177 We suggested that it might be preferable for there to be a single procedure for anyone to apply to the authority to vary a permission that has not yet been implemented (or not yet fully implemented). In response to such an application, the authority could categorise the proposed amendment as:

1) the renewal of a permission that has not yet expired;

2) a non-material change to the development already permitted (in which case an amendment to the permission could quickly be approved without further ado);

3) a material but minor change (in which case the application may need to be advertised or notified, but the authority should be required to consider only the proposed amendment, rather than the principle of the development); or

4) a major change (in which case the authority should promptly advise the applicant to submit a new application, which will be considered from first principles in the normal way).

8.178 We suggested that this would be simpler for applicants, and ensure more flexibility for planning authorities, who can respond to an application for variation in whatever way they consider appropriate, depending on the particular circumstances.[72] We also suggested that it should be within the authority's discretion to decide what "non-material" or "material" should mean in this context.

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71 Consultation Paper, paras 8.154 – 8.158.

72 Consultation Paper, para 8.159.

8.179 We received 45 responses to this proposal. Five consultees strongly supported the proposal, with the National Trust noting that it would "help to simplify what is quite a complex mix of procedures".

8.180 Twenty-five consultees agreed in principle, but expressed concerns about the proposal's precise details. Monmouthshire CC asked whether the procedure would add complexity to enforcement, if a developer were to implement part of the original scheme and part of the revised one. Andrew Ferguson asked whether the proposal would create confusion about the status of section 106 agreements.

8.181 Eleven consultees disagreed with the proposal entirely. The Canal & River Trust emphasised that

> It is important to keep a distinction between the two procedures given that they have different timescales for determination, and different requirements for information and consultation.

8.182 This sentiment was also expressed by a number of other consultees, who were particularly concerned about the loss of section 96A, which has in their view provided a quick, easy way of achieving a non-material amendment. Several emphasised that section 96A results in an amendment to the original permission, whereas section 73 results in the issue of a new permission alongside it, which minimises enforcement problems.

8.183 The Mineral Products Association supported the introduction of a unified procedure, but questioned how it would operate in relation to a minerals permission, which may subsist for many years.

Recommendations

8.184 On reflection, we agree that the procedure for applications for non-material amendments, under section 96A, should be retained as a separate procedure, as it provides a speedy route to achieve minor amendments. And it is probably preferable for such an application to result in a variation of the original permission, since that will lead to greater clarity in the event of any subsequent enforcement action. Any conditions (including those as to time limits for implementation) and any planning obligations would remain in place – save insofar as they were the subject of the approved amendment.

8.185 Section 73 applications seem to provide a useful procedure for achieving some variation to a planning permission. However, they are subject to limitations.

8.186 We note that Sullivan J held in *Pye v Secretary of State* that the determination of an application under section 73 was a matter to which the duty (under section 70(2)) to have regard to the development plan would apply.[73] We question whether this is correct; but in any event our recommendation in Chapter 5 (bringing all functions under the planning Acts within the scope of the development plan duty – and indeed other duties) would remove uncertainty in this regard. And it would also make plain

[73] [1998] 3 PLR 72, approved by the Court of Appeal in *R (Powergen) v Leicester CC* (2001) 81 P&CR 5, at [26].

that consideration must be given to the development plan as it is at the time of the amendment application, not as it was at the time of the original decision.[74]

8.187 We also note that one possible response to an application under section 73 is that an authority may grant planning permission unconditionally.[75] This may seem to contradict sections 91 and 92, whereby every permission is subject to a time-limit condition. The Court of Appeal, in *R (Powergen) v Leicester CC*, indicated that this was not a problem; but we consider that it should be made plain that a new permission granted under section 73 should be subject to a new time limit – either as specified or, by default, five years – but in either case measured from the grant of the new permission, not from that of the original permission.

8.188 More significantly, we have already observed above that an application under section 73 may be used in a variety of ways, but we consider that it should be possible to make an application under a restated section 73 not merely for a variation to conditions but also for any other variation to the permission. In considering such an application, the planning authority should be under a duty to consider only the part of the planning permission to which the variation application relates – although it must not ignore the wider considerations affected by the proposed amendment, as a successful application would result in a new permission.[76]

8.189 Furthermore, if the authority decides that the amendment is sufficiently minor that it could have been dealt with by an application under the provision restating section 96A, it should generally be able to treat the application that has been made under the restatement of section 73 as if it had been made under the restated section 96A. The fees consequences of this would need to be adjusted appropriately.

8.190 An application under section 96A can only be made by or on behalf of someone who has an interest in the relevant land; and someone who has made an application under section 73 might not want it to be dealt with under section 96A. The power to convert an application under section 73 to one under section 96A should therefore be exercisable only with the written consent of both the applicant and (if different) the owner.

8.191 If on the other hand the authority concludes that the amendment is sufficiently major that it should be the subject of a completely new application – with consequential implications for notifications and fees – it should notify the applicant straight away.

8.192 We accept that special provision may need to be made to reflect the special circumstances applying in the case of minerals permissions.

8.193 The discretionary power of an authority to modify a permission of its own volition, under what is currently section 97 of the TCPA 1990 – possibly subject to the payment of compensation in appropriate cases – would remain as it is.

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74 See *Stefanou v Westminster CC* [2017] EWHC 908.

75 TCPA 1990, s 73(2)(a).

76 *Pye v Secretary of State* [1998] 3 PLR 72.

Recommendation 8-23

We recommend that section 73 of the TCPA 1990, governing the procedures for seeking amendments to conditions attached to a planning permission, should be restated in the Bill in an amended form so as to allow the making of an application for any amendment to a permission, including but not limited to a change of conditions, provided that:

(1) in considering such an application, the planning authority should be under a duty to consider only the part of the planning permission to which the variation application relates;

(2) if it decides that the proposed amendment is sufficiently minor that it could have been dealt with by an application under the provision restating section 96A (non-material minor amendments), the authority can treat the application as if it had been made under that provision; and

(3) if it decides that the proposed amendment should be the subject of a new application, it should notify the applicant as soon as possible.

We provisionally proposed that the Planning Code should extend the scope of section 96A (approval of minor amendments) to include approvals of details (Consultation Question 8-24).

8.194 We noted in the Consultation Paper that it might be helpful to extend the scope of the procedure under section 96A (non-material minor modifications) to applications for the approval of details. So, for example, where one type of brick has been approved, a similar one could readily be substituted.

8.195 Of the 36 responses to this suggestion, 29 were in agreement, largely without comment. Several authorities disagreed, simply commenting that the current process works well.

8.196 Section 96A allows for the making of non-material minor amendments to an existing permission, including to conditions attached to a permission. This would also arguably include amendments to the details approved in response to a condition. If that is right, our suggested reform would not be required. But it would be helpful to clarify that this is so.

Recommendation 8-24.

We recommend that the Bill should make it clear that the scope of the provision restating section 96A (approval of minor amendments) includes the making of non-material minor amendments to the details of a development approved in response to a condition of a permission.

Variation in case of urgency

We provisionally proposed that there be available an expedited procedure for the determination of an application to vary a permission where the permitted development is under way (Consultation Question 8-25)

8.197 In the Consultation Paper we noted the particular problems that may arise where a need to amend a planning permission arises with building works about to start, or indeed under way. We suggested that it might be helpful for the amendment procedures discussed above to be operated in an expedited manner in such cases – possibly subject to the payment of an enhanced fee.

8.198 This proposal resulted in 41 responses – 18 in support, 17 in opposition, and six equivocal. National Grid welcomed it, commenting that "we believe this recognises the challenges of development, and helps to make Wales an attractive area for investment". The RTPI suggested that a form of expedited procedure is already in place in some areas. Some emphasised the need to ensure that the interests of consultees were not harmed by such an expedited procedure.

8.199 A number of planning authorities disagreed, preferring to use the existing procedures under section 96A and section 73. They also cited lack of resources – pointing out that an increase in fee income cannot be instantly translated into additional staff.

8.200 We note that the section 96A procedure (non-material amendments) results in a decision being made within 28 days – 14 days to allow for representations to be made in response to notices on site and delivered to neighbours, and 14 days to process the application. That may still be an excessive period in cases of urgency. On the other hand, it would be unfortunate if amendments were too easily made in cases where the initial application had been controversial – even small amendments may be equally controversial.

8.201 We therefore consider that the restatements of both section 96A and section 73 (assuming that they remain separate) should facilitate an expedited procedure, to be available in any case where the original application produced no response at all, or no response in relation to the particular element of the scheme now sought to be amended. Secondary legislation (currently article 28A of the DMP(W)O 2012) could then be amended to allow for a 14-day turnaround time in such cases where the proposed amendment is non-material; and perhaps 28 days where the application was for a more substantial amendment, under section 73.

8.202 There would be no requirement for a specific provision in primary legislation relating to a higher fee, as that would be covered by the general power to require the payment of different fees in different circumstances.[77]

[77] TCPA 1990, s 303A; see **para 18.51** and Consultation Paper, paras 18.74 to 18.79.

Recommendation 8-25

We recommend that there should be available an expedited procedure for the determination of an application to vary a permission – under the provisions restating either section 96A or section 73 – where the implementation of the permitted development is imminent or under way, limited to cases that have not attracted representations in relation to the part of the development now sought to be varied.

REGULATIONS FOR CALLING-IN APPLICATIONS

We provisionally proposed that the Welsh Ministers should have powers to make regulations requiring applications in a particular category to be notified to them, and to make a direction requiring a particular application to be so notified, so that they may decide whether to call it in for their decision (Consultation 8-26).

8.203 Under section 77 of the TCPA 1990, Welsh Ministers have the power to direct that applications in certain categories are referred to them, so that they can "call in" an application where that seems appropriate.[78]

8.204 The principal direction requiring the notification to the Welsh Ministers of applications in certain categories is the TCP (Notification) (Wales) Direction 2012. This replaces previous directions issued in 1992 and 1993.[79] It includes applications for development in flood risk areas, residential development containing over 150 units, minerals, waste disposal, and the extraction of aggregates in national parks or areas of outstanding natural beauty. Circular 07/12, accompanying the 2012 Direction, observed that only 15 per cent of applications referred to the Welsh Ministers under the previous arrangements were in the end "called in", and the direction had been revised in consequence.

8.205 In our Consultation Paper, we proposed that this power should be transposed into secondary legislation, in the form of regulations, rather than being based in directions, as at present. We made no suggestion as to Welsh Ministers' power to call in individual planning applications, noting that a direction remained the most appropriate vehicle for that purpose.

8.206 This suggestion provoked 33 responses, of which 32 were in favour (largely without further comment). The RTPI, who agreed with our proposal, suggested that it would "help with the transparency of the call-in process".

8.207 It has been suggested that it is quicker to make a direction than to produce regulations. However, we emphasise that a new power to impose by regulations the general requirements as to notifying the Welsh Ministers of applications in certain categories is not intended to detract from their power to issue directions in particular

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78 Planning Policy Wales (Edition 9), Chapter 3: Development Management (November 2016).

79 TCP (Development Plan ands and Consultation) Directions 1992; TCP (Shopping Development) (England and Wales) (No 2) Direction 1993.

cases – there will always be situations that will require their intervention on an urgent basis.

8.208 What we had in mind was that the power to call in applications should be framed by reference **both** to directions (to be used in specific cases, if necessary at very short notice) **and** to regulations, for applications in certain categories. So, for example, if the Welsh Ministers take a policy decision that all applications involving the creation of more than 1000 sq m of retail floorspace should be called-in for their decision, that should be in regulations. But if they decide to call-in a specific application, perhaps because of substantial local controversy, that should be done by a direction.

Recommendation 8-26.

We recommend that the Bill should include a provision which empowers Welsh Ministers to:

(1) make regulations requiring applications in a particular category to be notified to them, and

(2) make a direction requiring a particular application to be so notified, so that they may decide whether to call it in for their decision.

We provisionally proposed that, where the Welsh Ministers decide to call in an application for planning permission, they (rather than, as at present, the planning authority) should be under a duty to notify the applicant (Consultation Question 8-27).

8.209 In relation to the proposal outlined above, we also suggested in our Consultation Paper that the duty to notify an applicant that their application has been called in should lie with the Welsh Ministers, rather than the planning authority. We suggested that this would ensure that the procedure was consistently carried out. Such a duty would apply only where an application is actually called in, not where it is simply referred to the Welsh Ministers.[80]

8.210 This was supported by all but one of the 35 consultees who responded to this suggestion, with the RTPI arguing that it would "provide clarity of the process and who is responsible". Lawyers in Local Government also agreed, as "it is their decision".

8.211 Only one consultee, Sirius Planning, disagreed. It argued that "there would be less room for error if all communication comes from the council". We do not agree. Welsh Ministers have responsibility for processing and making decisions about the case. By requiring the planning authority, or council, to notify the applicant, there is room for errors to arise due to communication failures between the authority and the Ministers. Requiring the council to notify applicants would therefore add an unnecessary layer of bureaucracy to the process.

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80 Consultation Paper, para 8.186.

8.212 Additionally, as the *Planning Encyclopedia* notes, more and more applications are being processed through electronic submission, and there is provision for Welsh Ministers to be sent information electronically. The process of notification can therefore be carried out with ease, ensuring that communications are less easily missed out or lost.

8.213 This could be achieved by an amendment to the GPDO.

Recommendation 8-27.

We recommend that, where the Welsh Ministers decide to call in an application for planning permission, they (rather than the planning authority) should be under a duty to notify the applicant.

PLANNING APPLICATIONS: MISCELLANEOUS POINTS

Procedural details to be moved from primary to secondary legislation

We provisionally proposed that the following provisions currently in the TCPA 1990 should not be restated in the Planning Bill, but that equivalent provisions be included in the DMP(W)O if considered necessary: (1) section 71(3) (consultation as to caravan sites); and (2) section 71ZB (notification of development before starting, and display of permission whist it is proceeding) (Consultation Question 8-28).

8.214 We noted that the requirement in section 71(3) of the TCPA 1990 as to consultation in relation to applications for caravan sites would more appropriately be located in secondary legislation.[81] All but one of the 31 consultees who responded to this question agreed.

8.215 We also suggested that the requirements of 71ZB, to notify the authority before starting and to display a copy of the permission until it is complete, would be better in regulations.[82] This too was agreed by almost all.

8.216 However, the Mineral Products Association observed that minerals permissions often ran to many pages, and the development lasted for many years, so that the requirements of section 71ZB as to site notices were wholly impractical. We consider this a perfectly reasonable point, which underlines the desirability of including such procedural requirements in secondary rather than primary legislation. We suggest that the regulations could make special provisions for applications in particular categories, including minerals.

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81 Consultation Paper, para 8.189.

82 Consultation Paper, paras 8.190 – 191.

Recommendation 8-28.

We recommend that the following provisions currently in the TCPA 1990 should not be restated in the Bill, but that equivalent provisions should be included in secondary legislation if considered necessary:

(1) section 71(3) (consultation as to caravan sites); and

(2) section 71ZB (notification of development before starting, and display of permission whist it is proceeding)

and that such secondary legislation takes account of the special features of development in particular categories, including in particular minerals.

Redundant provisions

We provisionally proposed that the following provisions currently in the TCPA 1990, which appear to be redundant (at least in relation to Wales), need not be restated in the Bill: sections 56(1) (initiation of development); section 70(3) (applications for private hospitals); section 74(1)(b) (proposals not in accordance with the development plan); section 74(1A) (applications handled by different authorities); section 76 (provisions for disabled people); and section 332 (planning applications to be treated as applications under other legislation) (Consultation Question 8-29).

8.217 In the Consultation Paper, we drew attention to a variety of miscellaneous provisions that appeared to be entirely redundant.[83] All of the 30 consultees responding to this question agreed that these provisions could all be omitted.

8.218 PEBA agreed, but drew attention to the desirability of there being a provision to enable the developer and the planning authority to know when development has been begun. We understand that, especially in the light of the plethora of case law over the years as to what constitutes the start of development. However, this is the subject of section 56(2) of the TCPA 1990, which relates to the time when development is "begun", which we accept should be restated in the Bill, rather than section 56(1), which refers to the date when development is "initiated", which we suggest is not required.

8.219 The last of the provisions to which we were referring, section 332 of the TCPA 1990, enables the Welsh Ministers to produce regulations under which a single application to a local authority may serve both as a planning application and as an application under some other legislation. The Welsh Government has drawn our attention to the Economic Action Plan under the Well-being Act objective of achieving modern and connected infrastructure, which identifies the desirability of reducing the number of consents required for development, and suggests that section 332 might assist in achieving that aim.

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[83] Consultation Paper, paras 8.196, 8.207.

8.220 However, we note that section 332 has apparently never been relied on at any time in the 70 years since it was first introduced.[84] We consider that, if the Welsh Ministers were to wish to bring together particular statutory regimes, it would be almost inevitable that they would do so by introducing new primary legislation, and not simply by making use of this little-known power to make regulations.

8.221 We therefore consider that all of the provisions we have identified should be repealed.

Recommendation 8-29.

We recommend that the following provisions currently in the TCPA 1990, which appear to be redundant (at least in relation to Wales), should not be restated in the Bill:

(1) section 56(1) (the initiation of development);

(2) in section 70(3), the reference to the Health Services Act 1976 (applications for private hospitals);

(3) section 74(1)(b) (to make provision for the grant of permission for proposals not in accordance with the development plan);

(4) section 74(1A) (planning applications being handled by different types of planning authority);

(5) section 76 (duty to draw attention to certain provisions for the benefit of disabled people); and

(6) section 332 (power of Welsh Ministers to direct that planning applications should also be treated as applications under other legislation).

OTHER POINTS RAISED BY CONSULTEES

Split decisions

8.222 The Law Society and the Radio Society of Great Britain both made the point that it is possible for a planning inspector to make a split decision in response to an appeal, under section 79(1)(b) of the TCPA 1990; and a planning authority can make a split decision in response to an application for advertisements consent.[85] There appears to be no reason why this should not also be possible for planning authorities determining applications for planning permission (or for listed building consent, or for consent for works to protected trees).

8.223 We agree. It will often not be appropriate to allow an application in part, but it may be. Where, for example, an application is submitted for a loft conversion and a rear

[84] As TCPA 1947, s 102(2).

[85] TCP (Control of Advertisements) Regulations 1992, reg 13(1)(a).

extension to a house, the authority may wish to allow one and not the other. It may be said that there is an inherent power to allow an application in part,[86] but it would be more satisfactory if the power were explicit.

Recommendation 8-30.

We recommend that the power to determine an application for planning permission, currently in section 70(1) of the TCPA 1990, should be clarified to make explicit the power of an authority to grant permission for all or part of the development that is the subject of the application.

Reasons for decisions

8.224 The Law Society and Allan Archer both drew attention to the need for a planning authority to provide reasons for its decision on a planning application, and to the decision of the Supreme Court in *R (CPRE Kent) v Dover DC*, handed down after the publication of the Consultation Paper.[87] There has always been a statutory duty for an authority to provide reasons for refusing to grant permission, and for the imposition of any conditions on a grant of permission. A general duty to give reasons for a grant of permission was introduced (in England) in 2003, but withdrawn in 2013.[88]

8.225 In *Dover*, Lord Carnwath considered that, notwithstanding the absence of a statutory duty (since 2013), there could nevertheless be a common law duty in certain cases. He observed:

> The court should respect the exercise of ministerial discretion, in designating certain categories of decision for a formal statement of reasons. But it may also take account of the fact that the present system of rules has developed piecemeal and without any apparent pretence of overall coherence. It is appropriate for the common law to fill the gaps, but to limit that intervention to circumstances where the legal policy reasons are particularly strong.

8.226 As for the circumstances where that common law duty would apply, Lord Carnwath observed as follows:

> It should not be difficult for councils and their officers to identify cases which call for a formulated statement of reasons, beyond the statutory requirements. Typically they will be cases where, as in *Oakley* and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance (such as the "specific policies" identified in the NPPF …). Such decisions call

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86 *R (McAlpine Homes) v Staffordshire CC* [2002] 2 PLR 1 (application to register land as a town or village green may be allowed in part).

87 [2018] 1 WLR 108, SC.

88 TCP (General Development Procedure) (England) (Amendment Order 20013, art 5; TCP (Development Management Procedure) (England) (Amendment) Order 2013, art 7.

> for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out [in *SAVE Britain's Heritage v Secretary of State* [1991] 1 WLR 153], they are likely to have lasting relevance for the application of policy in future cases.

8.227 We consider that it would be of assistance to planning authorities, applicants and third parties if there were to be an explicit statutory basis as to the circumstances in which there is a duty to give reasons. We suggest that, on the basis of the reasoning in *Dover*, the duty applies where

1) permission has been granted

   - in the face of substantial public opposition, and
   - against the advice of officers;

2) for projects which involve major departures

   - from the development plan, or
   - from other policies of recognised importance (such as those in the PPW).

8.228 We recognise that it would be difficult if not impossible to produce a statutory formula to encapsulate satisfactorily the terms "in the face of substantial public opposition"; "major departures"; and "policies of recognised importance".

8.229 However, a key element in the *Dover* formulation is that the permission will have been granted against the advice of officers, which will be readily ascertainable. Further, there will be relatively few cases where this occurs. And just as it is helpful to developers to know the reasons for the refusal of permission, so that they can decide whether or not to appeal to the Welsh Ministers, so it would equally be helpful for third parties to know the reasons for the grant of permission against officers' recommendations, so that they can decide whether to pursue an application for judicial review.

Recommendation 8-31.

We recommend that there should be a duty on planning authorities to provide a reason for a decision to grant planning permission in the face of a recommendation by officers to refuse permission.

Power to dispose of applications

8.230 POSW, and five individual planning authorities, suggested that the power for authorities to dispose of dormant applications should be extended. Neath Port Talbot CBC commented as follows:

> The ability to finally dispose of applications was amended in Wales when the DM Procedures Order was amended in 2015 and as such whilst LPAs can finally dispose of applications submitted before that date, they can't do so for those submitted after that date. It would be good to reinstate the powers for LPAs to finally dispose of applications that are lying dormant without progress being made by the applicants/agents.

8.231 We consider that, if negotiations in relation to an application have come to an end without leading to a solution acceptable to the planning authority, the correct course is for the authority to refuse the application, since it must be, by definition, unacceptable. That refusal will have to be accompanied by reasons in the usual way; and may lead to an appeal – which will at least resolve the matter one way or another. However, if there is indeed a significant problem for authorities, substantiated by evidence, a suitable amendment could be made to the DMP(W)O 2012 when it is next amended or replaced.

Completion notices

8.232 Finally, PINS drew attention to the provisions of sections 94 and 95 of the TCPA 1990, relating to completion notices. It observed:

> Though it is not known how much LPAs use these provisions, appeals in this respect are rare and do not appear to serve much of a practical purpose. On appeal, Completion Notices are unlikely to lead to any significant change in progressing development. Such situations are an issue, and maybe worthwhile in reviewing.

8.233 A completion notice enables a planning authority to take action where development has been started, in reliance on planning permission, but not completed – where, for example, a builder becomes insolvent half way through the erection of a house. Where it seems clear that no further action will take place, the issue of a completion notice at least stops the clock, and means that no further action can take place in the distant future. Once the notice has come into effect, the authority can then serve a discontinuance notice (under section 102) to bring about the removal of the half-completed building. An example of the procedure in action is afforded by the decision in *Cardiff City Council v National Assembly and Malik*.[89]

8.234 We agree with PINS that completion notices are probably only used rarely, but we can see that they might occasionally have a useful function, and we recommend that the provisions currently in sections 94 to 96 of the TCPA 1990 should be restated in the Bill.

8.235 However, we note that the provisions as to completion notices should be adjusted to refer to notices being "issued" rather than "served" (in accordance with our recommendations in Chapter 12).[90]

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89 [2006] EWHC 1412 (Admin), [2007] 1 P&CR 9, JPL 60.

90 See **Recommendations 12-8, 12-17**.

Recommendation 8-32

We recommend that the provisions in the TCPA 1990 relating to the service of completion notices be restated in the Bill, amended so as to refer to a notice being "issued" rather than "served".

Chapter 9: Applications to the Welsh Ministers

INTRODUCTION

9.1 Applications for planning permission are generally made to, and considered by, the relevant planning authority. However, there are some circumstances in which applications may (or must) be made direct to the Welsh Ministers. These include:

1) where a planning authority has been designated as an "underperforming authority";

2) where an application has effects beyond the immediate locality; and

3) in response to urgent applications for development by the Crown.

9.2 In our Consultation Paper, we made some proposals in relation to (1) and (2). These proposals were relatively minor, as a result of the recent legislative changes to the law in this area. We considered that it would be inappropriate to make proposals for significant reforms until the effects of these changes have been fully established.

APPLICATIONS IN THE AREAS OF UNDERPERFORMING PLANNING AUTHORITIES

We provisionally proposed that sections 62M to 62O of the TCPA 1990, enabling a planning application to be made directly to the Welsh Ministers in the area of an underperforming planning authority, should be restated in the new Planning Code, subject to appropriate adjustments to reflect our proposals in Chapters 7 and 8 (Consultation Question 9-1).

9.3 Section 23 of the Planning (Wales) Act (P(W)A) 2015 provided applicants with the option to bypass the planning authority, where it had been designated as underperforming, subject to criteria determined by the Welsh Ministers and laid before the National Assembly.[1] This procedure is distinct from the call-in procedure, which is rarely used in practice; it enables the applicant to take the initiative, and may save delay.[2]

9.4 In the light of the provision's infancy, we proposed that it should be restated in the Planning Code. Of the 33 consultees who responded to this question, 16 supported our provisional proposal. 17 disagreed.

9.5 The Planning Officers Society in Wales (POSW) and POSW South-East Wales disagreed with our proposal, as did 15 planning authorities and one individual consultee. Several authorities described sections 62M to 62O as unnecessary.

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1 TCPA 1990, s 62N. The National Assembly has 21 days to resolve not to approve the document, after which the criteria will have satisfied each of the conditions set out in the TCPA 1990.

2 Consultation Paper, paras 9.6 to 9.10.

Merthyr Tydfil CBC and Pembrokeshire NPA argued that applications could instead be called-in by the Welsh Ministers in circumstances where a problem had arisen with planning authorities. Pembrokeshire CC argued that the possibility of appealing on grounds of non-determination was sufficient to allow applicants to overcome underperforming planning authorities.

9.6 POSW South East Wales and Cardiff Council also considered the provision as unnecessary. They suggested instead provisions requiring planning authorities to return fees if an application is not determined within an agreed period. They describe this procedure as an "adequate sanction" likely to "encourage [planning authorities] to perform efficiently".

9.7 We note the seriousness of the concerns expressed by those who disagreed with our proposal, who were almost entirely the planning authorities responsible for administering the system. They were concerned with the procedural and other problems they considered would arise where the Welsh Ministers assume the responsibilities of an authority, and pointed out that the longer-term aspects of a planning decision (such as the discharge of conditions, and enforcement) will require the planning authority's participation eventually.

9.8 We do not consider relying on either call-in or appeal to be a sufficient replacement for the procedure under sections 62M to 62O of the TCPA 1990. Relying on call-in is unsatisfactory, as it requires an application to be considered by the authority before Ministers will act; and they are reluctant to call-in applications other than in exceptional circumstances. An appeal relies on waiting until the authority has refused the application, or has failed to make any decision. Both procedures are likely to delay projects, resulting in additional costs for developers, and neither are likely to relieve the pressures placed on a planning authority struggling to carry out its duties. Additionally, we do not consider them to be a "sanction", but rather a means of ensuring that the development management process in a particular area does not come to a halt, where authorities break down.

9.9 The exceptional nature of this provision was emphasised by a number of the consultees who agreed with our proposal. The Royal Town Planning Institute (RTPI) argued that it should only be used as an "option of last resort", while the Theatres Trust suggested that it should be accompanied by an attempt by Welsh Ministers to "[work] with 'underperforming' planning authorities to resolve any perceived shortcomings as quickly as possible". Both consultees supported the proposal, suggesting that it could be a valuable provision in the right circumstances.

9.10 We agree that the existence of a power to assume temporarily the responsibilities of a planning authority can have value. Its introduction reflects a recently adopted policy of the Welsh Government; to abolish it would amount to a significant change of policy. We expect that the powers would only be exercised in extreme circumstances, and on a temporary basis, while the authority makes the changes necessary in order to allow it to resume normal operation.

9.11 Essentially, the responses disagreeing with our proposal represented the views of those who are not in favour of the law as it stands, and who understandably do not wish to see it carried forward into the new Bill. Whilst we understand such concerns, we do not consider that they have demonstrated any technical flaws to justify our

intervention to prevent the new procedure being rolled forward. Whether it is ever used in practice will of course be a matter to be considered in any future review of the legislation.

9.12 We therefore continue to recommend that the power to allow applicants to make planning applications direct to the Welsh Ministers in the area of an underperforming planning authority should be restated in the new Planning Code.

Recommendation 9-1.

We recommend that sections 62M to 62O of the TCPA 1990, enabling a planning application to be made directly to the Welsh Ministers in the area of an underperforming planning authority should be restated in the Bill, subject to appropriate adjustments to reflect our recommendations in Chapters 7 and 8.

DEVELOPMENTS OF NATIONAL SIGNIFICANCE

9.13 Local planning authorities do not have responsibility for determining all applications for developments within their area.

9.14 Firstly, nationally significant infrastructure projects ("NSIPS") in certain categories will be the subject of applications to the Secretary of State (not the Welsh Ministers) for "development consent", rather than planning permission, under a procedure laid down in the Planning Act 2008, as amended by the Localism Act 2011.[3] A grant of development consent from the Secretary of State overrides the need for any other consent or permission from local planning authorities.[4]

9.15 Secondly, applications for planning permission for a project that is in any of a further twelve categories of "developments of national significance" (or "DNSs") are to be made to the Welsh Ministers rather than to local planning authorities.[5] A list of these categories is in the Developments of National Significance (Specified Criteria and Prescribed Secondary Consents) (Wales) Regulations 2016.[6] These include various energy generating schemes, and development relating to airports, railways, reservoirs, and waste disposal.[7] The procedure for handling DNSs, following the legislative changes introduced by the Wales Act 2017 that came into force on 1 April

3 The five categories of projects are listed in Planning Act 2008, ss 15 to 17, 21 and 24, subject to amendments in the Wales Act 2017 that came into force on 1 April 2018 (see SI 2017/1179).

4 Planning Act 2008, s 33.

5 TCPA 1990, s 62(3).

6 SI 2016/53

7 Developments of National Significance (Specified Criteria and Prescribed Secondary Consents) (Wales) Regulations 2016, Reg 3(1).

2018, is currently the subject of a consultation exercise being carried out by the Welsh Government.[8]

9.16 The law in relation to NSIPs are beyond the scope of this review, and we made no proposals in relation to them in our Consultation Paper. We did, however, make a few proposals as to the law in relation to the DNS procedure. These are considered below.

Pre-application consultation and services

We provisionally proposed that the law relating to pre-application consultation and pre-application services in connection with developments of national significance should be reviewed and, where appropriate, clarified (Consultation Question 9-2).

9.17 Section 17 of the P(W)A 2015 introduced a requirement for developers of DNSs to undertake a pre-application consultation. The consultation process includes the publicising of the proposed application in a way which is "likely to bring it to the attention of a majority of the persons who own or occupy premises in the vicinity of the land".[9] Section 18 empowers Welsh Ministers to prescribe duties for themselves and local planning authorities to provide "pre-application services".[10] These services include the provision of information about the planning history of the land, the development plan, and any planning obligations or considerations that are likely to be considered by them upon submission of the application.[11]

9.18 In our Consultation Paper, we suggested that there was some ambiguity as to the scope and application of both provisions, especially in relation to secondary consents. We noted that the duty as to consultation only applies to "applications for planning permission", and suggested that it was unclear whether it also applies to applications for related secondary consents. For example, where a DNS relates to a site containing hazardous substances, it is unclear whether a developer would be required to consult the bodies that they would consult in order to obtain hazardous substances consent.

9.19 In relation to the provision of pre-application services, the duty applies only to applications made "under or by virtue" of Part 3 of the TCPA 1990.[12] In the Consultation Paper, we questioned the scope of that duty, querying whether it applies to applications for secondary consents where they are not automatically included along with the application for development consent itself.

9.20 Thirty of the 32 consultees responding to this question agreed that the law should be clarified. The Planning Inspectorate (PINS), who welcomed our proposal, described it as "support[ing] the provision of advice on secondary consents", while Planning Aid

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8 Welsh Government, *Changes to the consenting of infrastructure: Towards establishing a bespoke infrastructure consenting process in Wales*, 30 April 2018.

9 TCPA 1990, ss 61Z, introduced by P(W)A 2015, s 17.

10 TCPA 1990, ss 61Z1, 61Z2 introduced by P(W)A 2015, s 18.

11 Reg 7, Developments of National Significance (Specified Criteria and Prescribed Secondary Consents) (Wales) Regulations 2016.

12 TCPA 1990, 61Z1(4), inserted by P(W)A 2015, section 18.

Wales also expressed support, noting that it "would be pleased to be involved in any future review".

9.21 Two consultees, SP Energy Networks and Natural Resources Wales, suggested that a potential review should be wider in its scope, and should cover the NSIP process and major developments. As noted above, review of the procedure as to NSIPs is beyond the scope of the current review, and the Welsh Government may decide to change the consenting process for major developments during the course of our suggested review.

9.22 The uncertainties we have identified above may be resolved as the changes introduced by the Planning (Wales) Act 2015 come fully into force. We suggest, however, that the relevant law might usefully be clarified – either in the course of drafting the new Planning Code or as part of any review of the DNS procedure emerging from the current consultation.

Recommendation 9-2.

We recommend that the law relating to pre-application consultation and pre-application services in connection with developments of national significance should be reviewed and, where appropriate, clarified.

Assessors

We provisionally proposed that the power to appoint assessors to assist inspectors to determine DNS applications that are the subject of inquiries or hearings be extended to allow their appointment in connection with applications determined on the basis of written representations (Consultation Question 9-3).

9.23 Applications for a DNS may proceed by way of written representations, hearings, inquiries, or a combination of all three, conducted by the Planning Inspectorate.[13] The result of these procedures is the production of a report, which is presented to the Welsh Ministers, leading to a "reasoned decision" by the Welsh Ministers. Schedule 4D to the TCPA 1990 provides Welsh Ministers with a power to appoint assessors to assist inspectors for hearings or inquiries. In our Consultation Paper, we suggested that there was no reason why this power should not be extended to include applications conducted by way of written representations.[14]

9.24 All 29 consultees unanimously agreed with this proposal. PINS described how assessors could be "as helpful in dealing quickly and correctly with matters raised in written representations as they would be during inquiries/hearings". Sirius Planning also suggested that it could help "speed up the determination of applications".

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13 Department for Economy Skills and Natural Resources (Welsh Government), *Explanatory Memorandum to the Developments of National Significance (Specified Criteria and Prescribed Secondary Consents) (Amendment) (Wales) Regulations 2016* (2 February 2016) at para 6.21.

14 Consultation Paper, para 9.28.

9.25 While the Law Society agreed with our proposal, they suggested that those appointed to assist should be called "experts" or "expert advisors", as a term which most accurately describes the role in question. While we agree that the role of assessors is to provide assistance and information (rather than to independently assess the application in question), we consider that the term "assessors" is more commonly used in other contexts, and we do not recommend any change.

Recommendation 9-3

We recommend that the power to appoint assessors to assist inspectors to determine DNS applications that are the subject of inquiries or hearings should be extended to allow their appointment in connection with applications determined on the basis of written representations.

Restatement in the Code

We provisionally proposed that sections 62D to 62L of the TCPA 1990 be restated in the new Planning Code, subject to appropriate adjustments to reflect our proposals in Chapters 7 and 8 (Consultation Question 9-4).

9.26 As was noted in the introduction to this Chapter, the provisions which set out the procedure for DNS applications are set out under the P(W)A 2015. As such, they are of very recent origin. Problems arising from them have yet to emerge, and we are not minded to make any recommendations for change.

9.27 All 28 consultees agreed with this approach. The RTPI described the proposal as "reasonable" and suggested that the lack of widespread experience as to the "very recent legislation". Only one consultee expressed concern. While PINS agreed with it in principle, they advised that "it is not clear exactly how proposals would alter the DNS application procedure", and warned that "as the DNS system is a unique procedure, any changes in relation to the application process would have to be carefully considered".

9.28 We agree, but do not consider that this proposal will affect the scope of the DNS application procedure. We are therefore minded to maintain it.

Recommendation 9-4.

We recommend that sections 62D to 62L of the TCPA 1990 should be restated in the new Planning Bill, subject to appropriate adjustments to reflect our proposals in Chapters 7 and 8.

PLANNING INQUIRY COMMISSIONS

We provisionally proposed that section 101 of and Schedule 8 to the TCPA 1990 (planning inquiry commissions) should not be restated in the new Planning Code (Consultation Question 9-5).

9.29 The TCPA 1968 established a planning inquiry commission to consider matters of "national or regional importance" or "technical or scientific aspects of [a] proposed development [which are] unfamiliar in character".[15] Ministers have the power to constitute a commission, and refer to it applications for planning permission.[16]

9.30 We noted, both in our Scoping and Consultation Papers, that no commission had ever been established, the procedure had been subject to much criticism, and that there was no prospect of a commission being established in the future.[17] As a result, we suggested that provisions relating to planning inquiry commissions should not be restated in the new Planning Code.

9.31 All 29 consultees agreed with our proposal. The Law Society described the procedure as a "historical leftover", while the National Grid suggested that the proposal "fits in well with the philosophy of planning simplification".

Recommendation 9-5.

We recommend that section 101 of and Schedule 8 to the TCPA 1990 (planning inquiry commissions) should not be restated in the new Planning Bill.

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15 TCPA 1990, s 101(3).

16 TCPA 1990, s 101.

17 Scoping Paper, para 5.53; Consultation Paper, para 9.36.

Chapter 10: The provision of infrastructure and other improvements

INTRODUCTION

10.1 The development of land can impose significant burdens on an area's infrastructure. A housing development, for example, can increase the traffic on nearby roads, place additional pressures on schools, hospitals and community facilities, and limit the effectiveness of protective infrastructure like flood defences.[1]

10.2 The necessary improvements can be carried out, or at least paid for (in whole or part), by private developers. Two mechanisms are commonly used to achieve this:

1) the Community Infrastructure Levy (CIL); and

2) section 106 agreements, or "planning obligations".[2]

10.3 This Chapter provides an overview of both procedures, and makes some recommendations for reform. Our recommendations are limited, in the light of the more extensive review that is likely to be undertaken, once the necessary legislative powers (in relation to CIL) have been devolved to the Welsh Government. But they propose some changes which may be adopted in advance of such a review, to deal with certain specific technical problems that have arisen.

COMMUNITY INFRASTRUCTURE LEVY (CIL)

10.4 The CIL Review Group set up by the Government in 2015 defined CIL as

> The Government's preferred means of collecting developer contributions to infrastructure investment that has been identified as necessary to support the development of an area.[3]

10.5 The Levy is implemented by local authorities, who calculate the charge based on the site area or floorspace of the new development. The money received from several development projects can then be pooled together and used to fund the provision of the necessary infrastructure, which can include transport, schools, hospitals and other health and social care facilities within the relevant area.[4]

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1 Consultation Paper, para 10.28.

2 TCPA 1990.

3 *A New Approach to Developer Contributions*, CIL Review Group, February 2016), para. 2.2.2.

4 A full list of infrastructure capable of being funded by charges collected under the Levy is contained in s 216, Planning Act 2008. Note that the provision of affordable housing is restricted by Community Infrastructure Levy Regulations 2010 [SI 2010/948], reg 63.

10.6 In order to implement CIL, a local authority must prepare a charging schedule, and adopt it after public consultations and a review by an independent examiner.[5] Only three planning authorities in Wales have so far chosen to implement the Levy, but another six are in the process of producing and verifying their charging schedules.

We provisionally considered that the statutory provisions relating to CIL, currently in Part 11 of the Planning Act 2008 as amended by the Localism Act 2011, should be incorporated broadly as they stood into the Planning Code, pending any more thoroughgoing review that may take place in due course (Consultation Question 10-1).

10.7 In our Consultation Paper, we highlighted two key aspects of CIL arrangements in relation to Wales:

1) that the topic has been the subject of a number of legislative reviews over many years;[6] and

2) that the Wales Act 2017 has only recently given the National Assembly legislative competence to regulate CIL.[7]

10.8 As a result, we suggested that changes of any substance to the CIL regime would be likely to arise at a later date, once the new legislative arrangements under the 2017 Act have been fully brought into force. We also suggested that a future review of the system, with a focus on Welsh needs and practices, was likely to be forthcoming. As a result, we recommended that the existing provisions were broadly carried forward unaltered into the new Code, pending the outcome of any such review.

10.9 We received 34 responses to this proposal, 30 of which agreed. Several consultees expressed agreement, subject to a more intensive review by the Welsh Government at a later date. Caerphilly CBC, Torfaen CBC and POSW South-East Wales, all agreed with our proposal, adding that a "thoroughgoing review can't come soon enough". Carmarthenshire CC, which also agreed, noted the need to avoid the existence of a "vacuum…while CIL [is being] reconsidered in its entirety by the Welsh Government", particularly for planning authorities who have already adopted CIL.

10.10 We also received four equivocal responses. The Central Association of Agricultural Valuers and Pembrokeshire CC expressed discontent at the scope or content of the current CIL regulations. The Central Association of Agricultural Valuers suggested that CIL's reliance on a development's floorspace inappropriately penalises agricultural developments. Pembrokeshire CC suggested the regulation's restriction on the use of CIL funds to pay affordable housing schemes renders the CIL regime less desirable to planning authorities. Bridgend CBC also asked whether carrying the provisions forward into the new Code would "make it more difficult to repeal CIL if that [was] the desired course of action".

10.11 No substantive recommendations as to the scope of CIL Regulations have been made during the course of this review, and no limitation of the Welsh Government's

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5 Planning Act 2008, Part 11.

6 Consultation Paper, paras 10.28 – 10.32.

7 Welsh Ministers (Transfer of Functions) Order 2018 (SI 644), para 44(1). Note that the date on which it comes into force is yet to be determined.

freedom of action would arise from this proposal. It remains open to the Welsh Government to amend or revoke the CIL Regulations, as it sees fit. At present, however, we still consider that it is necessary to provide sensible interim arrangements, and in particular to ensure that the primary legislation relating to CIL is within the main Planning Bill, rather than (as at present) in a freestanding piece of legislation.

10.12 We therefore still consider that the proposed approach provides desirable interim arrangements.

Recommendation 10-1.

We recommend that the statutory provisions relating to CIL, currently in Part 11 of the Planning Act 2008 as amended by the Localism Act 2011, should be incorporated into the Planning Bill, pending any more thoroughgoing review that may take place in due course.

PLANNING OBLIGATIONS

10.13 Section 106 of the TCPA 1990 enables anyone interested in land to enter into a "planning obligation" – often in the form of an agreement with the planning authority, but in some cases a unilateral undertaking. Such an obligation can involve a restriction of the use of land or operations to be carried out on it, or require that particular activities are carried out, or oblige the landowner to pay sums of money to the authority, either for the maintenance of nearby infrastructure or to offset community costs incurred by the activity on the land.[8]

10.14 The need for a planning obligation arises as a result of the nature of the proposed development. Planning authorities may negotiate with anyone who is "interested in [the] land" with a view to their entering into an obligation, usually linked to a grant of planning permission.

We provisionally proposed that provisions relating to planning obligations, currently in sections 106 to 106B of the TCPA 1990, be incorporated broadly as they stand into the Planning Code, pending any more thoroughgoing review that may take place in due course. (Consultation Question 10-2)

10.15 Planning obligations differ from CIL in two key ways;

1) planning obligations are intended to render a specific development scheme acceptable, rather than to encourage the provision of infrastructure and other improvements throughout a wider area; and

[8] TCPA 1990, s 106(1).

2) the number of developer contributions which may be pooled together to pay for new infrastructure is capped at five for planning obligations, but unlimited for CIL payments.

10.16 However, there is a significant overlap between the two procedures. Both operate to help provide local infrastructure, incidental to or directly arising from development. And, as we noted in our Consultation Paper, planning authorities regularly use planning obligations to obtain outcomes which could have been used under the CIL procedure, as a means of avoiding having to undertake the difficult and expensive exercising of implementing a charging schedule.[9]

10.17 Previous reviews of the subject have sought to determine the degree to which both procedures can be integrated. The CIL Review Group, for example, determined that both could be integrated under a proposed local infrastructure tariff scheme, which reserved planning obligations for large-scale infrastructure development. Alternatively, the Planning Officers' Society in England have argued for "development management levies" and "development management agreements" to be used instead.

10.18 For these reasons, any forthcoming review of CIL is likely to substantially effect the law relating to planning obligations. Our principal proposal therefore broadly mirrors Consultation Question 10-1, to ensure that the legislation relating to both CIL and planning obligations is included within the Planning Bill.

10.19 As with Consultation Question 10-1, the 32 responses were broadly supportive, subject to a desire to see a wider review of CIL and planning obligation regimes in general.

10.20 We therefore maintain the proposal.

Recommendation 10-2.

Subject to the following recommendations in this Chapter, we recommend that provisions relating to planning obligations, currently in sections 106 to 106B of the TCPA 1990, should be incorporated into the Planning Code, pending any more thoroughgoing review that may take place in due course.

We provisionally proposed that the rules as to the use of planning obligations, currently in regulation 122 of the CIL Regulations, should be included within the new Planning Code (Consultation Question 10-3).

10.21 Regulation 122(2) of the CIL Regulations sets out statutory test as to the validity of a planning obligation. These require that a proposed obligation be:

1) necessary to make the development acceptable in planning terms;

[9] Consultation Paper, para 10.72.

2) directly related to the development; and

3) fairly and reasonably related in scale and kind to the development.[10]

10.22 These regulations have been treated with a degree of caution by the courts, with Lord Hoffman emphasising that the first limb of the test was "unsuited to application by the courts", describing it as "suffer[ing] from the fatal defect that it necessarily involves an investigation by the court of the merits of the planning decision" – a task for which he believed the courts to be unsuited.[11] Despite citing Lord Hoffman's dictum with approval, Dove J describes the test as providing a "starting point" for discussions regarding the validity of an obligation, and held that it should be relied upon by authorities.[12] Thus, the test is still considered to be good law, and of value to the courts and to planning authorities.

10.23 In our Scoping and Consultation Papers, we described how secondary legislation should be reserved for "minor procedural and administrative details", while primary legislation should be used for "broad principles…enshrined in general terms".[13] We suggested that the test in regulation 122(2) fell within this second category, and should therefore be contained in primary, rather than secondary legislation.

10.24 All 29 consultees who responded to this proposal supported it. Rhondda Cynon Taf CBC described the test as being of "sufficient clarity and importance" that it was more appropriately suited to primary legislation. The Association of Local Government Ecologists also agreed, subject to the proviso that "the interpretation of 'necessary' [should not] become too restrictive". They suggested that too narrow an interpretation would "limit the ability of such agreements to be used to secure improvements or enhancements that are required under policy or other legal duties".

10.25 We emphasise that this proposal would not result in any substantive change to the test, or its interpretation. Questions of interpretation would still fall to the courts, who would still be likely to interpret it as they currently do. By including it within primary legislation, however, the structure of the law is clarified.

10.26 We therefore consider that the proposal should be maintained, and recommend that the test is included within primary legislation.

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10 Community Infrastructure Regulations (SI 2010/948).

11 *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759 at p. 780. This case concerned an obligation for the developer to provide a new link road to relieve traffic congestion which was likely to be only marginally exacerbated by the development of a new food superstore in the town centre.

12 *R (Wright) v Forest of Dean DC and Resilient Energy Severndale* [2016] EWHC 1349 (Admin), at [52] and [59], upheld at [2017] EWCA Civ 2102.

13 Scoping Paper, chapter 3; Consultation Paper, paras 4.48 – 4.26.

Recommendation 10-3.

We recommend that the rules as to the use of planning obligations, currently in regulation 122 of the CIL Regulations, should be included within the Planning Bill.

Highways requirements

We provisionally suggested that it might be helpful for a provision to be included in the Code whereby a planning agreement under what is now section 106 of the TCPA 1990 – but not a unilateral undertaking – could include any provision that could be included in an agreement under section 278 of the Highways Act 1980 (execution of highway works), provided that the highway authority is a party to that agreement. (Consultation Question 10-4).

10.27 Agreements to alter highways are executed under section 278 of the Highways Act 1980. The provision allows highways authorities to enter into agreements with private persons for the execution of works, on the condition that they pay the cost (or part of the cost) of those works.

10.28 In Wales, each local authority is generally both the highways authority and the planning authority.[14] There are two exceptions to the rule; in relation to motorways and trunk roads (where the Welsh Government is the highways authority) and in national parks, where the national park authority is the planning authority. Our proposal explicitly excluded such cases.[15]

10.29 We suggested in our Consultation Paper that there was scope to integrate the requirements of section 278 of the Highways Act and those of section 106 of the TCPA 1990. We noted that an integrated procedure would not always be appropriate, for example in circumstances where the highways issues were extensive in scope or highly complex, but suggested that the option to allow such arrangements to be included in one agreement could be helpful.[16]

10.30 We received 34 consultation responses to this proposal, 18 of which were in support. The Mineral Products Association applauded the "avoidance of duplication and the requirement for both acts to be satisfied separately". Rhondda Cynon Taf CBC also agreed, on the grounds that it would avoid "the need for an applicant to resubmit…the same information…to both the Planning and Highways service areas of the same authority".

10.31 Six consultees expressed support in principle but noted concerns about the unintended consequences of the proposal; and eight disagreed.

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14 National Assembly for Wales, '*Governance of Wales: Who is responsible for what?* (Available at: http://www.assembly.wales/en/abthome/role-of-assembly-how-it-works/Pages/governance-of-wales.aspx)

15 Consultation Paper, para 10.46.

16 Consultation Paper, paras 10.47 to 10.49.

10.32 A key concern for consultees was the possibility that an integrated agreement might result in applications being significantly delayed. The Home Builders Federation, which disagreed with our proposal, noted that a "section 278 agreement is a far more technical approval process so it may add delay to the signing of the section 106 agreement whilst technical detail is agreed". Monmouthshire CC also expressed concern that "any lack of approval by the highway authority would delay release of a planning permission".

10.33 Consultees also expressed concern about the capacity of the integrated approach to complicate the process of obtaining planning permission. Neath Port Talbot CBC suggested that including "complex technical highway details [would] complicate the planning process and…further blur responsibilities".

10.34 Some consultees disagreed with the proposal, as they considered that, even where a single local authority is both the highways authority and the planning authority, the issues involved in negotiating the two agreements are too separate to allow them to be integrated. Newport City Council suggested that an integrated process could result in "different signatories for the agreements and due to delays in implementing, figures [being] out of date".

10.35 The Institution of Civil Engineers Wales pointed out that section 278 agreements relate to an existing highway, which may be some distance from the site of the proposed development, and may relate the maintenance of a new highway. In either case, the developer may not have access to the highway land.

10.36 For smaller, simple alterations to highways, we consider delays to the determination of planning applications may not be as extensive as some consultees suggested. While delays might occur, while the highways and planning departments of the same authority come to an agreement about the technical details of the relevant works, the saving of resources that would otherwise be spent on producing two separate agreements could enable the application process to progress more quickly.

10.37 However, we recognise that such an approach would not work in many cases. And we agree that the proposal could lead to some difficulties in relation to questions of enforcement and implementation. We consider that greater coordination between the two arms of the local authority would be beneficial, both for applicants and for the general public; but this could best be encouraged through guidance. And it would probably be difficult to prescribe in statute the cases in which the new procedure would be available.

10.38 On balance, therefore, we therefore do not pursue this proposal further, considering that it is a matter that would be more suitable for more detailed consideration as part of any future review of the legislation relating to planning obligations.

Recommendation 10-4.

We recommend that any future review of the law relating to planning obligations should consider introducing a provision whereby a planning agreement (under what is now section 106 of the TCPA 1990) could in certain circumstances include provision that could be included in an agreement under section 278 of the Highways Act 1980.

Enforcement of planning obligations

We provisionally proposed that the enforcement of a planning obligation under section 106 of the TCPA 1990 should be made more straightforward by including the breach of such an obligation within the definition of a breach of planning control (Consultation Question 10-5).

10.39 Where a developer, either intentionally or unintentionally, fails to carry out the obligations agreed in a section 106 agreement, the TCPA 1990 provides authorities with the power to enforce the obligation by injunction or to enter the land and carry out the operations themselves, and to recover expenses incurred whilst doing so.[17] Obstructing authorities is an offence punishable by a level 3 fine (£1,000) on summary conviction.[18]

10.40 More serious breaches of planning obligations can be prosecuted as fraud. The Serious Fraud Office has used a number of criminal offences to prosecute the use of "fraudulent arrangements" to avoid complying with obligations under a section 106 agreement.[19]

10.41 We suggested in our Consultation Paper that these provisions provided a piecemeal response to the enforcement of planning obligations, as there would be situations whether neither approach would be appropriate.[20] We suggested that instead, the enforcement of planning obligations should fall within the wider principles of planning enforcement law.[21] However, we recognised that such an approach would raise a number of practical problems that would need to be resolved before it could be implemented.[22]

10.42 Of the 42 consultees who responded to this proposal, 18 were in agreement. POSW and Caerphilly CBC both argued that including the breach of the obligation within the definition of a breach of planning control would make the enforcement system more

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17 TCPA 1990, s 106(5) and (6).

18 TCPA 1990, s 106(8).

19 See *Serious Fraud Office v Evans* [2014] EWHC 3803 (QB), in which the Serious Fraud Office brought prosecutions against developers under the Fraud Act 2006, the Insolvency Act 1986 and the Companies Act 2006.

20 Consultation Paper, para 10.51.

21 See **Chapter 12** below.

22 Consultation Paper, para 10.53.

straightforward. The Theatres Trust described the proposal as "strengthening the ability of planning authorities to enforce obligations".

10.43 A further 20 consultees also agreed in principle, but expressed concern about how the proposal would work in practice. Planning Aid Wales asked about "the extent to which technicalities of enforcing breaches of planning control, including time limits are appropriate for breaches of section 106 obligations".

10.44 Newport CC also drew attention to section 106(5), which provides that a restriction or requirement imposed by a planning obligation may be enforced by an injunction, and questioned whether that would have "less bite" if breaches of obligations were to be brought within the broader enforcement system.

10.45 Four consultees disagreed with the principle of the proposal altogether. The Bar Council argued that

> There are implicit difficulties of legal principle in putting the enforcement of breaches of planning control per se on the same footing as failures to comply with covenants within a section 106 agreement or a unilateral obligation. The first is in effect a breach of regulatory law which ultimately can end in prosecution for failure to comply with the enforcement notice and the second is in effect a breach of contract which is governed by civil law remedies.

10.46 The suggestion that breaches of section 106 obligations fall within the purview of contract law reflects the voluntary nature of planning obligations, which arise from a process of offer and acceptance between developer and the planning authority. On such an approach, authorities would have to apply to the courts for relief where a developer decides not to comply with obligations undertaken under a section 106 agreement, rather than carrying out the work directly themselves.

10.47 The contractual approach presents some problems in practice. It can result in uncertainty or delay in the performance of obligations, which can adversely affect the amenity of those in proximity to the site, including users of nearby roads and members of the community whose infrastructure is now under strain.

10.48 It is this aspect of a planning obligation which differentiates it from an ordinary contract – the fact that is made to ensure that "a development is acceptable in planning terms"[23] and to limit any adverse effects of a development. While the section 106 agreement is made and interpreted under ordinary contractual principles, compliance with it raises issues of wider interest and importance which goes to the validity of the planning permission itself.

10.49 We also have some sympathy with the observation from the Institution of Civil Engineers Wales to the effect that, if a breach of an obligation by a developer is to be the subject of enforcement action, so too should a breach by an authority (for example, to spend money paid under the obligation for the specified purpose). But it is difficult to see how that would operate in practice.

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[23] See **para 10.15**.

10.50 We therefore consider that the topic more naturally falls within planning enforcement in general, and believe that a reform along the lines indicated could be beneficial. And we note the weight of consultee opinion in favour of that approach. However, we note the large number of detailed issues that would need to be resolved, and therefore conclude that this too is a matter that would be more suitable for consideration as part of any future review of the legislation relating to planning obligations.

Recommendation 10-5.

We recommend that any future review of the law relating to planning obligations should consider bringing the breach of a planning obligation under section 106 of the TCPA 1990 within the definition of a breach of planning control.

Section 106(12) empowers the Welsh Ministers to provide by regulations for the breach of an obligation to pay a sum of money to result in the imposition of a charge on the land, facilitating recovery from subsequent owners. We noted that no such regulations have been made and asked whether this causes a problem in practice (Consultation Question 10-6).

10.51 We noted in our Consultation Paper, that section 106(12) of the TCPA 1990 provides a power for the Welsh Ministers to make regulations which provide for charges to be imposed on the land where planning obligations require the payment of money. Failure to pay could then result in a charge on the land, so that any shortfall could be recovered by the authority upon sale of the land.[24] No such regulations have ever been made, and we asked whether consultees felt that such a power of recovery would be useful.

10.52 Some 33 consultees responded to this question. Fifteen suggested that the provision was unnecessary, with Neath Port Talbot CBC and Carmarthenshire CC noting that

> The regulation for direct charges on land have not been brought in as planning obligations are local land charges, and as such can effectively be turned into charges with a power of sale. Therefore it would seem that there is no need for direct charges over land, although they may be easier to enforce than local land charges.

10.53 Bridgend CBC provided a similar response, arguing that, as planning obligations are registered as local land charges, they are already capable of binding successive owners.

10.54 Eight consultees expressed some interest in giving effect to the power in section 106(12). Cardiff Council suggested that it could operate to speed up repayment process. Blaenau Gwent CBC also suggested that it would "provide an additional and useful enforcement tool".

[24] Consultation Paper, para 10.55.

10.55 The local land charge register records any charges registered by public authorities against the land. Unmet planning obligations can be registered, and can then be discovered by prospective purchasers of the land.[25] Failure to register a local land charge will not affect its enforceability, but a purchaser would be able to claim compensation if the charge is not made visible to them on the register.[26] This framework appears to duplicate the power envisaged under section 106(12) of the TCPA 1990. Both appear operate to allow planning obligations to run with the land, rather than remain with the parties to the obligation.

10.56 We consider that the benefits outlined in favour of retaining section 106(12) – and making regulations in reliance on it – are substantially outweighed by the potential confusion that could arise from two overlapping procedures. Difficulties could arise in determining a successive owner's compensation rights if a planning authority fails to register an obligation on the local land charges register, but then claims from them the cost of undertaking works on their land. Additionally, it seems beneficial to provide prospective owners with a means of discovering if land is subject to any prohibitions, restrictions and obligations.

10.57 We therefore do not consider there to be any need for regulations empowering the recovery of expenses from successive owners, and recommend that the provision for the Welsh Ministers to make them is not restated in the Planning Code.

Recommendation 10-6.

We recommend that section 106(12) of the TCPA 1990, which empowers the Welsh Ministers to provide regulations whereby the breach of an obligation to pay a sum of money would result in the imposition of a charge on the land to facilitate recovery from subsequent owners, should not be restated in the Planning Code.

Expedition of negotiations as to planning obligations

We provisionally proposed that the use of standard clauses should be promoted in Welsh Government guidance (Consultation Question 10-7).

10.58 In our Consultation Paper, we suggested that the Welsh Government should promote within its guidance the use of standard clauses in planning obligations. This would facilitate the drafting of obligations by planning authorities and developers.[27]

10.59 We received 38 responses to this proposal, all of which were in agreement. The Canal & River Trust noted that it would "save a considerable amount of time and expense to the planning authorities and its beneficiaries". The Planning Inspectorate (PINS) also noted that it would also aid inspectors in assessing the legality of

25 Local Land Charges Act 1975, ss 1 and 2.

26 Local Land Charges Act 1975, s 10(1).

27 Consultation Paper, paras 10.57 to 10.58.

unfamiliar clauses, and allow them to devote greater attention to the substance of the obligations.

10.60 Five consultees expressed agreement in principle, subject to some conditions. The Royal Town Planning Institute (RTPI) expressed support "subject to the ability for developers and planning authorities to revise these where required in specific cases".

10.61 We agree, and consider that by including the clauses within guidance, users would have sufficient flexibility to use, amend, or disregard them. we consider that the proposal should be maintained.

Recommendation 10-7.

We recommend that the use of standard clauses in planning obligations should be promoted in Welsh Government guidance.

Resolution of disputes as to planning obligations

We provisionally considered that the introduction of a procedure to resolve disputes as to the terms of a section 106 agreement in Wales (along the lines of Schedule 9A to the TCPA 1990, to be introduced in England by the section 158 of the Housing and Planning Act 2016) might be useful (Consultation Question 10-8).

10.62 Schedule 9A of the TCPA sets out a dispute resolution procedure for disputed terms of a section 106 agreement. It allows planning authorities and applicants to refer their case to the Secretary of State, who may appoint a person (possibly, but not necessarily, an inspector) to consider the matter and to prepare a binding recommendation.

10.63 This provision applies only in England.[28] In our Consultation Paper, we suggested that a similar procedure might also be of value in Wales as well,

10.64 Of the 31 consultees who responded to this proposal, 21 expressed agreement. POSW South-East Wales, Monmouthshire CC and Ceredigion CC suggested that it would be a "useful tool", while the Mineral Products Association suggested that the a "quick and transparent" procedure could usefully help to resolve disputes associated with obligations.

10.65 Remaining consultees expressed mixed opinions; three were equivocal in their responses while three disagreed entirely. Allan Archer described the procedure as "another complex remedy", and asked whether there was "evidence to suggest that

[28] The procedure was introduced under Housing and Planning Act 2016, s 158, which applies only in England (not yet in force).

such arrangements are needed" in the light of the ability for applicants to appeal against non-determination or to submit "twin-tracked" applications.[29]

10.66 We consider that a procedure that assists in the resolution of deadlock between planning authorities and applicants could be of value. Such disagreements can substantially delay or frustrate development, resulting in wasted resources and lost opportunities. The capacity to obliges the Welsh Ministers, to provide upon request a report on any remaining points of contention between both parties, which seems to provide a simple solution to the problem.

10.67 Additionally, we do not consider either of the suggested alternatives as being sufficiently quick or flexible to mitigate the need for a separate procedure. Appeals against non-determination can result in significant delays, while twin-tracked applications require careful handling.

10.68 Consultees also expressed concern about the form and nature of the dispute resolution procedure applying in England. The RTPI argued that it was "a little premature to make a convincing case" for the provision's introduction, noting that it was "untested in practice". The Law Society, which provided an equivocal response, felt that "the machinery in England is likely to prove cumbersome and difficult to operate".

10.69 Problems are bound to emerge when implementing new procedures, and they are unlikely to be sufficiently addressed in their entirety by the time the Planning Code comes into force. We therefore consider that, while such a dispute resolution mechanism may indeed be helpful, it would be appropriate to delay the introduction of a formal statutory machinery pending a more general review of the law relating to planning obligations, by which time it may be possible to learn from experience of the English procedure.

Recommendation 10-8.

We recommend that any future review of the law relating to planning obligations should consider introducing a procedure to resolve disputes as to the terms of a section 106 agreement, possibly along the lines of Schedule 9A to the TCPA 1990.

Restriction on the use of planning obligations

We provisionally considered that it might be useful to introduce a procedure for the Welsh Ministers to impose restrictions or conditions on the enforceability of planning obligations as they relate to particular categories of benefits to be provided (along the lines of section 106ZB of the TCPA 1990, introduced by section 159 of the 2016 Act with

[29] A practice where two applications are submitted at or around the same time; one is appealed as soon as the relevant time limit for determination has expired, while the other is the subject of continuing negotiations with the authority. See Consultation Question 8-6 [X-REF PARAS] for more information.

regard to obligations relating to the provision of affordable housing) (Consultation Question 10-9).

10.70 Section 106ZB empowers the Secretary of State to make regulations to restrict or to impose conditions on the enforceability of planning obligations entered into with regard to provision of affordable housing. Such regulations might include conditions on the enforceability of planning obligations relating to housing of a certain size or for developments of a specific nature (including the provision for a certain type of housing).[30] As before, this provision applies only in England.[31]

10.71 The regulations would not formally invalidate planning obligations relating to affordable housing which do not comply with the prescribed conditions, but would render them unenforceable.[32]

10.72 We suggested in our Consultation Paper that it might be useful for a similar provision to be developed in relation to Wales in relation to a wider variety of categories of conditions, and asked consultees for suggestions about what those categories might include.

10.73 We received 30 responses to this proposal, many of which mirrored responses received to Consultation Question 10-8. The RTPI asked whether it would be

> premature to make a convincing case for bringing forward provisions similar to the Housing and Planning Act in England, that are not yet in force and therefore untested.

10.74 No consultee provided suggestions for additional categories of benefits which should also be subject to this procedure.

10.75 Upon re-examination, we consider that, here too, the imposition of additional restrictions or conditions solely for planning obligations relating to affordable housing is likely to be overly complex. As we noted in relation to Recommendation 10-5, there is already a degree of uncertainty about the ways in which a planning authority can enforce a planning obligation.

10.76 In the light of the discussion above, we consider that it would be more appropriate to earmark this issue for consideration during the broader review of the CIL and section 106 system in Wales, as the Law Society and Newtown and Llanllwchaiarn Town Council both suggested.

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30 Explanatory Notes to the Housing and Planning Act 2016, at para 454.

31 It was introduced under section 159 of the Housing and Planning Act 2016 (not yet in force). See Recommendation 10-9.

32 Housing and Planning Act 2016, s 106ZB(1).

Recommendation 10-9.

We recommend that any future review of the law relating to planning obligations should consider the introduction of a procedure for the Welsh Ministers to impose restrictions or conditions on the enforceability of planning obligations as they relate to particular categories of benefits.

Planning obligations binding authorities in relation to their own land

We provisionally proposed that planning authorities should be able to enter into planning obligations to bind their own land in appropriate cases (Consultation Question 10-10).

10.77 In the Consultation Paper, we suggested that it might be helpful for a planning authority to be able to enter a planning obligation to bind its own land in certain circumstances. This could apply in the case of a local authority owning land outside the area for which it is the planning authority (for example, land in the area for which the planning authority is either a neighbouring local authority or a national park authority) or in relation to land that an authority proposes to dispose of – perhaps following a land assembly exercise.

10.78 However, we realise that thought would need to be given as to how the law as it applies generally should be modified in relation to such cases – particularly as to what such a planning obligation might require, how it could be enforced, and how it could be discharged or modified.

10.79 Respondents to the Scoping Paper had suggested that it would be helpful for planning authorities to be able to bind their own land with planning obligations. Where local authorities want to dispose of land, but want to restrict or oblige the activities carried out on it by future owners, it was suggested that they should be provided with a power to do so.

10.80 Of 34 consultees who responded to this proposal, 27 consultees were in agreement, including the Law Society and Huw Williams (Geldards LLP),who said “Agree strongly. The problem identified arises where a local authority is the owner of land, possibly having assembled a site itself with a view to its future development with the benefit of planning permission”. Bridgend CBC described how “existing restrictions can frustrate the disposal of Council owned assets”. And Pembrokeshire CC and the Planning Officers’ Society of Wales also agreed, noting how local authorities are often tempted to use public land as a way of extracting the maximum possible financial gain (rather than incorporating any planning or environmental considerations). They described the sale of council-owned land as a “fraught exercise”.

10.81 Four consultees expressed concern about the difficulties of enforcing such obligations. Lawyers in Local Government argued that the proposal should be given effect only when it has been satisfactorily resolved as to how an authority can covenant with itself; enforce against itself; and prosecute or take injunctive

proceedings against itself. The CLA expressed a similar sentiment, neither agreeing nor disagreeing with the proposal, but asked for "more detail on the pros and cons".

10.82 Clearly an authority cannot enter into an agreement with itself. And it cannot require an unknown future purchaser to carry out or pay for works. However, where an authority has assembled a site, it is likely to be willing to grant planning permission for its development, but only on the basis that certain consequential works are carried out (or payments made). In those circumstances, would be helpful for future developers to know the basis on which planning permission would be (or has been) granted.

10.83 We consider that it should be possible for an authority to grant permission for the development of its own land, and at the same time pass a resolution setting out the terms of an obligation that would be deemed to have been entered into by any third party acquiring the land. The purchaser of the land could then rely on the permission that has been granted, knowing the terms of the obligation that is deemed to have been entered into. The arrangement would be dependent on the authority selling the land within a specified period – say, five years (the period within which the permission must be implemented) or such other period as may be specified.

10.84 We therefore recommend accordingly.

Recommendation 10-10.

We recommend that a planning authority should be given power, when granting planning permission for the development of its own land, to pass at the same time a resolution setting out the terms of an obligation that will be deemed to have been entered into by any third party acquiring the land within a specified period.

Planning obligations binding those other than owners of land

We provisionally proposed that a person proposing to enter into a contract for the purchase of land be able to enter into a planning obligation so as to bind that land, which would take effect if and when the relevant interest is actually acquired by that person (Consultation Question 10-11).

10.85 Section 106(1) of the TCPA 1990 limits the classes of person who can enter into planning obligations, setting out that they can only be entered into by a "person interested in the land". Those who do not yet own a freehold or leasehold interest in the land but own an interest in it by virtue of an option to purchase or a contract of sale are therefore able to enter into a section 106 agreement, but only so as to bind that limited interest. And those who are merely contemplating purchasing the land have no interest at all.

10.86 We suggested that section 106(1) should be amended to allow anyone to enter into obligations, which would come into effect if and when a relevant interest is actually acquired. So, for example, where two developers both wish to obtain planning permission for the development of a piece of land, the authority might be willing to

give permission to one or other or both, but only subject to a planning obligation. At present, that is impossible.

10.87 We received 35 responses to this proposal. 14 consultees were in agreement, including PINS, who suggested that the proposal "would simplify and speed up arrangements and thus expedite development being permitted".

10.88 The remaining 21 consultees were split as to whether or not the conditional agreement should run with the land or with the prospective owner. There are problems associated with either approach. If the agreement were to run with the land, it would effectively allow a third party to bind land which they did not own, potentially contrary to the actual landowner's wishes, as the Central Association of Agricultural Valuers suggest.

10.89 If the agreement were to run with the prospective owner, the entire agreement would have to be renegotiated by the planning authority if the purchase did not go ahead. Neath Port Talbot CBC argues that this would be problematic, as they note that "planning permission normally goes with the land rather than the applicant and this amendment would effectively turn that on its head". And PEBA noted that "it would need to take account of the possibility that the land may be sold to some other person. If planning permission (which runs with the land) has been granted, it will be important that the purchaser (whoever it is) is bound".

10.90 We had envisaged that section 106 agreements between the planning authority and someone other than the owner would be a form of conditional contract, which would only become effective upon the actual acquisition of the land. In effect, they would be a draft set of obligations, which would become formalised upon sale. Unless and until the sale is completed, however, we consider that it would be unfair to allow land to be bound by prospective owners, who may not eventually gain any interest in the land whatsoever.

10.91 While we note the concerns of planning authorities in relation to the additional work that the proposal might create, we suggest that prospective owners and developers would be unlikely to invest the requisite resources in the negotiation of a section 106 agreement without a strong desire to purchase the land in question. We therefore consider that the proposal will merely bring forward in time the work required of planning authorities in relation to the negotiation of planning obligations, rather than increase it.

10.92 If on the other hand a prospective owner (A) enters into a conditional agreement with the authority, and subsequently a third party (B) buys the land, the original conditional agreement would lapse. However, B and the authority would both be aware that its terms had been acceptable to the authority; any subsequent agreement with B would no doubt retain many if not all of the features of the agreement with A, and should therefore not involve the authority in any significant extra work. But to ensure that in this situation a new obligation would be entered into, it would be necessary to impose a condition to the effect that the permitted development must not start until an obligation has been entered into that is in terns identical to the provisional obligation.

10.93 Subject to the above points, therefore, we reaffirm the proposal.

Recommendation 10-11.

We recommend that a person other than the owner of land (including but not limited to a person considering entering into a contract for the purchase of it) should be able to enter into a planning obligation relating to the land, which would take effect if and when a relevant interest is actually acquired by that person. Any permission linked to such a provisional obligation should be subject to a condition that, in the event that the land passes into the hands of a third party, the permitted development is not to be started until an agreement in the same or substantially the same terms has been concluded with the authority.

Chapter 11: Appeals and other supplementary provisions

INTRODUCTION

11.1 In the previous Chapters of this Report, we discussed the need for applications to the planning authority for planning permission, the submission of such applications, and their determination. In this Chapter we consider a number of other issues relevant to development management, in particular appeals against a decision made by a planning authority.

11.2 As we noted in the Consultation Paper, the appeals system is of great importance in practice – partly because it provides an important means of redress for those feeling aggrieved by particular planning decisions, and partly because it provides a mechanism by which the decisions of different planning authorities can be harmonised (both with Welsh Government policy, and with each other).

11.3 We also discuss briefly the revocation or modification of planning permission, the discontinuance of permitted development, the service of purchase notices, and procedures relating to highways affected by development. None of these issues are likely to be encountered by applicants or developers on a regular basis, but they will occur from time to time.

11.4 In this Chapter we do not make any recommendations for substantive reform. In particular we do not deal with the suggestion from several consultees that there should be a right for third parties to appeal against the grant of planning permission by a planning authority. We consider that that would amount to a fundamental change to the system, and as such is a matter falling outside our terms of reference. We have, however, made a few suggestions as to the legal and procedural mechanisms underlying each set of provisions.

APPEALS IN CONNECTION WITH PLANNING APPLICATIONS

11.5 The Town and Country Planning Act (TCPA) 1990 provides applicants with a number of rights to appeal to the Welsh Ministers against various decisions by planning authorities. In particular, an appeal may be made where an application for planning permission has been refused,[1] where an authority has failed to make any decision within the specified time,[2] or where an application to approve reserved matters has been refused.[3]

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1 TCPA 1990, s 78(1)(a), (2).

2 TCPA 1990, s 78(2).

3 TCPA 1990, s 78(1)(b). For a comprehensive list of grounds of appeal, see our Consultation Paper, paras 11.7 – 11.9.

We provisionally proposed that the provision in section 79(1) of the TCPA 1990, as to the powers of the Welsh Ministers on an appeal, should be amended so as to make it plain that they are required to consider the application afresh – as opposed to having a power to do so, as at present (Consultation Question 11-1).

11.6 Section 79(1) of the TCPA 1990 empowers the Welsh Ministers (or in practice, inspectors acting on their behalf) to determine an appeal. Under the provision, they may allow or dismiss the appeal, or reverse or vary any part of the planning authority's decision, and "*may* deal with the application as if it had been made to them in the first instance".[4]

11.7 In our Consultation Paper, we suggested that those determining an appeal (whether the Welsh Ministers or an inspector on their behalf) invariably do consider the application afresh, and we provisionally considered that it might be clearer if that was made an explicit duty on the face of the statute.

11.8 We received 37 responses to this suggestion, 31 of which were in agreement. The UK Environmental Law Association suggested that it would add clarity to the appeals procedure, "[ensuring] that all parties, including those who wish to oppose development…fully understand this process". Andrew Ferguson also agreed with the proposal, suggesting that would "ensure that comments/issues raised are addressed at appeal irrespective of whether the planning authority considers them to be acceptable".

11.9 Four consultees disagreed with our proposal. Sirius Planning suggested the proposal would have adverse effects on the appeals process generally. They argued that

> The appeal process would be quicker, and greater certainty for the appellant if, generally, appeals related to the LPA reasons for refusal or matters listed as being in dispute in a statement of common ground. This would save cost and time in an already overstretched appeal system.

11.10 Significantly, the Planning Inspectorate ("PINS") pointed out that

> Inspectors may consider an appeal proposal 'de novo' (afresh) but in practice the Inspector's starting point will be the LPA's reason(s) for refusal (in non-determination cases there are usually putative reason(s) for refusal). If Inspectors consider there are substantive matters that would be determinative but which are not the subject of a reason for refusal they will raise and consider them, but such occurrences are rare.
>
> The Act as currently worded allows Inspectors the necessary flexibility to go beyond main issues if required. Reasons for refusal should be clear, precise and comprehensive and, unless evidence indicates otherwise, Inspectors should be entitled to assume that all other aspects of a development have been considered thoroughly by the LPA and deemed to be acceptable. To require all matters to be considered afresh is likely to result in unnecessary duplication of the work carried out by the LPA at application stage. It would also increase the time and cost of appeals to both the PINS and LPAs, as

[4] TCPA 1990, s 79(1) (emphasis added).

LPAs would need, in their statements of case, to justify why elements are acceptable as well as justify the reasons for refusal.

Further, the Courts have established that Inspectors do not have to address all material considerations in their decisions. If cases were required to be considered afresh, this would require them to address all material considerations. The discretion allowed currently to elevate considerations if necessary, is appropriate.

11.11 We had sought to provide additional certainty to applicants by clarifying the starting point of the appeals procedure. However, we accept the points made by PINS, and recognise that the proposed amendment might unnecessarily limit inspectors' discretion to consider, or to refuse to consider, issues arising in the course of an appeal. We therefore do not make any recommendation for change.

Recommendation 11-1.

We recommend that section 79(1) of the TCPA 1990 should be incorporated in the Planning Bill broadly without amendment.

Determination of appeals by inspectors

We provisionally proposed that the Code should make it clear that all appeals (including those relating to development proposals by statutory undertakers) are to be determined by inspectors or examiners, save for (1) those in categories that have been prescribed for determination by Welsh Ministers; and (2) those that have been specifically recovered by them (in case-specific directions) for their determination (Consultation Question 11-2).

11.12 The vast majority of appeals are determined by a person appointed by (and usually but not always employed by) PINS, rather than the Welsh Ministers themselves.

11.13 Inspectors are empowered to decide appeals by virtue of Schedule 6 to the TCPA 1990, which provides the Ministers with the power to designate classes of appeals which may be delegated to inspectors.[5] At present, these classes include appeals under 78 of the TCPA 1990, appeals against enforcement notices, and appeals against refusals to give decisions on applications for certificates of lawfulness of existing or proposed use or development.[6]

11.14 We noted in our Consultation Paper that the current statutory framework regarding the powers of inspectors to decide appeals was unnecessarily complex. We suggested that inspectors should be presumed to be responsible for determining appeals, except in circumstances where the Welsh Ministers have prescribed for themselves the responsibility for determining a category or case-specific appeal. By

5 TCPA 1990, Sched 6, para 1.

6 TCP (Determination of Appeals by Appointed Persons) (Prescribed Classes) (Wales) Regulations 2015 (SI 1822), reg 3.

reversing the presumption, the categories of appeals which could be determined by inspectors would be made clearer.

11.15 We received 33 responses to this proposal, of which 32 consultees agreed. The Royal Town Planning Institute ("RTPI") suggested that the proposal would "provide clarity", a sentiment that was mirrored in the responses of several other consultees, including the Law Society, Rhondda Cynon Taf CBC and the Planning Officers' Society of South Wales, all of whom agreed with our proposal.

11.16 Only one consultee, PINS, disagreed with the proposal, on the grounds that they considered the change to be "unnecessary". In the light of the overwhelming support for the proposal, however, we consider that the simplification of the law is desirable. It would not change the substance of what occurs in practice, but it would make the law correspond more closely with what occurs.

Recommendation 11-2.

We recommend that the Bill should clarify that all appeals (including those relating to development proposals by statutory undertakers) are to be determined by inspectors, except for:

(1) those in categories that have been prescribed for determination by Welsh Ministers; and

(2) those that have been recovered by Welsh Ministers (in case-specific directions) for their determination.

Assessors

We provisionally proposed that the power to appoint assessors to assist inspectors to determine appeals that are the subject of inquiries or hearings (1) be widened so as to be exercisable by inspectors as well as by the Welsh Ministers; and (2) be extended to allow the use of assessors in connection with applications determined on the basis of written representations (Consultation Question 11-3).

11.17 Paragraph 6 of Schedule 6 to the TCPA 1990 empowers the Welsh Ministers to appoint an assessor to "to sit with the appointed person at the hearing or inquiry to advise him on any matters arising, notwithstanding that the appointed person is to determine the appeal".

11.18 In our Consultation Paper, we suggested that this power should be broadened in two respects:

1) to allow inspectors to appoint assessors directly; and

2) to allow assessors to assist with written representations.[7]

[7] Consultation Paper, paras 11.32 – 11.34.

11.19 We received 34 responses to this proposal, 32 of which agreed. Allan Archer, an independent planning consultant, described it as a "logical and sensible" proposal. The RTPI "welcomed" the proposal, suggesting that it would "ensure that a more robust decision is made" and would "speed up the appeal process". PINS was in favour.

11.20 Some consultees expressed concerns about the potential consequences of the power. The RTPI noted the necessity of ensuring that the position of inspector was not weakened as a result, and that this would undermine the "rigorous and transparent" nature of the appeals process. We agree that it would be undesirable to relegate the role of an inspector to that of an "overseer", but suggest that, by retaining the provision's explicit qualification that "the appointed person [inspector] is to determine the appeal", this concern would not materialise.[8]

11.21 Keith Bush QC, who neither agreed nor disagreed with the proposal, suggested that inspectors should have the permission of Welsh Ministers to exercise the power to appoint, as the Ministers would be responsible for funding the exercise. While it is important not to burden the Welsh Ministers financially, we consider that a requirement to obtain permission before making appointments would place a significant restriction on the power, making it largely superfluous.

11.22 In relation to assessors' capacity to assist with written representations, we consider it irrational to limit the scope of assessors' work to include only work relating to hearings or inquiries.[9] As before, no consultees disagreed with this proposal and we consider it should be retained.

Recommendation 11-3.

We recommend that the power to appoint assessors to assist inspectors to determine appeals and other proceedings that are the subject of inquiries or hearings:

(1) should be widened so as to be exercisable by inspectors as well as by the Welsh Ministers; and

(2) should be extended to allow the use of assessors in connection with such proceedings determined on the basis of written representations.

8 Note that the "appointed person" refers to the inspector.

9 See also **para 9.24**.

OTHER TYPES OF APPEAL

We provisionally proposed that the changes proposed in consultation questions 11-1 to 11-3 should apply equally to appeals against enforcement notices; appeals relating to decisions relating to applications for listed building consent or conservation area consent, express consent for the display of advertisements, and consent for the carrying out of works to protected trees; and appeals against listed building and conservation area enforcement notices, advertisements discontinuance notices, tree replacement notices, and notices relating to unsightly land. (Consultation Question 11-4).

11.23 Consultation questions 11-1 to 11-3 referred specifically to appeals relating to planning applications. But rights of appeal also exist in relation to enforcement notices,[10] applications for listed building consent or conservation area consent,[11] express consent for the display of advertisements,[12] and consent for the carrying out of works to protected trees.[13]

11.24 We suggested in our Consultation Paper that the changes proposed in those questions (relating to general planning appeals) should apply equally to in relation to each of the specialised types of appeal noted above.

11.25 Of 26 consultees who responded to this proposal, 25 agreed, largely without comment. The Theatres Trust expressed support on the grounds that it would ensure that applications relating to listed building consent and conservation area consent were "treated with equal significance to any other application". The RTPI also agreed, suggesting that the proposal would being "clarity and consistency" to the appeals process.

11.26 Only one consultee, the Country Land and Business Association ("CLA"), disagreed. It argued that the change would undermine the "need to keep existing flexibility" in relation to the appeals process.

11.27 We do not consider the recommendations 11-1 to 11-3 to be overly inflexible, as they largely relate to the procedural aspects of an appeal, which we consider to require sufficient certainty for the benefit of applicants, authorities and inspectors alike. For this reason, we have decided to maintain the proposal.

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10 TCPA 1990, s 174(1); see Chapter 12.

11 Listed Buildings Act 1990, s 20; see Chapter 13.

12 TCPA 1990, s 220; see Chapter 14.

13 TCPA 1990, ss 78, 198(3)(c); see Chapter 15.

Recommendation 11-4.

Subject to our recommendations in Chapter 13 relating to listed buildings and conservation areas, we recommend that the changes proposed in recommendations 11-1 to 11-3 should apply equally to:

(1) appeals against enforcement notices;

(2) appeals relating to decisions relating to applications for listed building consent or conservation area consent, express consent for the display of advertisements, and consent for the carrying out of works to protected trees; and

(3) appeals against listed building and conservation area enforcement notices, advertisements discontinuance notices, tree replacement notices, and notices relating to unsightly land.

MODIFICATION AND REVOCATION OF PERMISSION; AND DISCONTINUANCE NOTICES

11.28 Planning permission, once granted, may be implemented at any time until the expiry of the period stated within it – which will normally be five years.[14] A planning authority may itself occasionally wish to vary a permission, or to revoke it altogether.[15]

11.29 The exercise of this power to modify or revoke a permission, without the co-operation of those entitled to the benefit of the permission, is unsurprisingly subject to a right by those affected to receive compensation.[16] For that reason, it is rarely used in practice.

11.30 Similarly, once a permission has been fully implemented, it cannot be modified or revoked. However, circumstances may have changed since it was granted, such that the building that has now been lawfully erected, or the use of land that is now taking place, is no longer appropriate. In such situations, the planning authority may serve a discontinuance order requiring the building to be removed or the use brought to an end.[17]

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14 TCPA 1990, s 91, amended by PWA 2015, s 35; see para 11.xxx. The same is true of listed building consent and conservation area consent (Listed Buildings Act 1990, s 18.).

15 TCPA 1990, ss 97 to 99. There is a similar suite of provisions in the Listed Buildings Act 1990 enabling the planning authority or the Welsh Ministers to modify or revoke LBC or CAC (ss 23 to 26, 28; applied to CAC by s 74(3)).

16 TCPA 1990, ss 107 to 113.

17 TCPA 1990, ss 102 – 104.

11.31 As with the power to modify or revoke a permission, the service of a discontinuance order will usually require the payment of compensation.[18] For that reason, this procedure too is rarely used in practice, but may be useful where circumstances have changed.

11.32 In our Consultation Paper, we considered that these provisions did not appear to require any technical reforms. No consultee suggested otherwise.

PURCHASE NOTICES

11.33 Where planning permission has been refused, or a modification or revocation notice or a discontinuance order has been served,[19] the land involved can be rendered incapable of any reasonably beneficial use. In such circumstances, the owner of the land is able to compel the planning authority to purchase the land at market value, by serving a purchase notice upon it.[20] The authority must serve a response notice, stating that it is willing to comply with the notice; or that another local authority or statutory undertaker has agreed to comply with it; or that it has referred the matter to the Welsh Ministers.[21]

11.34 We noted that the meaning of the phrase "incapable of beneficial use" has given rise to considerable litigation over the years. However, we considered that its meaning in any case will vary according to the circumstances, and we did not propose a definition. We note that no consultee suggested a definition, either in response to that observation or in response to Consultation Question 18-14 (our request for suggestions as to terms that should be defined).

Serving a purchase notice

We provisionally proposed that the legislation should provide that, in a case where there has been an appeal to the Welsh Ministers, the period within which a purchase notice can be served should run from the date of the decision of the Welsh Ministers on the appeal (Consultation Question 11-5).

11.35 A purchase notice must be served within 12 months of the relevant decision by the planning authority or the Welsh Ministers.[22] We noted in the Consultation Paper that there was confusion as to whether, in a case which is the subject of an appeal, this period runs from the date on which the planning authority made its decision, or the date of the decision by the Welsh Ministers.[23] We proposed that the period within

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18 TCPA 1990, s 115.

19 Consultation Paper, paras 11.41 – 11.49.

20 TCPA 1990, s 137.

21 TCPA 1990, s 139.

22 TCP General Regulations 1992, reg 12.

23 Consultation Paper, para 11.55.

which a purchase notice may be served should start on the date on which the Welsh Ministers had decided an appeal.[24]

11.36 All 25 consultees who responded to this question agreed, mostly without comment. Lawyers in Local Government and Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services agreed that the proposal "would clarify" the procedure, but suggested that a wider review of the purchase notice procedure should be undertaken – although without specifying the basis for such a review. We consider that to be beyond the scope of the present exercise, but note that this specific recommendation does not preclude such a review from occurring in the future.

Recommendation 11-5.

We recommend that the Bill should provide that, in a case where there has been an appeal to the Welsh Ministers, the period within which a purchase notice can be served runs from the date of the decision of the Welsh Ministers on the appeal.

We provisionally proposed that the Planning Code should clarify that a purchase notice may not be amended, but that a second or subsequent notice served in relation to a single decision should be deemed to supersede any earlier such notice (Consultation Question 11-6).

11.37 In our Consultation Paper, we cited the Court of Appeal's decision in *Herefordshire Council v White*.[25] In that case, Dyson LJ held that there was no right to amend a purchase notice once it had been served; but that an owner who serves a second purchase notice will be taken to have impliedly withdrawn any earlier notice.[26]

11.38 We proposed the Bill should state this principle expressly, to provide clarity for applicants. All of the 23 consultees who responded to this question agreed, with Lawyers in Local Government again noting that it would provide clarification.

Recommendation 11-6.

We recommend that the Planning Code should clarify that a purchase notice may not be amended, but that a second or subsequent notice served in relation to a single decision should be deemed to supersede any earlier such notice.

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24 Consultation Paper, para 11.54.

25 Consultation Paper, para 11.56.

26 [2008] 1 WLR 954, CA, at [33].

HIGHWAYS AFFECTED BY DEVELOPMENT

We provisionally considered that it would not be appropriate to bring together the powers currently in section 247, 248, 253 to 257 of the TCPA 1990 (relating to highways affected by development) and those in section 116, 118 and 119 of the Highways Act 1980 (Consultation Question 11-7).

11.39 For developments relating to highways, or which require the stopping up or the diverting of highways, works can be authorised under two separate procedures.

11.40 Orders made under the TCPA 1990 are made by the Welsh Ministers, either in anticipation of, or by virtue of a grant of planning permission.[27] They can relate either to a highway or to another public path,[28] and can be made in the context of land acquired by compulsory purchase or to be used for the purposes of installing electronic communications apparatus, such as telephone cables.[29]

11.41 Authorisation for stopping up or diverting highways (or other types of public path) may also be made by order of a magistrate under the Highways Act 1980, where they consider that the highway is unnecessary, or can be diverted so as to make the highways "nearer or more commodious to the public".[30]

11.42 We suggested that, despite the overlap between the two procedures in terms of subject matter, it would not be beneficial to integrate them. We noted that the two sets of orders perform different functions and are made pursuant to different procedures and in different forums.[31]

11.43 Of the 23 consultees who responded to this proposal, all but three agreed. The Home Builders Federation supported it, describing the current framework as "providing flexibility to use the most appropriate method". The RTPI also argued that "each [procedure] covers separate requirements" and thus agreed with the proposal not to merge them.

11.44 Three consultees disagreed, arguing that the existence of two separate mechanisms was overly complex for developers. The Law Society provided an example of a situation where funding for a major development project was put at risk where a magistrate "unversed in the intricacies of highway planning" had declined the necessary highway order.

11.45 We agree that the procedural requirements should be clarified for prospective developers. However, this need not necessarily require the integration of the two procedures. Problems of the kind described by the Law Society could equally be resolved by the provision of additional guidance by the Welsh Government.

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27 TCPA 1990, ss 253 and 247. Note that section 253 only allows the Welsh Ministers to authorise draft orders in anticipation of planning permission, and is contingent upon the grant of the relevant permission.

28 Including footpaths, bridleways and restricted byways (TCPA 1990, s 257).

29 TCPA 1990, ss 254, 255 and 257.

30 Highways Act 1980, s 116.

31 Consultation Paper, para 11.63.

11.46 We therefore remain of the view that there should be no change to the law.

Recommendation 11-7.

We recommend that the powers currently in section 247, 248, 253 to 257 of the TCPA 1990 (relating to highways affected by development) should be restated in the Planning Bill, but those in section 116, 118 and 119 of the Highways Act 1980 should not.

Orders under section 249 of the TCPA 1990

We provisionally proposed that sections 249 and 250 of the TCPA 1990 (relating to orders extinguishing the right to use vehicles on a highway, in conjunction with a proposal for the improvement of the amenity of an area) should not be restated in the Bill, in view of the parallel provisions in section 1 of the Road Traffic Regulation Act 1984 (Consultation Question 11-8).

11.47 Section 249(1) of the TCPA 1990 provides the Welsh Ministers (upon application of the planning authority) with the power to extinguish any rights which persons may have to use vehicles on a highway that is neither a trunk road, nor a principal road, if this is required by a proposal to "improve the amenity of part of its area".[32] There is a right to compensation for "any depreciation in the value of [the] interest…directly attributable to the order and any other loss or damage".[33] That enables an authority to pedestrianise a highway – for example, in a town or village centre.

11.48 We suggested in our Consultation Paper that this provision substantially overlapped with section 1 of the Road Traffic Regulation Act 1984, which provides authorities with a general power to make an order preventing or limiting or facilitating the passage of persons or vehicles using the road.[34] That power may also be used "for preserving or improving the amenities of the area"

11.49 We observed that the procedure under the 1984 Act was of greater value to authorities, as it does not require the payment of compensation. Additionally, duties arising under the Active Travel (Wales) Act 2013, which sets out a duty for the Welsh Ministers and local authorities to "take reasonable steps to enhance the provision made for walkers and cyclists" only applies to powers exercised under the 1984 Act, but not to those under the 1990 Act.[35]

11.50 All 24 responding consultees supported this proposal. We continue to recommend that sections 249 and 250 not be restated in the Planning Code.

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32 TCPA 1990, s 249(1)(a).

33 TCPA 1990, s 250(1).

34 Road Traffic Regulation Act 1984, s 1(1).

35 Active Travel (Wales) Act 2013, s 9.

Recommendation 11-8.

We recommend that sections 249 and 250 of the TCPA 1990 (relating to orders extinguishing the right to use vehicles on a highway, in conjunction with a proposal for the improvement of the amenity of an area) should not be restated in the Bill, in view of the parallel provisions in section 1 of the Road Traffic Regulation Act 1984.

Other provisions in the TCPA 1990 relating to highways

We provisionally proposed that decisions relating to orders under section 252 of the TCPA 1990 be generally made by inspectors rather than by the Welsh Ministers, subject to a power for Welsh Ministers to make a direction to recover a particular case for their decision (Consultation Question 11-9).

11.51 Sections 251 and 258 of the TCPA 1990 allow for the extinguishment of public rights of way and paths over land that has been acquired for planning purposes (under Part 9). In the Consultation Paper, we made no proposals in relation to those provisions, since we anticipated that the provisions in Part 9 would not be included in the Bill. However, as explained earlier, we now recommend that it should be included[36], and we accordingly recommend that sections 251 and 258 should also be included.[37]

11.52 Section 252 of the TCPA 1990 sets out the process which must be undertaken by the Welsh Ministers when proposing to make an order under sections 247, 248 and 251 of the TCPA 1990. They must publicise the order in the local newspaper and set out a period within which the public may object. Schedule 14 provides a parallel code for the making of orders relating to footpaths and bridleways.

11.53 We did not make any proposals to amend the substance of the procedure set out in section 252 and Schedule 14, but suggested that decisions could be made by inspectors, rather than by the Welsh Ministers themselves, noting that inspectors now decide almost all appeals.[38] The Welsh Ministers would still have power to make a direction recovering a particular case for their decision.

11.54 All 24 responding consultees agreed with this proposal.

Recommendation 11-9.

We recommend that decisions relating to orders under section 252 and Schedule 14 of the TCPA 1990 should generally be made by inspectors rather than by the Welsh Ministers, subject to a power for them to make a direction to recover a particular case for their decision.

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36 See **paras 16.98 to 16.111**.

37 See **Recommendation 16-14**.

38 See **Recommendation 11-2**.

Chapter 12: Unauthorised Development

INTRODUCTION

12.1 In Chapter 12 of our Consultation Paper we highlighted the principle that a breach of planning control is not a criminal offence, but non-compliance with subsequent enforcement action usually is.[1] We also noted that, in some cases, development that has been carried out without the necessary planning permission may be perfectly acceptable in policy terms, or at least could be made acceptable following remedial work.[2] However, in other cases, the planning authority (and the local community) may simply wish the offending development to be removed without further ado.

12.2 It is important that planning authorities have the right tools to ensure that the required works – whether to remedy the effects of the unauthorised development or simply to remove it – are in fact undertaken. These tools are largely to be found in Part 7 of the Town and Country Planning Act (TCPA) 1990.

12.3 As in other areas of the planning system, the existing rules and procedures relating to planning enforcement represent a fine balance between competing legitimate interests. We did not wish our proposed reforms to upset that balance. Accordingly, the reforms we suggested in the Consultation Paper were minor and technical, and were designed to introduce a measure of consistency, clarity and simplicity to the existing law – and to ensure that it operated effectively – without making radical changes.

12.4 Despite having stated this to be our approach, we received a number of general comments that expressed a desire to strengthen the enforcement system, dissuade retrospective planning applications and punish planning offenders more harshly.[3] Given the aims and scope of this project, we do not discuss these suggestions here. They are summarised in our analysis of consultation responses, published separately from this report.

12.5 We have received comments in response to our consultation questions as to enforcement from a variety of different consultees, with a range of different interests, the great majority of whom were agreed with our approach; National Grid, for example, described our proposals as “measured and appropriate”. We consider that this vindicates our intentionally measured approach to the reform of planning enforcement in Wales.

12.6 Other consultees emphasised the need for greater resources to be made available to implement the various procedures.

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1 Consultation Paper, para 12.3.

2 Consultation Paper, para 12.2.

3 For example, one consultee suggested that making a retrospective planning application should be a criminal offence incurring a custodial sentence.

PRELIMINARY PROCEDURE

We provisionally proposed that the provisions currently in sections 171C and 330 of the TCPA 1990 be conflated into a single power for the Welsh Ministers or a planning authority to serve a "planning information notice" on the owner and occupier of land or any person who is carrying out operations or other activities on the land or using it for any purpose, requiring the recipient to supply information as to the land and its existing use. Where it appears that there has been a breach of planning control, such a notice may also require further information as to matters specified, and may request a meeting at which the recipient can discuss the matters referred to in the notice (Consultation Question 12-1).

12.7 In our Consultation Paper, we noted that a planning authority may first become aware of a suspected breach of planning control on the basis of inaccurate or incomplete information.[4] Following the receipt of such information, an authority's first step is often to serve a planning contravention notice (PCN) under section 171C of the TCPA 1990, through which an authority can request information related to the suspected breach. Alternatively, the planning authority has a more general power to issue a notice under section 330, seeking information as to the land and its existing use. Such information may assist the authority to decide whether to serve a notice under the Act, and in what terms.[5]

12.8 We noted that both information-gathering powers may require information as to the interest in the land held by the recipient of the notice and by any other person, the use of the land and when it began, and the time when activities now taking place on the land began.

12.9 A PCN may in addition:

1) require information about persons carrying out "operations" (insofar as they are distinct from "activities");

2) require details of any planning permission that has been granted, or reasons why permission is believed not to be required; and

3) invite the recipient to attend a meeting to discuss the matter with the authority.[6]

12.10 We suggested that it was confusing to have two overlapping information-gathering powers, observing that the additional powers to obtain information under a PCN are potentially intrusive (and possibly in breach of the right to peaceful enjoyment of property).[7] We suggested combining the two powers.

12.11 Of the 33 consultees responding to this question, 26 supported the proposal, one agreed subject to conditions, and three supplied equivocal responses. Consultees

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4 Consultation Paper, para 12.12.

5 Consultation Paper, para 12.13.

6 TCPA 1990, s 171C(3)(d), (4)

7 Consultation Paper, para 12.18.

who responded to this question were all in agreement with the general proposal to merge the two powers into a single power. However, concerns were raised about two aspects of the recommendation – the proposed scope of the new power, and the name of the new notice. Liam Jones of the National Association of Planning Enforcement ("NAPE") also drew attention to the powers of local authorities to obtain information under section 16 of the Local Government (Miscellaneous Provisions) Act 1976.

12.12 We have reviewed the three powers carefully. As to the persons on whom a notice may be served, all three refer to an occupier of the land; all refer to the owner (or any person with an interest in the land); the 1976 Act refers to any person authorised to manage the land; and section 171C refers to any person carrying out operations on the land or using it for any purpose. We consider that the new power should refer to all of those – although of course it would empower, but not require, the authority to involve any of them.

12.13 As to the information that can be required, we have mentioned above the features of a PCN additional to those of a notice under section 330. We consider that these may perfectly reasonably be requested in any case, and not just in one relating to enforcement – noting, again, that they will often not be needed. On further reflection we doubt that they will ever involve a breach of the right of the recipients to the peaceful enjoyment of their property; at all events, the risk of that being so in an extreme case is not sufficiently great to warrant expressly qualifying the statutory power.

12.14 Two consultees, Allan Archer (an independent planning consultant), and Blaenau Gwent CBC, argued that our proposed name 'planning information notice' would not impress on recipients the gravity of the situation and the importance of providing the requested information; unlike the existing term 'planning contravention notice.' Allan Archer noted that:

> One of the benefits of the s171C provisions is that it sits in the Enforcement section of the Act and is called a Planning Contravention Notice which clearly highlights for the recipient the nature of the planning authority's interest and the possibility of future enforcement action – I'd suggest that it would be beneficial if these advantages were not lost in the placement of this new provision in the Code and the naming and wording of the notice served in cases which correspond to those subject currently to s171C.

12.15 Blaenau Gwent CBC commented in similar terms.

12.16 We agree. The name of the new notice is a matter of drafting. Some legislation refers to "information notices", some to "information orders"; and the Data Protection Act 2018 to both. If it were considered desirable to emphasis the seriousness of the new procedure, it would be possible to use a term such as *planning information order* (PIO), instead of the term we originally suggested, 'planning information notice'. In our view the new term would to some extent reflect both the seriousness of the old PCN, and the fact that the notice is essentially information-gathering and not necessarily related to enforcement. But either term could be used.

12.17 It is, however, important that the definition of "taking enforcement action", currently in section 171A(2) of the TCPA 1990, should be restated in amended form to include the service of a planning information order or notice, in place of the current reference to the service of a PCN, as this has implications for time limits within which further action can be taken.

Recommendation 12-1.

We recommend that the provisions currently in sections 171C and 330 of the TCPA 1990 should be combined into a single power for the Welsh Ministers or a planning authority to serve a "planning information order" (or "planning information notice") on anyone who owns or occupies the land, anyone who has an interest in it, any person who is carrying out operations or other activities on the land or is using it for any purpose, and anyone who is authorised to manage it. The power should be exercisable where the Welsh Ministers or the authority believe that there may have been a breach of planning control, or where the information is needed to make any order, issue, or to serve a notice or any other document under the Act.

The order-making power should include the features mentioned in section 171C(3) (information required to be supplied) and 171C(4) (offer of a meeting to discuss); and where it is believed that there may have been a breach of control, the order must contain the information specified in section 171C(5) (as to possible enforcement action).

ENTERING PROPERTY FOR ENFORCEMENT PURPOSES

We provisionally proposed that the restriction on entering property for enforcement purposes only after giving 24 hours' notice, currently in section 196A(4) of the TCPA 1990, should be clarified to ensure that it applies in relation to all property in use as a dwelling (Consultation Question 12-2).

12.18 In our Consultation Paper we briefly discussed the power under section 196A of the TCPA 1990 for anyone authorised by a planning authority to gain entry to land to investigate a suspected breach of planning control.[8] We noted that section 196A provided that in the case of a dwellinghouse, 24 hours' notice should be given.[9] We recommended that the better term would be 'dwelling,' which would include a flat, a mobile home or a houseboat.[10]

12.19 All of the 30 consultees who responded to this question agreed with our provisional proposal.

12.20 Newport City Council suggested that "the term dwelling should include … or associated buildings." Richard White further suggested that "it should also state

8 Consultation Paper, para 12.21.

9 Consultation Paper, para 12.21.

10 Consultation Paper, para 18-106 to 18-127; and see **Recommendation 18-15**.

clearly that it applies to any land surrounding the 'dwelling'", including "buildings used in connection to a dwelling". We are not convinced of this, as a dwelling may very well be connected to commercial property. As long as the boundary between the dwelling and the non-dwelling is respected, we do not think that (for example) the restriction should apply to a shop located directly below a flat in the same ownership.

Recommendation 12-2.

We recommend that the restriction on entering property for enforcement purposes only after giving 24 hours' notice, currently in section 196A(4) of the TCPA 1990, should be clarified to ensure that it applies in relation to any property in use as a dwelling.

CONCEALED BREACHES OF PLANNING CONTROL

We provisionally proposed that the law as to concealed breaches of planning control should remain as it is, subject to the common law principles developed in* Welwyn Hatfield Council v Secretary of State*, and in particular that the "planning enforcement order" procedure, introduced by the Localism Act 2011, should not be included in the Bill (Consultation Question 12-3).

12.21 In our Consultation Paper we discussed the period of time after which unauthorised development becomes immune from enforcement action, and thus "lawful".[11]

12.22 We highlighted the case of *Welwyn Hatfield Council v Secretary of State and Beesley*.[12] In that case, the Supreme Court held that in exceptional circumstances dishonest conduct could preclude an applicant from being granted a certificate of lawfulness following the expiry of the statutory enforcement period.[13]

12.23 In England, provisions relating to concealed breaches of planning control have subsequently been introduced – as sections 171BA to 171BC of the TCPA 1990.[14] Under these provisions, a planning authority can apply to a magistrates' court for a "planning enforcement order" (PEO), which extends the time limit within which action can be taken.[15]

12.24 We provisionally suggested that it was unhelpful to have two overlapping procedures, one statutory and one at common law. We also suggested that the PEO procedure was problematic for several reasons.[16] We therefore suggested that the PEO

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11 Consultation Paper, para 12.22.

12 *Welwyn Hatfield Council v Secretary of State and Beesley* [2010] UKSC 15, [2011] 2 AC 304.

13 Consultation Paper, para 12.24. The applicant in *Welwyn Hatfield* had disguised his house as a barn to avoid planning enforcement for four years.

14 Consultation Paper, para 12.25.

15 Consultation Paper, para 12.25.

16 Consultation Paper, para 12.31.

procedure should not be included in the new Code, whereas *Welwyn* should continue to apply as an (uncodified) common law principle.

12.25 We received 30 responses to this consultation question, of which 27 were in agreement, two were equivocal, and one disagreed.

12.26 Most consultees agreed with our proposal not to adopt the PEO procedure. The Royal Town Planning Institute (RTPI) stated that there was "little point" in adopting it. Liam Jones of NAPE suggested that "the PEO procedure will be problematic if introduced in Wales." Of the consultees who responded, only the Institute of Historic Building Conservation (IHBC) suggested that the PEO procedure should be adopted:

> An alternative remedy to the concerns about Planning Enforcement Orders would be to provide for them in the new Bill, but with clarification on those areas of concern, i.e. placing a limit on the time extension for which LPAs can apply, and a facility to challenge the certificate issued by the LPA as to the date on which the breach came to its attention. Lack of training for magistrates is hardly a reason for weakening the law.

12.27 We agree that an amended PEO procedure, in combination with appropriate training for magistrates, would result in a significantly improved system compared to that which currently operates in England. However, it would not overcome the complications arising from two separate procedures. On balance, we still consider the *Welwyn Hatfield* principle to be preferable, as did most of our consultees.

12.28 Several consultees suggested that the principle in *Welwyn* should be codified in the statute. We are sympathetic to this position, given the difficulties that could arise from it not being made obvious to a reader of the statute. However, the case was decided fairly recently. Despite our view that it sets out a sensible rule, we believe that it would be premature to codify that rule at this stage, given the possibility of future clarifications that may best be developed by the courts. We stated at the outset of this project that we only intend to codify case law that has been established and relied on for a significant period of time.[17]

12.29 It might seem that it would be appropriate to refer explicitly to *Welwyn Hatfield* in the statute. However, experience with criminal law reform has led us to the view that this will rarely if ever be appropriate. This is because a named case could in the future be overruled, distinguished or otherwise modified by the courts, nullifying the reference to it.

12.30 We also share the view expressed by Lord Brown of Eaton-under-Heywood in *Welwyn*:

> I simply do not accept that amending legislation is required before this salutary principle of public policy can ever be invoked. I do recognise, however, that, as

[17] Consultation Paper, paras 4.54 – 4.56.

matters presently stand, it should only be invoked in highly exceptional circumstances.[18]

12.31 We consider that it would be difficult if not impossible to codify satisfactorily the circumstances in which the *Welwyn* principle could be invoked, give that each such case will by definition be "highly exceptional".

12.32 Not stating the *Welwyn Hatfield* principle in the new Act creates a risk that a reader will not be aware of it. We suggest that this risk will be mitigated by clear references to the *Welwyn Hatfield* principle in Government guidance on enforcement.

Recommendation 12-3.

We recommend that:

(1) Welsh Government guidance should draw clear attention to the common law principle highlighted in *Welwyn Hatfield Council v Secretary of State* [2010] UKSC 15, [2011] 2 AC 304; and

(2) the "planning enforcement order" procedure, introduced in England by the Localism Act 2011, should not be included in the Bill.

ENFORCEMENT WARNING NOTICES

We provisionally proposed that section 173ZA should be amended, to prevent the period for enforcement action being extended indefinitely, so as to provide either: (1) that an enforcement warning notice can be served during the period of 4 or 10 years within which enforcement action can be taken, but that the service of such a notice does not extend that period; or (2) that where an enforcement warning notice has been served, the period for taking other enforcement action starts on the date on which the notice was served (Consultation Question 12-4).

12.33 In our Consultation Paper, we noted that Section 173ZA of the TCPA 1990, introduced by the P(W)A 2015, enables a planning authority to issue an enforcement warning notice (EWN). This is appropriate where development appears to have been carried out without planning permission, but there is a reasonable prospect that, if an application were to be made, permission would be granted. Where this applies, the authority may issue a notice informing recipients that further enforcement action may be taken if a planning application is not received within a specified period.[19]

12.34 We also noted that section 173ZA(5) of the TCPA 1990 provides that issuing an enforcement warning notice "does not affect any other power" exercisable in relation to any breach of planning control. Section 171B(4)(b) permits the taking of further enforcement action within four years of previous enforcement action – which, under

[18] [2011] 2 AC 304, at [84].

[19] Consultation Paper, para 12.34.

section 171A(2)(aa), includes serving an enforcement warning notice. The result is that an authority could extend the time for other forms of enforcement action indefinitely simply by serving a stream of notices.[20]

12.35 We suggested two possible options:

1) not restating section 171A(2)(aa) in the Bill, so that the service of an enforcement warning notice could take place during the period (of four or ten years) within which other enforcement action is possible, but could not extend that period; or

2) amending s 173ZA(5) so that that, where an enforcement warning notice has been served, the period for taking further enforcement action starts on the date on which the notice was served.

12.36 Thirty-two consultees responded to this question. Six clearly favoured the first option and 21 were clearly in favour of the second.

12.37 Those in favour of the first option highlighted the need for certainty in respect of enforcement time limits. The Mineral Products Associated stated that "we support the proposals to ensure breaches of planning control are not extended indefinitely." The Central Association of Agricultural Valuers said that "we do not believe that an enforcement warning notice should extend beyond the enforcement period."

12.38 Those in favour of the second option found it advantageous to planning authorities, while providing certainty in the form of a fixed time limit. Carmarthenshire CC suggested that the option "provides far more clarity re timescales." POSW, Monmouthshire CC, Ceredigion CC, Carmarthenshire CC, Neath Port Talbot CBC, Pembrokeshire Coast NPA and National Parks Wales all noted that "option 2 is the most clear, practical and appropriate option." The Law Society and Huw Williams (Geldards LLP) saw practical difficulties with the first option if a warning notice was served towards the end of the four or ten-year period, as the time limit could pass while a planning application was being determined.

12.39 On reflection, we agree that the second option is preferable. It is a compromise between the current position which allows indefinite extension, and the position that time limits should be strictly adhered to.

12.40 However, we are persuaded that, without clarification of our provisional proposal, there may be a risk of indefinite extensions of time limits by local authorities who fail to address the alleged breach. We therefore suggest that it should be clear from the wording of the new provision that the power cannot be used to create what is in effect an indefinite extension.

12.41 Torfaen CBC expressed concern that the second option may restrict the "second bite" provision in section 171B(4)(b) of the TCPA 1990, which allows an authority to take "further" enforcement action within 4 years of previous enforcement action in respect of the same breach. Others made a similar point. The example given by Torfaen was where an enforcement notice is served within the 4-year period following the service

[20] Consultation Paper, para 12.35.

of the EWN, but is subsequently found to be defective at appeal. Torfaen suggested that it would be important to retain the right to issue a new corrected enforcement notice within a 4-year period. We are confident that our recommendation will not adversely affect or replace the general "second bite" provision in section 171B(4)(b), which we recommend should be restated in the Bill in its current form.

Recommendation 12-4.

We recommend that section 173ZA of the TCPA 1990 should be restated in an amended form such that, where an enforcement warning notice has been issued, the period for taking other enforcement action starts on the date on which the notice was served, but that the time limit cannot be extended further by the issuing of additional enforcement warning notices in relation to the same matter.

TEMPORARY STOP NOTICES

12.42 In our Consultation Paper we highlighted the fact that where there has been a breach of planning control, and the planning authority is contemplating further action, it may issue a "temporary stop notice" ("TSN"), under section 171E of the TCPA 1990 (introduced by the PCPA 2004).[21] The effect of such a notice is to require the offending activity to cease immediately.[22] The notice expires after 28 days, with the expectation that during that period the authority will have taken some other form of enforcement action. Non-compliance with a TSN is an offence, punishable by a fine.

We provisionally proposed that the restriction on issuing a temporary stop notice, currently in section 171F(1)(a) of the TCPA 1990, be clarified to ensure that it applies in relation to any dwelling (defined so as to include a house and a flat) (Consultation Question 12-5).

12.43 We noted that by virtue of Section 171F, the power to issue a TSN under section 171F is not available to prohibit the use of any building (which would include a part of a building[23]) as a "dwellinghouse".[24] We provisionally proposed that the position should be clarified to make it clear that a TSN should not prohibit the use of any building, or part of a building, as a dwelling – not just as a dwellinghouse.[25]

12.44 All of the 31 consultees who responded to this question were in agreement. The RTPI told us that the proposal "appears logical." Carmarthenshire CC noted that "this makes clear the restriction in relation to all types of dwelling houses." Rhondda Cynon Taf CBC said that "there should be clarity to ensure that a temporary stop notice applies in relation to any dwelling."

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21 Consultation Paper, para 12.38.

22 TCPA 1990, s 171E(3), inserted by PCPA 2004, s 52.

23 TCPA 1990, s 336.

24 TCPA 1990, s 171F(1)(a).

25 See **Recommendation 18-15**.

Recommendation 12-5.

We recommend that the restriction on issuing a temporary stop notice, currently in section 171F(1)(a) of the TCPA 1990, should be clarified to ensure that it applies in relation to any dwelling.

We provisionally proposed that: (1) a temporary stop notice (TSN) should come into effect at the time on the date stated in it, which will normally be when a notice is displayed on the land in question; (2) it should remain in effect for 28 days (starting at the beginning of the day after the day on which it is displayed); (3) the notice should be displayed on the land, as near as possible to the place at which the activity to which it relates is occurring, stating that a TSN has been issued, summarising the effect of the TSN, and stating the address (and, if applicable, the website) at which a full copy of the TSN can be inspected; (4) the authority should have a power (but not a duty) to serve copies of the TSN on the owner and occupier of the land and on others as may seem appropriate (Consultation Question 12-6).

12.45 We noted in our Consultation Paper that by virtue of section 171E(5) of the TCPA 1990, a planning authority that has issued a TSN must display a copy of it (and a statement of its effect and the penalties for non-compliance) on the land to which it relates. The authority may also serve "the notice" on

1) the person who it thinks is carrying out the activity that constitutes the breach of planning control,

2) the person who it thinks has an interest in the land, or

3) the person who it thinks is the occupier of the land.[26]

12.46 It will be noted that this does not refer to the person who is the owner, occupier etc; merely the person who seems to be.

12.47 We noted the requirement to display a site notice refers only to "the land" on which the offending activity is occurring. This could cause problems in the case of a large area of land, for example in a rural area, if a notice were displayed at a point on the land that was far from where the activity was actually taking place. It also seems unhelpful for the planning authority to be required to display on the land a copy of the TSN itself, as the notice may be several pages long, and may be phrased in technical language.[27]

12.48 We also noted that a TSN has effect "from the time" it is first displayed, which presumably means that it takes effect immediately after the start of the display – although it is not clear what happens if the notice is itself displayed, but without the

[26] Consultation Paper, para 12.46.

[27] Consultation Paper, para 12.48.

required statement of its effect.[28] The notice is effective for a period of 28 days starting "on" the *day* it is displayed, but it is not clear whether that period starts (and finishes) at the precise time on which the notice is displayed, or at the start or end of the day.[29] This contrasts with section 173(8), which provides that an enforcement notice takes effect "on" the *date* specified within it – which means at the start of that day.

12.49 We provisionally proposed that a notice should come into effect at the time and date stated within it, which will normally be when it is displayed on the land in question.[30] It should then remain in effect for a period of 28 days starting at the beginning of the day following the day on which it is displayed. That display should be on the land, as near as possible to the place at which the activity is occurring, and should include a notice stating that a TSN has been issued, summarising the effect of the notice, including the date on which it comes into effect, and stating the addresses (both a physical location and, where available, a website) at which full copies of the notice can be inspected.

12.50 Of 33 consultees who responded to this question, 30 agreed with our provisional proposal.

12.51 Pembrey and Burry Port Town Council believed that our proposal "would make stop notices more effective." Allan Archer said the proposal "would provide clarification of the issues identified and should be supported." The RTPI said that that the changes would be "acceptable."

12.52 There was some disagreement as to whether there should be a duty to serve a copy of the temporary stop notice on the owner of the land, if known. The Canal & River trust considered "that any formal notice should always be served on both the owner and the occupier." The Home Builders Federation suggested that "the requirement to serve the notice on the owner, if known, should be a requirement 'duty' as it is the owner who is required to respond to the notice.

12.53 By contrast, the Planning and Environmental Bar Association (PEBA) agreed that "the authority should have a power rather than a duty to serve copies of the TSN" as "it is important to avoid circumstances in which an owner/occupier could become aware of a temporary stop notice before it has been displayed" – as this could allow an occupier or landowner to instigate breaches of planning control (such as bringing caravans onto the land), without criminal sanction. Newport CC noted that "ownership of some land is difficult to ascertain particularly when it is not registered."

12.54 On balance, we do not think it desirable to turn the existing power to notify into a statutory duty to do so. We noted in the Consultation Paper that it will be easier to secure a conviction for non-compliance if the existence of the notice has been widely publicised.[31] A prudent authority will notify the owner of the land, if known, following the display of the notice. We consider that this best practice should be reflected in Government guidance. However, we are persuaded by PEBA's point that creating a

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28 Consultation Paper, para 12.49; TCPA 1990, s 171E(6).

29 TCPA 1990, s 171E(7).

30 Consultation Paper, para 12.50.

31 Consultation Paper, para 12.51.

duty to inform the owner would increase the risk of situations where an owner is made aware of a TSN before it is displayed and comes into effect. Furthermore, the persons most directly affected by the notice are those on the land carrying out the activity in question, who will be made aware of the notice through its display.

Recommendation 12-6.

We recommend that:

(1) **a temporary stop notice (TSN) should come into effect at the time and date stated in it, which will normally be when a notice is displayed on the land in question;**

(2) **it should then remain in effect for 28 full days (starting at the beginning of the day after the day on which it is displayed);**

(3) **the notice to be displayed on the land, as near as possible to the place at which the activity to which it relates is occurring, should:**

- **state that a TSN has been issued;**
- **summarise the effect of the TSN; and**
- **state the address (and, if applicable, the website) at which a full copy of the TSN can be inspected;**

(4) **the authority should have a power (but not a duty) to serve copies of the TSN on the owner and occupier of the land and on others as may seem appropriate; and**

(5) **Welsh Government guidance should emphasise that, following the display of the notice, copies of the TSN should be served within a reasonable time on the owner and occupier of the land, if either are known to the planning authority.**

We provisionally proposed: (1) that it should be an offence to contravene a temporary stop notice that has come into effect (rather than one that has been served on the accused or displayed on the site); and (2) that it should be a defence to a charge of such an offence to prove that the accused had not been served with a copy of the notice, and did not know, and could not reasonably have been expected to know, of its existence (Consultation Question 12-7).

12.55 We noted in our Consultation Paper that under section 171G(1) of the TCPA 1990 it is an offence for a person to contravene a TSN that has been served on him or her,

or that has been displayed on the land.[32] We identified two problems with this provision:

1) a person served with a notice may be prosecuted for non-compliance even if a notice is not displayed on the land; and

2) a person not served with a notice may be able to avoid prosecution even if a notice has been obviously displayed on the land.

12.56 We provisionally proposed that the offence under section 171G should relate to the contravention of a notice that has come into effect, rather than one of which a copy has been served or displayed on the land.[33]

12.57 Responses to this question were received from 33 consultees, of whom 30 agreed, and two disagreed – in all cases, largely without comment.

Recommendation 12-7.

We recommend that:

(1) it should be an offence to contravene a temporary stop notice that has come into effect (rather than, as at present, one that has been served on the accused or displayed on the site);

(2) it should be a defence to a charge of such an offence to prove that the accused

- **had not been served with a copy of the notice; and**
- **did not know, and could not reasonably have been expected to know, of the existence of the notice.**

BREACH OF CONDITION NOTICES

We provisionally proposed that the provisions relating to breach of condition notices, currently in section 187A of the TCPA 1990, be amended so that a notice is to be "issued", to come into force on the date stated in it, with copies being served on those apparently responsible for the breach (rather than, as present, a separate notice being served on each such person, coming into force on a date specified by reference to the date of service) (Consultation Question 12-8).

12.58 In our Consultation Paper, we discussed breach of condition notices (BCNs) under section 187A of the TCPA 1990, which can be issued if planning permission has been granted but a condition of that permission has been breached by the developer.[34] We

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32 Consultation Paper, para 12.55.

33 Consultation Paper, para 12.56.

34 Consultation Paper, paras 12.58 – 12.59.

noted the main benefit of BCNs compared to enforcement notices is that there is no right of appeal in respect of the former, so that it is not permissible to challenge the merits of a condition (the reasoning behind this being that a condition should be been challenged when it is first imposed, not once the development is being carried out).

12.59 We noted that, at present, a breach of condition notice must be served on any person who has carried out or is carrying out the development, or anyone having control of the land.[35] The notices takes effect immediately, but the time for compliance is the end of a period of at least 28 days starting on the date it is served.[36] This contrasts with the provisions as to an enforcement notice relating to a breach of conditions, which require the notice to be "issued", with copies to be served as required.

12.60 We also noted that there is no requirement for a copy of a breach of condition notice to be displayed on or near the land. This may be unsatisfactory where there are two or more people associated with a breach, leading to separate notices being served on each, possibly on different dates, resulting in differing times for compliance for each person involved.

12.61 We provisionally proposed to bring the timing provisions relating to breach of condition notices in line with those relating to enforcement notices, by requiring a notice to be "issued", and to come into force on the date specified in the notice.[37] Copies could then be served – not necessarily on the same date – on those whom the authority considered appropriate.

12.62 All 31 responding consultees agreed.

12.63 The Law Society noted "the desirability of adopting as far as possible a common approach to the service and coming into effect of notices related to the enforcement of planning control." The RTPI said that "this proposal appears to be a logical approach." Liam Jones of NAPE said that "bringing [breach of condition notices] in line with enforcement notices would avoid any confusion in relation to different notices being issued."

12.64 The Mineral Products Association suggested that there should be a right of appeal against a breach of condition notice for specific developments on the basis that "some developments may last for many years and circumstance may change. Conditions may therefore become out of date." Whilst we are sympathetic with this view, we consider that the remedy lies with an application to vary the permission, rather than simply unilaterally breaching the condition.

Recommendation 12-8.

We recommend that the provisions relating to breach of condition notices, currently in section 187A of the TCPA 1990, should be restated in an amended form such that a notice is to be "issued", to come into force on the date stated in it, with copies

35 Consultation Paper, para 12.59.

36 TCPA 1990, s 187A(7).

37 Consultation Paper, para 12.62.

being served on those apparently responsible for the breach (rather than, as present, a separate notice being served on each such person, coming into force on a date specified by reference to the date of service).

ENFORCEMENT NOTICES

Content of enforcement notice and accompanying note

We provisionally proposed that an enforcement notice should be required to specify (1) the steps that the authority requires to be taken, or the activities that are to cease, in order to achieve, wholly or partly, all or any of the purposes set out in section 173(4) of the TCPA 1990; and (2) which one or more of those purposes it considers will be achieved by taking those steps (Consultation Question 12-9).

12.65 In our Consultation Paper we noted that the most commonly encountered form of enforcement action is the issue of an enforcement notice.[38] An enforcement notice is a notice that states the matters that appear to the planning authority to constitute a breach of planning control, and specify the steps that the authority requires to be taken or the activities it requires to cease.

12.66 We have mentioned that section 173(3) of the TCPA 1990 requires an enforcement notice to specify the steps that are to be taken, or the activities that are to cease, "in order to achieve, wholly or partly, any of the following purposes". The purposes are:

1) remedying the breach

   - by making any development comply with the terms (including conditions or limitations) of any planning permission which has been granted in respect of the land,
   - by discontinuing any use of land, or
   - by restoring the land to its condition before the breach took place[39]; and

2) remedying any injury to amenity which has been caused by the breach.[40]

12.67 We noted that in *Oxfordshire CC v Wyatt Bros (Oxford) Ltd*, the Court of Appeal held that a planning authority could require steps for both of the specified purposes, so that the word "or" at the end of section 173(4)(a) should be read as "and/or".[41]

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38 Consultation Paper, para 12.66.

39 TCPA 1990, s 173(3)(a); indents added to improve clarity.

40 TCPA 1990, s 173(3)(b).

41 *Oxfordshire CC v Wyatt Bros (Oxford) Ltd* [2005] EWHC 2402 (QB); Consultation Paper, para 12.71; Scoping Paper, paras 5.25 to 5.27.

12.68 We provisionally proposed that section 173(3) be amended to require that a notice should specify:

1) the steps that the authority requires to be taken [etc] in order to achieve, wholly or partly, one or more of the purposes set out in section 173(4); and

2) which one or more of those purposes it considers will be achieved by taking those steps.

12.69 Of 31 consultees responded to this proposal, 21 were in agreement, three were equivocal and seven disagreed.

12.70 Several consultees highlighted the increased clarity that would result from the proposal. The RTPI stated that the proposal "will provide better clarification" to enforcement notices. Rhondda Cynon Taf CBC noted that the proposed amendments "will make it clearer as to the requirements that can be specified in an enforcement notice."

12.71 However, a significant number of consultees questioned the value of the proposal and asked what problem it was intended to remedy. Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services and Lawyers in Local Government noted that the proposal "does not introduce any practical difference in terms of the effect of a notice". Torfaen CBC found it "not entirely clear what purpose this would serve." The Canal & River trust suggested that our proposal "would not be helpful to anyone who is served with an enforcement notice." Liam Jones of NAPE noted that

> [We] can see the benefit of inclusion of the words 'all or any' as set out in (1) but don't consider that LPAs should need to further say which one or more of the purposes it considers will be achieved by taking those steps as set out in (2) – The reasons for serving the enforcement notice will set out why the LPA has taken action.

12.72 There was also concern among consultees that the proposal would result in a new ground of appeal based on the stated purpose. The Planning Inspectorate (PINS) questioned whether the proposal "would have implications for appealing a notice."

12.73 On reflection, we agree that our provisional proposal would not change the existing requirements in substance, but might produce unintended consequences. By reformulating the requirements to state the purpose of enforcement action we did not intend to allow a new avenue for appeal on the basis of that purpose. However, we accept that the suggested new provision, as formulated, could have been interpreted as imposing a new or more onerous requirement on planning authorities. At the very least, a new statutory formulation may have invited questions about whether a new requirement was intended.

12.74 To avoid the possibility of unprofitable litigation on this point, we now recommend that section 173(4) of the TCPA 1990 be included in the Bill as it is currently written, but suitably amended to incorporate the gloss on its meaning highlighted by the court in *Oxfordshire CC v Wyatt Bros (Oxford) Ltd.*

Recommendation 12-9.

We recommend that section 173(4) of the TCPA 1990 should be restated in an amended form to make it clear that a local authority can require steps to be taken in respect of both of the specified purposes, as set out in *Oxfordshire CC v Wyatt Bros (Oxford) Ltd* [2005] EWHC 2402 (QB).

We provisionally proposed that there should be an explicit provision in the Bill, incorporating the principle in* Murfitt v Secretary of State *and subsequent cases, to the effect that, where an enforcement notice is served alleging the making of a material change of use of land, the notice may require that certain works be removed in addition to the cessation of the unauthorised use, provided that those works were integral to the making of the material change of use (Consultation Question 12-10).

12.75 Under the *Murfitt* principle, an enforcement notice can validly require the removal of any incidental operational development where it forms part of the development being enforced against.[42] This principle was qualified in the case of *Bowring v Secretary of State*, where the court held that the incidental development must be "integral to or part and parcel of" the development in question – although it went on to note that that would not be sufficient if the works had been undertaken for a different, and lawful, use and could be used for that other, lawful use even if the unauthorised use ceased.[43]

12.76 We provisionally proposed that the *Murfitt* principle should be codified in the Bill. All of the 28 consultees who responded to the question agreed.

12.77 There were few additional comments in respect of the proposal. POSW, Monmouthshire CC, Ceredigion CC, Pembrokeshire Coast NPA and National Parks Wales all told us that they "welcome this inclusion."

12.78 PINS, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services and Lawyers in Local Government all variously suggested that the "integral" requirement set out in *Bowring* should be expanded to include operational development that has:

1) facilitated the change of use, or

2) is ancillary to it, or

3) relates to the subsequent operation of the new use.

12.79 In consequence, related operational development that may be lawful if undertaken for a different purpose could not be the subject of an enforcement notice.

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42 *Murfitt v Secretary of State* (1980) 40 P&CR 254.

43 *Bowring v Secretary of State* [2013] EWHC 1115 (Admin); [2013] JPL 1417.

12.80 We agree that it would be desirable to amend our provisional proposal so as to widen the principle established in *Murfitt* in accordance with the decision in *Bowring*.

Recommendation 12-10.

We recommend that there should be an explicit provision in the Bill, incorporating the principle in *Murfitt v Secretary of State* and *Bowring v Secretary of State*, to the effect that, where an enforcement notice is served alleging the making of a material change of use of land, the notice may require that certain works be removed in addition to the cessation of the unauthorised use, provided that those works were carried out at or after the time of the making of the material change of use and were integral to the making of the change or the subsequent operation of the new use.

We provisionally proposed that the relevant regulations should require that the explanatory note accompanying an enforcement notice should include a statement (in line with the principle in* Mansi v Elstree RDC*) to the effect that the notice does not restrict the rights of any person to carry out without a planning application any development that could have been so carried out immediately prior to the issue of the notice (Consultation Question 12-11).

12.81 Under the *Mansi* principle, an enforcement notice must not seek to restrict the owner of land from using it in any way in which the land could have been used lawfully up until the issue of the notice. In the *Mansi* case itself, an enforcement notice was issued in relation to the selling of off-site horticultural produce at a greenhouse. However, the notice required the cessation of all retail sales. The court held that the notice should be amended to allow the sale of on-site produce, which had been permitted before the notice was issued.[44]

12.82 We recommended that the *Mansi* principle be recognised in the Code, but in the explanatory note to accompany the enforcement notice, envisaged by section 173(10), rather than in the notice itself.[45]

12.83 Of the 29 consultees who responded to the question. 22 were in agreement, three were equivocal, and three disagreed.

12.84 Newport CC agreed on the basis that the statement which we proposed should be in every enforcement notice was a "standard statement." Rhondda Cynon Taf CBC said that such a statement "would provide clarity to the recipient of an enforcement notice." The RTPI agreed as "this situation often arises during enforcement notice appeals." However, it cautioned that "the drafting of the note is an important factor, to ensure it is fully understood by the recipient."

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44 *Mansi v Elstree RDC* (1964) 16 P&CR 153, per Widgery J at p 161.

45 See SI 2017/530, reg 7.

12.85 Cardiff Council likewise noted that "a simple explanatory note may be useful but it should not confuse the recipient of the Notice to the effect that a previous use may continue on land which could also be unauthorised".

12.86 Caerphilly CBC and POSW South East Wales disagreed with the proposal because "this may make the notice, which is complex enough for members of the public, more confusing." Torfaen CBC disagreed on the basis that "the recipient of a notice would then expect the authority to tell them what they could have done without the need for planning permission."

12.87 We consider that the benefits of including a reference to the *Mansi* principle in the matters to be included in the note to accompany an enforcement notice are that it would clarify the effect of the notice in some cases. On the other hand, in many cases the principle will be irrelevant – and in some cases a notice of the kind envisaged might be more confusing than helpful. We also note that the Welsh Government will shortly be reviewing Circular 24/97, *Enforcing Planning Control*, and incorporating update guidance in the Development Management Manual. On balance, therefore, we consider that it may be more appropriate to incorporate advice on *Mansi* in the Manual.

Recommendation 12-11.

We recommend that Welsh Government guidance should explain the implications of the principle in *Mansi v Elstree RDC*, to the effect that an enforcement notice does not restrict the rights of any person to carry out without a planning application any development that could have been carried out lawfully immediately prior to the issue of the notice.

Appeal against an enforcement notice

We provisionally proposed that the Bill should omit section 177(5) and (6) of the TCPA 1990, relating to the application for planning permission deemed to have been made by an appellant relying on ground (a) in section 174(2). Instead, it should provide that the Welsh Ministers on determining an appeal including ground (a) may grant planning permission for any or all of the matters that are alleged to have constitutes a breach of control; discharge the condition that is alleged to have been breached; or issue a certificate of lawfulness, insofar as they determine that the matters alleged by the notice to constitute a breach of control were in fact lawful (Consultation Question 12-12).

12.88 The recipient of a copy of an enforcement notice may appeal to the Welsh Ministers on the grounds specified in section 174(2) of the TCPA 1990.[46] We noted in our Consultation Paper that one of the most important grounds in practice is ground (a) – "in respect of any breach of planning control which may be constituted by the

[46] Consultation Paper, para 12.95.

matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged".[47]

12.89 Section 177(5) of the TCPA 1990 provides that where an appeal relies on ground (a) the appellant is "deemed to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control." This is known as the "deemed application."

12.90 However, the Welsh Ministers may grant planning permission on the determination of an appeal under section 174 in any event.[48] Section 177(6) states that any permission granted by the Welsh Ministers shall be treated as a grant of the deemed application.

12.91 We were not aware of a compelling reason as to why a deemed application is necessary in the light of the Welsh Ministers' powers to grant permission on appeal. We therefore provisionally proposed that section 177(5) and 177(6) of the TCPA 1990 should not be included in the Code.

12.92 Of the 28 consultees responded to this question, 23 were in agreement, three were equivocal, and two disagreed.

12.93 Several stakeholders suggested that the proposal would clarify the role of the Welsh Ministers and make the appeal process more straightforward. The Law Society described our provisional proposal as a "welcome simplification." PEBA agreed on the basis that "it is not proposed to remove the requirement to pay a fee."

12.94 Those who answered 'no' to our consultation question did not appear to challenge the substance of the provisional proposal. The CLA disagreed on the basis that the proposal amounted to removing ground (a), which was not our intention. Newport CC expressed concern that our reform might lead to the possibility of unauthorised developments being granted permission in response to a ground (a) appeal; but that is already the position.

12.95 PINS suggested that it would be clearer to limit the scope of action of Welsh Ministers determining an appeal including ground (a) to those elements of the alleged breach that are the subject of the ground (a) appeal rather than any or all of the breaches alleged. So for example, if a notice alleges two breaches, X and Y, an appeal may be made in relation to X on ground (a) (permission should be granted), and in relation to Y on ground (c) (no breach of planning control). The suggestion was that the inspector determining the appeal should not have power to allow the appeal on ground (a) in relation to the matters alleged to constitute breach Y – as there may have been no evidence from the authority as to the planning merits of those matters.

12.96 We agree with that concern, and consider that the power of the inspector to grant planning permission or to discharge any condition or limitation – currently in section 177(1)(a) and (b) – should be limited to those matters that formed the subject of any appeal on ground (a). Similarly, the ability to grant a certificate of lawfulness under

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47 Consultation Paper, para 12.95.

48 TCPA 1990, s 177(1)(a).

section 177(1)(c) should be limited to those matters that formed the subject of an appeal under (c) or (d) (no breach of control; or no enforcement action possible).

Recommendation 12-12.

We recommend that that the Bill:

(1) should omit section 177(5) and (6) of the TCPA 1990, relating to the application for planning permission deemed to have been made by an appellant relying on ground (a) in section 174(2) (permission ought to be granted for any matter stated in the enforcement notice as constituting a breach of control); and

(2) should provide instead that the Welsh Ministers, on determining an appeal under section 174, may do all or any of the following:

- **in relation to any of the matters that form the basis of an appeal under ground (a), grant planning permission or discharge any condition or limitation that is alleged to have been breached;**
- **in relation to any of the matters that form the basis of an appeal under ground (c) or (d), issue a certificate of lawfulness, insofar as they determine that those matters were in fact lawful.**

We provisionally proposed that ground (e) on which an appeal can be made against an enforcement notice (under section 174 of the TCPA 1990) should refer to copies of the notice not having been served as required by section 172(2) (which refers to service on owners and occupiers etc) rather than as required by section 172 (which also refers to time limits for service) (Consultation Question 12-13).

12.97 Section 174(2)(e) of the TCPA 1990 allows the recipient of an enforcement notice to appeal on the ground that copies of the notice were not served as required by section 172. Section 172(3) includes the requirement that the service of the notice shall take place not more than 28 days after its date of issue, and not less than 28 days before the date specified in it as the date on which it is to take effect.

12.98 Under section 285(1) of the TCPA 1990, the validity of an enforcement notice may not be challenged in relation to a ground under Part 7 of the Act (which includes all the grounds in section 174(2)), other than through the statutory appeal process in Part 7 itself.

12.99 In our Consultation Paper we noted that, because of this interaction, the recipient of an enforcement notice might be unable to challenge its validity in the courts on the basis that a copy had been served out of time, leaving a period in which to appeal that was shorter, possibly much shorter, than envisaged by the scheme of the Act. However, in *R (Stern) v Horsham DC*, the court found that, despite the wording of the

statute, it should be possible to apply to the court under section 285 to quash a notice that had been served out of time.[49]

12.100 We provisionally proposed that the problem could be remedied by amending section 174(2)(e) of the TCPA 1990, so that it referred to section 172(2) rather than section 172 more broadly. This would put time limits for service of enforcement notices outside the scope of the statutory appeal procedure.

12.101 Of 27 consultees who responded to this question, 26 agreed without further comment.

12.102 Torfaen CBC disagreed on the basis that allowing recipients to apply for judicial review of an out-of-time enforcement notice in addition to the statutory appeal procedure would amount to an unnecessary waste of time, resources and money for all parties. We reject that concern, as the basis of the decision in *Stern* was that, in the situation of a notice being served out of time, the statutory appeal (to the Welsh Ministers) would be inadequate.

Recommendation 12-13.

We recommend that ground (e) on which an appeal can be made against an enforcement notice (under section 174 of the TCPA 1990) should refer to copies of the notice not having been served as required by the provision restating section 172(2) (which refers to service on owners and occupiers etc) rather than as required by the provision restating section 172 as a whole (which also refers to time limits for service).

We provisionally considered that section 174(4) of the TCPA 1990 (requirements as to the statement to be submitted with appeal against an enforcement notice) should be amended so as not to duplicate the requirements of the relevant secondary legislation (Consultation Question 12-14).

12.103 In our Consultation Paper we noted that under section 174(4) of the TCPA 1990 a person appealing against an enforcement notice must submit a statement

1) specifying the grounds of appeal that are being relied on; and

2) giving such further information as may be prescribed by regulations.[50]

12.104 Under the relevant regulations the statement should specify the grounds of appeal being relied on, the facts relied on, and the case being put forward in relation to each ground.[51]

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49 [2013] EWHC 1460 (Admin), [2013] PTSR 1502.

50 Consultation Paper, para 12.105.

51 2017 SI 530, reg 8(1)(a).

12.105 Given this duplication, we provisionally proposed that all that is needed in the primary legislation is a requirement that a person making an appeal must provide information and details as prescribed in secondary legislation.

12.106 25 consultees responded to this question. No consultee disagreed or added substantial further comments. Allan Archer described it as a "sensible amendment."

Recommendation 12-14.

We recommend that section 174(4) of the TCPA 1990 (requirements as to the statement to be submitted with appeal against an enforcement notice) should be amended so that it does not duplicate the requirements of the relevant secondary legislation.

High Court challenge to an enforcement notice

We provisionally proposed that there be included in the part of the Code dealing with enforcement a provision equivalent to section 285(1) and (2), to the effect that an enforcement notice is not to be challenged, other than by way of an appeal to the Welsh Ministers, on any of the grounds on which such an appeal could have been brought (Consultation Question 12-15).

12.107 We noted in our Consultation Paper that it is possible to challenge a decision of the Welsh Ministers to grant planning permission in response to an enforcement appeal by way of an application to the High Court under section 288 of the TCPA 1990. It is also possible to challenge any other decision of the Welsh Ministers on such an appeal by way of an application under section 289 of the TCPA 1990.[52]

12.108 In Chapter 17 of our Consultation Paper, we proposed that the statutory procedure under sections 288 and 289 of the TCPA 1990 should not be restated in the Bill, but should be replaced by an application to the High Court for judicial review, under Part 54 of the Civil Procedure Rules.[53]

12.109 However, in Chapter 12 we proposed that the Bill should still contain a provision equivalent to sections 285(1) and (2) of the TCPA 1990, which state that an enforcement notice is not to be challenged by a person on whom a copy of the notice was served, other than by way of an appeal to the Welsh Ministers, on any of the grounds on which such an appeal could have been brought.[54]

12.110 Twenty-nine consultees responded to this question. No consultee disagreed or added substantive further comment. Carmarthenshire CC stated that the proposal "clarifies [the] appeals process."

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52 Consultation Paper, para 12.111.

53 Consultation Paper, Consultation Question 17-1.

54 Consultation Paper, para 12.112.

Recommendation 12-15.

We recommend that there should be included in the part of the Bill dealing with enforcement a provision equivalent to section 285(1) and (2) of the TCPA 1990, to the effect that an enforcement notice is not to be challenged, other than by way of an appeal to the Welsh Ministers, on any of the grounds on which such an appeal could have been brought.

STOP NOTICES

Service of a notice

12.111 An enforcement notice will not come into effect immediately, and will usually allow time for compliance.[55] The service of such a notice, on its own, may therefore be inadequate when it is desirable that an unauthorised activity ceases immediately. Where this is the case, a planning authority may therefore issue a "stop notice" requiring the recipient to halt the activity immediately.[56] We provisionally proposed three changes relating to the service and coming into effect of stop notices.

We provisionally proposed that the restriction on issuing a stop notice, currently in section 183(4) of the TCPA 1990, should be clarified to ensure that it applies in relation to any building in use as a dwelling (Consultation Question 12-16).

12.112 First, we noted that, as with temporary stop notices, the power to serve a stop notice is not available to bring to an end the use of any building as a dwelling house.[57] Here too, we provisionally consider that this should be clarified to make plain that it applies to any part of a building in use as a dwelling.

12.113 None of the 30 responding consultees disagreed. The RPTI noted that such a change would "provide continuity." Rhondda Cynon Taf CBC said it would "provide clarity."

Recommendation 12-16.

We recommend that the restriction on issuing a stop notice, currently in section 183(4) of the TCPA 1990, should be clarified to ensure that it applies in relation to any building in use as a dwelling.

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55 Consultation Paper, para 12.113.

56 Consultation Paper, para 12.114.

57 TCPA 1990, s 183(4). See **paras 12.43, 12.44.**

We provisionally proposed that the provisions relating to stop notices, currently in section 184 of the TCPA 1990, should be amended so that a notice is to be "issued", to come into force on the date stated in it, with copies being served on those apparently responsible for the breach of control (rather than, as present, a separate notice being served on each such person, coming into force on a date specified by reference to the date of service) (Consultation Question 12-17).

12.114 Secondly, we noted that, by virtue of section 183(5), a planning authority does not "issue" a stop notice, but "serves" it on any person who appears to have an interest in the land to which it relates, or to be engaged in the activity being prohibited by the notice. And it may display a site notice on "the land", although it does not have to.

12.115 As with a breach of condition notice, we provisionally considered that a notice should come into effect on the date stated within it. There should then be a duty for the authority to serve copies of the stop notice on the owner and occupier of the land. Copies of the stop notice may then be served on others – and a notice may be displayed on site – as may seem appropriate.[58]

12.116 Of the 29 consultees who responded to this proposal, 28 agreed.

12.117 PEBA reiterated the caveat in relation to its response to Consultation Question 12-6 (temporary stop notices), to the effect that it would be important for the power to serve copies of a notice to be discretionary.[59]

12.118 The RPTI agreed "in principle" but questioned whether there was a need to change the wording as "there appears to be very little wrong" with the existing procedure. However, we consider that it would be more straightforward for the service requirements for stop notices to mirror as closely as possible those relating to enforcement notices – not least since a stop notice will always be served alongside an enforcement notice. Uniform requirements would therefore simplify the system, and consequently reduce the risk of error on both sides.

12.119 In the Consultation Paper, we noted that the power to display a notice on "the land" could be problematic in the case of a large rural site, if a notice were to be displayed at a point on the land that was some distance from where the offending activity was actually taking place.[60] This point was not mentioned in the Consultation Question, and none of the consultees picked it up; but we have amended our recommendation to incorporate it.

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58 Consultation Paper, para 12.119.

59 See **para 12.53**.

60 Consultation Paper, para 12.117.

Recommendation 12-17.

We recommend that the provisions relating to stop notices, currently in section 184 of the TCPA 1990, should be restated in an amended form such that a notice is to be "issued", to come into force on the date stated in it, with copies being served on those apparently responsible for the breach of control (rather than, as present, a separate notice being served on each such person, coming into force on a date specified by reference to the date of service); and where a notice is to be displayed on the land, it is to be as close as reasonably possible to the location at which the offending activity is occurring.

We provisionally proposed: (1) that it should be an offence to contravene a stop notice that has come into effect; and (2) that it should be a defence to a charge of such an offence to prove that the accused had not been served with a copy of the stop notice, and did not know, and could not reasonably have been expected to know, of the existence of the notice (Consultation Question 12-18).

12.120 Following on from the previous recommendation, we proposed that the offence under section 187(1) should relate to the contravention of a notice that has come into effect, rather than one that has been served. But a person charged with such an offence would still have the defence available under section 187(3) – save that the reference to the service of the notice would need to be amended to refer to the service of a copy of the notice.[61]

12.121 Of the 31 consultees responding to the third proposal, the vast majority agreed, with only one equivocal response. Carmarthenshire CC and Rhondda Cynon Taf CBC both stated that the proposals "provide clarity." The RTPI and PEBA both agreed, but subject to the caveats raised in connection with Consultation Question 12-17.[62]

12.122 Newport CC argued that the suggested defence to a charge of non-compliance with a stop notice should be removed entirely. However, it is difficult to see how it could be fair to punish someone for failing to comply with a notice of which they knew nothing.

12.123 Michael Kiely noted that full stop notices were underutilised as the risk of compensation was too high, compared to temporary stop notices. This concern was echoed by the Law Society. It is certainly true that there has been a general decline in the use of stop notices in recent years, as we highlighted in our Consultation Paper.[63] However, as Huw Williams noted, the question of whether the current system is properly balanced is outside the scope of a technical law reform exercise such as this.

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61 Consultation Paper, para 12.120.

62 See **paras 12.117, 12.118**.

63 Consultation Paper, para 12.115.

Recommendation 12-18.

We recommend that:

(1) it should be an offence to contravene a stop notice that has come into effect; and

(2) it should be a defence to a charge of such an offence to prove that the accused

- **had not been served with a copy of the stop notice, and**
- **did not know, and could not reasonably have been expected to know, of the existence of the notice.**

Stop notices: other proposals

We provisionally proposed: (1) that a stop notice should cease to have effect when the planning authority makes a decision to that effect; and (2) that such a decision should be publicised as soon as possible after it has been made, by the display of a suitable site notice and the notification of all those who were notified of the original notice. (Consultation Question 12-19)

12.124 We noted in our Consultation Paper that under section 184(4) of the TCPA 1990, a stop notice will cease to have effect when the associated enforcement notice is withdrawn or quashed, or when the time for compliance with that notice expires. But a stop notice will also cease to have effect where the planning authority decides to withdraw it (either along with the linked enforcement notice, or otherwise).

12.125 In the latter case, the authority must notify all those who were served with the original stop notice (or notified of its service) that it has withdrawn it. The notice will cease to have effect when the first of those people receives the notice of withdrawal.[64] We provisionally proposed that it would make more sense for a stop notice to cease to have effect immediately following the planning authority's decision, and that the decision should be communicated as soon as possible to those who received the original notice and via a notice on the land itself.

12.126 None of the 28 responding consultees disagreed. The RTPI described our proposal as "a common sense approach."

12.127 Several consultees noted that the requirement under section 184(7) of the TCPA 1990, to publicise the withdrawal of a stop notice via a site notice, only takes effect if a site notice was used to publicise the original stop notice. This was not clear in the wording of our provisional proposal, and we have amended our final recommendation accordingly.

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64 Consultation Paper, para 12.121.

Recommendation 12-19.

We recommend that:

(1) where a planning authority decides to withdraw a stop notice, the notice should cease to have effect immediately; and

(2) such a decision should be publicised as soon as possible after it has been made:

- **by the notification of all those who were notified of the original notice, and**
- **where the original notice was publicised by a site notice, by the display of another such notice, at the same location.**

We provisionally considered that where a stop notice is served by the Welsh Ministers under section 185, and subsequently quashed, any compensation arising under section 186 should be payable by them and not by the planning authority (Consultation Question 12- 20).

12.128 In our Consultation Paper we highlighted the fact that if the Welsh Ministers issue a stop notice, it is the planning authority that is liable to pay any compensation that may be payable under section 186 of the TCPA 1990.[65]

12.129 We provisionally proposed that in the rare cases where this does happen, it would be more appropriate for the Welsh Ministers to be liable for compensation than the local planning authority.

12.130 All of the 29 consultees who responded to this question agreed, in several cases strongly – Huw Williams "completely" and Blaenau Gwent CBC "wholeheartedly". Allan Archer said that our proposal "seems only fair and logical."

12.131 However, on giving the matter further consideration, we note that compensation is only payable where:

1) the enforcement notice linked to the stop notice is quashed or varied on grounds other than planning permission being granted (that is, the legal grounds relating to the need for permission for the development, or the service of the notice); or

2) the enforcement notice is withdrawn by the planning authority on such grounds; or

3) the stop notice itself is withdrawn.

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65 TCPA 1990, Sch 1, para 16; Consultation Paper, para 12.124.

12.132 We recognise that, where an enforcement notice has been served by a planning authority and a stop notice by the Welsh Ministers, the liability to pay compensation would arise only in the event of the authority's enforcement notice being quashed or varied, which would be the responsibility of the authority; or where the authority itself withdraws its own notice. In such cases, it seems reasonable that the authority should pay compensation.

12.133 However, where the Welsh Ministers themselves issue an enforcement notice, under section 182 of the TCPA 1990, and then issue a stop notice under section 185, it seems more appropriate that the Welsh Ministers should meet any liability for compensation that may arise. We have adjusted our recommendation accordingly.

Recommendation 12-20.

We recommend that where an enforcement notice is served by the Welsh Ministers under the provision restating section 182 of the TCPA 1990, and a stop notice is served by them under the provision restating section 185, and the stop notice is subsequently quashed, any liability to compensation arising under section 186 should be payable by them and not by the planning authority.

CONSEQUENCES OF ENFORCEMENT ACTION

We provisionally proposed that the offences under section 179(2) (breach of an enforcement notice) and section 179(5) (subsequent resumption of prohibited activity) should each be framed so as to provide that a person commits an offence if: (1) the person is in breach of an enforcement notice; (2) the notice was at the time of the breach contained in the relevant register; and (3) the person had been served with a copy of the notice (Consultation Question 12-21).

12.134 We noted in our Consultation Paper that non-compliance with an enforcement notice that has come into effect is an offence under section 179(2) of the TCPA 1990.[66] Section 179(7) states that where a person is charged with an offence under section 179 and has not been served with a copy of the enforcement notice, and the notice is not contained in the enforcement register, it is a defence for that person to show that he or she was not aware of the existence of the notice.

12.135 We argued that it was onerous for the defendant to prove that the notice was not contained in the relevant register at the date of the offence and that he or she had not been served with a copy of it. We provisionally proposed that the prosecution should prove, to the criminal standard of proof, that the defendant was in breach of an enforcement notice, and that the notice was at the time of the breach contained in the relevant register, and that the person had been served with a copy of the notice.

12.136 Of 28 consultees who responded to this question, 25 agreed and three disagreed. The RTPI said that "this appears to be a logical approach."

66 Consultation Paper, para 12.125.

12.137 Those who disagreed provided detailed and useful comments. PINS stated the following:

> No, PINS disagrees with this proposal. Under present provisions it is a defence for a person to show that he or she was not aware of the existence of a notice if that person has not been served with a copy of the notice and the notice is not in the register. This latter requirement ensures that those who become involved in the site after the notice has been served are bound by its requirements (and should consult the register). The suggested change appears to alter the existing 2 options to requiring that both steps (serving on the person and register entry) are necessary.
>
> It would seem undesirable that: 1) a person served with a notice could plead ignorance of it on the basis that the register is not up-to-date; and 2) a person who becomes involved in the site after the notice has been properly served can use the defence that he/she was not served with a copy.

12.138 Torfaen CBC stated the following:

> It may be equally as difficult for a LPA to prove that a notice was contained in the relevant register at the time of the breach because there is not a requirement to record the date when a notice is added to the register. Although, in reality, most LPAs are likely to add any new notices to the enforcement register within a couple of days of being issued / served, if the authority was asked to confirm exactly when a notice was added to the register then this may be difficult.
>
> Furthermore, it is questionable whether it is actually beneficial to include reference to the register in respect of the above offences. No-one ever asks to see the enforcement register and there are probably very few people that know that one exists! Would it not be easier and fairer for the above offences to be proved with reference to points (1) and (3) only and to amend Section 179(7) accordingly?
>
> For those transgressors that weren't originally served with a copy of the enforcement notice (e.g. because they have only recently bought the land to which the notice relates), there could be a requirement for the LPA to prove that they subsequently supplied the transgressor with a copy of the notice and therefore made them aware of its existence.
>
> Finally, in terms of point (3), reference is made to the person being "served" with a copy of the notice. However, this term may be confusing as a person who is "served" with a copy of an enforcement notice is usually regarded as the original recipient of the notice. It may therefore be beneficial to distinguish between those people that were originally "served" with a copy of a notice, and those people who subsequently had an interest in the land and were "supplied / provided with" a copy of the notice.

12.139 Bridgend CBC stated the following:

> No - (2) and (3) should not have to be satisfied. If the notice was properly registered at the time of the breach then whoever breaches it should be criminally liable. Otherwise, the LPA will have to show service on each individual person as well as the registration of the notice. All of the onus of establishing service will fall on the LPA. This reform will make prosecutions in Wales for breach of an enforcement notice much harder for the LPA and is likely to make evasion much easier.
>
> We should either stick with the current section 179 or at the very least say that the offence will be made out if the notice had been properly registered.

12.140 We are persuaded by the point, raised by both PINS and Bridgend CBC, that the defence would be too favourable to defendants if there was a requirement on planning authorities to prove both service *and* entry on the register. As Torfaen CBC explained, it can be difficult for a planning authority to establish when an enforcement notice has been placed on the register. It would seem inappropriate for a defendant to avoid prosecution on the basis of the planning authority being unable to prove when the notice was placed on the register, if the planning authority can prove that the defendant was served with a copy of the enforcement notice before the breach in question. We have therefore amended our provisional proposal accordingly.

12.141 Torfaen CBC also noted that there may be defendants who know about an enforcement notice but are not served with a copy of it, such as subsequent occupiers of the land. We are persuaded that if a planning authority can prove beyond reasonable doubt that a defendant was aware of an enforcement notice, this should be sufficient to impose criminal liability notwithstanding the lack of service of a copy of the notice.

12.142 Following the above suggestions, we recommend that the burden of proof (to the criminal standard) should be on the planning authority, but we now recommend that the authority should only have to prove awareness of the notice *or* an entry on the enforcement register at the time of the alleged breach.

12.143 We note the comment by Torfaen CBC that the enforcement register is rarely consulted. However, prospective purchasers or their professional advisers are likely to be aware of it – or of the local land charges register.

12.144 A further problem, brought to our attention in relation to **Consultation Question 15-16**, also applies to this proposal – namely that the requirement to show that the notice was in the relevant register "at the time of the breach" could cause problems if the works were to be carried out outside office hours (for example, at the weekend). [67] The resulting evidential difficulty could be slightly alleviated by introducing, into the relevant regulations, alongside the requirement to include the enforcement notice in the register, a further requirement to record the date on which it was first thus included.

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[67] See **para 15.113**.

Recommendation 12-21.

We recommend that:

(1) the offences under section 179(2) (breach of an enforcement notice) and section 179(5) (subsequent resumption of prohibited activity) should each be reframed so as to provide that a person commits an offence if the person is in breach of an enforcement notice, and

- **the notice was at the time of the breach contained in the relevant register; or**
- **the person was aware of the notice, through service of a copy or otherwise.**

(2) the relevant regulations should include, alongside the requirement to include an enforcement notice in the register, a further requirement to record the date on which it was first included.

(3) Welsh Government guidance should advise users of the planning system to consult the enforcement register before undertaking activities on land that may be subject to planning control, and provide clear directions on how to do this.

We provisionally proposed that section 172A of the TCPA (assurances as to non-prosecution for breach of an enforcement notice) should be amended so as to enable an authority: (1) to give such an assurance simply by "giving notice" to the relevant person, rather than necessarily doing so by a letter; and (2) to give in response to a request from to a person (B), who acquires an interest in land following the issue of an enforcement notice relating to the land, an assurance explaining that, once the enforcement notice had been issued, the authority was required to serve a copy of it on a person (A) from whom person B had acquired the interest in the land (Consultation Question 12-22).

12.145 Section 172A of the TCPA 1990 was introduced by section 125 of the Localism Act 2011. Unlike most of the other provisions of the 2011 Act relating to enforcement, it applies in Wales as well as in England.

12.146 First, it enables a planning authority to give assurance to a person on whom a copy of an enforcement notice has been served that the person will not be at risk of prosecution for non-compliance. Section 172A thus states that:

> When, or at any time after, an enforcement notice is served on a person, the local planning authority may give the person a letter –
>
> > explaining that, once the enforcement notice had been issued, the authority was required to serve the notice on the person.

12.147 This presumably deals with the position where, for example, a notice has to be served by the authority on a freeholder of land (A) in circumstances where that owner has nothing to do with the breach of control being committed by an occupier (B). But it does not deal with the position where a copy of the enforcement notice is served on A, who subsequently transfers the land to B. There is no duty on the authority to serve a further copy of the notice on B, who will simply become aware of it in through the conveyancing process. But it should be open to an authority to give B an assurance in the same terms as it gave, or might have given, to A – particularly if B was seeking such assurance. In our Consultation Paper we noted that, where land is transferred, there is no power for the authority to give such an assurance to the new owner.

12.148 Secondly, section 127A as drafted requires the assurance to be in the form of a letter, rather than simply by an authority "giving notice", which could include doing so by email. We provisionally proposed that both of these anomalies be rectified.

12.149 Of 32 consultees who responded to this question, 28 agreed, 3 disagreed and one response was unclear.

12.150 No-one commented on the first point above. However, several consultees expressed the concern that under our proposal, "notice" could include verbal assurances. And Sirius Planning noted that:

> We disagree with the proposal to issue notice by other means than letter. Email addresses are regularly changed, or emails often lost into 'junk' folders; we consider that any communications should be supplemented by hard copy letter.

12.151 We agree that oral notice would not be desirable. But we consider that email would be appropriate where the recipient has indicated that it would be – the onus is on the person seeking the assurance to ensure that an email has indeed been received, and then to retain it (either by printing a hard copy or otherwise).

12.152 Our proposal simply referred to the giving of notice. Section 329 of the TCPA 1990 provides an elaborate definition of what that involves in different situations, including sending or delivering a written notice and (in certain circumstances only) sending it by electronic means – but not simply giving oral notice, either by telephone or face-to-face. We have amended our final recommendation to make this clearer.

Recommendation 12-22.

We recommend that section 172A of the TCPA 1990 (assurances as to non-prosecution for breach of an enforcement notice) should be amended so as to enable an authority:

(1) to give such an assurance simply by giving written notice, as defined in section 329 of the TCPA 1990, to the relevant person rather than necessarily doing so by a hardcopy letter; and

(2) **to give in response to a request from to a person (B), who acquires an interest in land following the issue of an enforcement notice relating to the land, an assurance explaining that, once the enforcement notice had been issued, the authority was required to serve a copy of it on a person (A) from whom B had acquired the interest in the land.**

We provisionally proposed that section 180(1) of the TCPA 1990 (relating to the effect on an enforcement notice of a subsequent grant of planning permission) should be amended so as to refer: (1) to the grant of planning permission generally, rather than just to permission for development already carried out; and (2) to the grant of planning permission following the issue of an enforcement notice, rather than following the service of a copy of the notice (Consultation Question 12-23).

12.153 Where, after the service of a copy of an enforcement notice or a breach of condition notice, planning permission is subsequently granted for "development carried out before the grant of that permission", the notice is of no effect in respect of that development.[68] The intention is clearly that, in effect, a grant of planning permission supersedes any earlier enforcement notice that is inconsistent with it.

12.154 We noted in our Consultation Paper that, at present, this applies only where the development for which permission is granted has already been carried out. However, if permission is granted prospectively for other development that in some way overlaps with or relates to the unauthorised development that is the subject of the enforcement notice, the same principle should apply. We therefore provisionally proposed that section 180(1) of the TCPA 1990 should be amended accordingly.

12.155 We also recommended amending section 180(1) so that it refers to the issuing of a notice rather than service of a copy of it. This would also apply to a breach of condition notice.

12.156 None of the 29 responding consultees disagreed with our provisional proposal.

12.157 Allan Archer queried why the reference in section 180(1) to "development carried out" is not correct, as enforcement action would not be taken in respect of development which has not yet been carried out".

12.158 We agree that the existing wording of section 180(1) would normally not be problematic in practice. However, an enforcement notice remains "in effect" indefinitely, until it is quashed or ceases to have effect, and it seems wrong in principle that it should remain in effect to the extent that permission is granted for development that overlaps with the unauthorised development. But that might not apply where permission is granted for such overlapping development, but where that permission is never implemented. We have amended our recommendation accordingly.

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[68] Consultation Paper, para 12.134; TCPA 1990, s 180(1).

Recommendation 12-23.

We recommend that section 180(1) of the TCPA 1990 (relating to the effect on an enforcement notice of a subsequent grant of planning permission) should be restated in an amended form so as to refer:

(1) to the grant of planning permission following the issue of an enforcement notice or a breach of condition notice, rather than following the service of a copy of the notice; and

(2) to the grant of planning permission generally for development already carried out; and

(3) to the grant of planning permission for other development, once that permission has been implemented.

CRIMINAL PENALTIES

We provisionally proposed that offences of supplying false information in response to a request from a planning authority, currently under sections 65(6), 171D(5), 194(1) and 330(5) of the TCPA 1990, should all be triable either summarily (in the magistrates' court) or on indictment (in the Crown Court), and the maximum penalty in each case should be in either case a fine of any amount (Consultation Question 12-24).

12.159 In various places the TCPA 1990 provides that it is a criminal offence to supply false information.[69] In our Consultation Paper we noted that there were inconsistencies in that some offences could attract a prison sentence whereas others only attracted an unlimited fine. For example, supplying false information to procure a certificate of lawful development, which is an offence under section 194(1), attracts on summary conviction a fine (of any amount), and on conviction on indictment (in the Crown Court) a fine and/or imprisonment for up to two years. By contrast, supplying a false certificate as to the ownership of land in connection with an application for planning permission, an offence under section 65(6), attracts only a fine on summary conviction.

12.160 We provisionally proposed that for the sake of consistency, the maximum penalty attracted by all of the offences related to the supply of false information to a planning authority should be an unlimited fine, without the option of imprisonment.

12.161 27 consultees responded to this question. None disagreed with our provisional proposal.

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69 Consultation Paper, paras 12.141 – 12.146.

12.162 Our provisional proposal suggested that offences which are currently indictable should continue to be so, despite the reduced maximum sentence. The Law Society and Huw Williams commented that

> We are unsure about this proposal. If the sentence both summarily and on indictment is an unlimited fine what is the purpose of proceeding by indictment? The availability of imprisonment, albeit only in the most serious cases provided a justification for retaining prosecution on an indictment.

12.163 In March 2015 the £5,000 cap on maximum fines in the magistrates' court was lifted, so that magistrates can now impose unlimited fines.[70] However, it may still be preferable to proceed by way of indictment if a case is particularly complex, or if the prosecution is linked with prosecution for other offences. Further, if the existing offences were made "summary only", there would also be some consequences for prosecution time limits.[71]

Recommendation 12-24.

We recommend that offences of supplying false information in response to a request from a planning authority, currently under sections 65(6), 171D(5), 194(1) and 330(5) of the TCPA 1990, should – in the case of offences committed on or after the date of the enactment of the Bill – all be triable either summarily (in the magistrates' court) or on indictment (in the Crown Court), and that the maximum penalty in each case should be in either case a fine of any amount.

We provisionally proposed that the offences of: reinstating or restoring buildings or works following compliance with an enforcement notice (under section 181(5) of the TCPA 1990); and failing to comply with a breach of condition notice (under section 187A(9) of the TCPA 1990) should be triable either summarily or on indictment, and punishable in either case by a fine of any amount, to bring them into line with the penalties for other breaches of planning enforcement notices (Consultation Question 12-25).

12.164 While the carrying out of unauthorised development is not a criminal offence, failing to comply with enforcement action is.[72] In our Consultation Paper, we noted that in most cases the offence in question may be tried summarily or on indictment, and

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70 Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 85, which came into force on 12 March 2015: SI 2015/504, art 2.

71 Summary only offences are subject to a stricter prosecution time limit than offences which are also indictable: Magistrates' Courts Act 1980, s 127(1). It is notable that under section 65(9) TCPA 1990, the summary only offence contained in section 65(6) is not subject to the stricter time limit. This can be contrasted with the summary only offence in section 171D(5). Oddly, the "either way" offence in s 194(1) is subject to a provision with the same wording in s 194(3), despite either way offences not being subject to the stricter time limit: Magistrates' Courts Act 1980, s 127(2)(a). See also *Blackstone's Criminal Practice* (2017) D21.18.

72 Consultation Paper, para 12.147.

punishable in either case by a fine of any amount.[73] However, there are two exceptions, each of which is a summary-only offence:

8) reinstating or restoring buildings or works following compliance with an enforcement notice, which attracts on conviction a maximum penalty of an unlimited fine (an offence under section 181(5) of the TCPA 1990).

9) failing to comply with a breach of condition notice, which attracts on conviction a maximum penalty of a fine of up to Level 4 in England, and up to Level 3 in Wales (an offence under section 187A(9)).

12.165 We provisionally proposed that that each of these two offences should be triable either way, and punishable in either case by a fine of any amount, to bring them into line with the penalties for other breaches of planning enforcement notices under the TCPA 1990.

12.166 30 consultees responded to this question. None disagreed with our provisional proposal. PINS described our provisional proposal as a "reasonable suggestion." Carmarthenshire CC welcomed the proposal. Rhondda Cynon Taf CBC agreed that "the penalties for none compliance should be brought in line with other notices". NAPE, PEBA and Lawyers in Local Government supported the proposal without comment. The Law Society and Huw Williams agreed, but reiterated their comment as to the previous recommendation – to which we would repeat our observations in response.[74]

12.167 There were two equivocal responses. The CLA noted that "consistency is important" but that it was "not in a position to know whether what is proposed is the right option." The Central Association of Agricultural Valuers noted that "in principle we believe that fines should be proportionate to the damage so that the level of any fine imposed should be justified." In practice, the sentence imposed in each case will be a matter for the court, and may vary from a heavy fine, in the case of a flagrant breach by a wealthy defendant, to an absolute discharge.

Recommendation 12-25.

We recommend that the offences of

(1) reinstating or restoring buildings or works following compliance with an enforcement notice (under the provision restating section 181(5) of the TCPA 1990); and

(2) failing to comply with a breach of condition notice (under the provision restating section 187A(9))

should, in the case of offences committed on or after the date of the enactment of the Bill, both be triable either summarily or on indictment, and punishable in either

[73] Consultation Paper, para 12.149.

[74] See **paras 12.162 and 12.163** above.

case by a fine of any amount, to bring them into line with the penalties for other breaches of planning enforcement notices under the TCPA 1990.

HISTORIC BREACHES OF PLANNING CONTROL

We provisionally proposed that sections 57(7), 302 of and Schedules 4 and 15 to the TCPA 1990, relating to pre-1948 breaches of planning control, should not be restated in the Code (Consultation Question 12-26).

12.168 In our Consultation Paper we highlighted two apparently redundant provisions in the TCPA 1990, relating to historic breaches of planning control, and recommended that they should not be restated in the Code:

1) Section 57(7) and Schedule 4, regarding the resumption of historic temporary uses of land prior to December 1968.

2) Section 302 of and Schedule 15, regarding the taking of enforcement action against unauthorised development on Crown land that took place during the Second World War.

12.169 All 29 responding consultees agreed.

Recommendation 12-26.

We recommend that sections 57(7), 302 of and Schedules 4 and 15 to the TCPA 1990, relating to historic breaches of planning control, should not be restated in the Code.

OTHER POINTS

12.170 PEBA suggested that we consider incorporating into the Bill the principle established by the House of Lords in *R v Wicks*[75] – that it is a defence to prosecution for breach of an enforcement notice that there is a defect on the face of the notice rendering it a nullity. However, we take the principle established in *Wicks* to be that challenges to the validity of an enforcement notice – even on the basis that it is so defective as to be a nullity – should almost always be dealt with by way of an application for judicial review rather than in the criminal courts (in the context of a prosecution for non-compliance under section 179 of the TCPA 1990). Further, we doubt that the exceptions to that principle could easily form the subject of a statutory provision.

12.171 We have therefore not included a recommendation in response to this suggestion.

[75] [1998] AC 92.

Chapter 13: Works affecting listed buildings and conservation areas

INTRODUCTION

The existing position

13.1 The previous Chapters have focussed on planning applications and appeals – that is, applications for planning permission, and all the various matters that relate to them. Such applications may relate to proposals for works that affect listed buildings and conservation areas; and our proposals for technical reforms apply in such cases just as in any others.

13.2 Planning permission is needed for the carrying out of "development", which includes making a material change in the use of a building or land, and the carrying out of any building or other operations. "Building operations" include the demolition of buildings; rebuilding; structural alterations of or additions to buildings; and other operations normally undertaken by a person carrying on business as a builder.[1] This applies to buildings that are listed or in a conservation area just as to any others.

13.3 But planning permission is not required for the carrying out of works for the maintenance, improvement or other alteration of any building which affect only the interior of the building, or do not materially affect its external appearance.[2] This means, in particular, that works affecting only the interior of a building do not require planning permission.[3]

13.4 "Listed building consent" (LBC) must be obtained for the carrying out of any works for the demolition of a listed building (including a pre-1948 structure in its curtilage); and for the alteration or extension of a listed building in any manner that would affect its character as a building of special architectural or historic interest.[4] A failure to obtain LBC for such works is a strict liability criminal offence.[5]

13.5 "Conservation area consent" (CAC) is required, in addition to planning permission, for the demolition of an unlisted building in a conservation area in Wales; demolition without CAC is an offence.[6]

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1 Town and Country Planning Act (TCPA) 1990, s 55(1), (1A), as amended by Planning and Compensation Act 1991, s 13. See **paras 7.6 to 7.19**.

2 TCPA 1990, s 55(2)(a).

3 With the possible exception of works to create additional space underground or in certain categories of retail stores (see **para 7.15**).

4 Planning (Listed Buildings and Conservation Areas Act (P(LBCA)A) 1990, s 7.

5 P(LBCA)A 1990, s 9.

6 P(LBCA)A 1990, s 74.

Possible reform

13.6 There is a significant overlap between the works for which planning permission is required and those for which either LBC or CAC is required. And the policy basis for the determination of all such applications is effectively identical. In our Consultation Paper, therefore, we considered whether there was some scope for simplifying the law, to minimise the number of consents required. We considered five options as to the way in which this issue could be dealt with in the Bill:

1) No change (retain planning permission, LBC and CAC);

2) Retain two types of consent (planning permission and LBC/CAC), but in one piece of legislation;

3) Retain two types of consent, but provide for only one to be needed;

4) Merge planning permission and CAC, but retain LBC;

5) Abolish LBC and CAC, and require that planning permission be obtained for all the types of works that currently require either type of consent.

13.7 After carefully considering each of these options, we provisionally concluded (in Consultation Question 13-1) that the fifth would be most appropriate. We suggested that the definition of "development" in the TCPA 1990 could be extended to include what we called "heritage development", that is:

1) the demolition of a listed building;

2) the alteration or extension of a listed building in any manner that is likely to affect its character as a building of special architectural or historic interest; or

3) the demolition of a building in a conservation area.

13.8 The requirement for LBC and CAC for such works could then be removed. But we recognised that it would be necessary to introduce certain additional measures to ensure that the existing level of protection for historic assets would be maintained; these were the subject of Consultation Questions 13-2 to 13-8.

13.9 This proposal resulted in responses from 91 consultees (slightly over half of all those responding to the Consultation Paper). Approximately one-third agreed with the merging of the three consents, and two-thirds disagreed. We accordingly consider the issue in more detail in this Chapter.

13.10 For simplicity, and because some consultees responded differently in relation to LBC and CAC, we consider first the merger of planning permission with LBC[7] and secondly the merger of planning permission with CAC.[8] We then consider Consultation Questions 13-2 to 13-9, which are consequential upon Consultation Question 13-1.

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7 See **paras 13.15 to 13.147** below.

8 See **paras 13.148 to 13.172** below.

Finally, we deal with Consultation Questions 13-10 and 13-11, which deal with other topics relating to the historic environment.

Statistics

13.11 We have helpfully been supplied by the South Wales and Mid and West Wales Conservation Groups with relevant statistics as to applications for LBC and CAC, summarised in **Table 13.1** below. These put the practical issues into context.

Table 13.1 Applications for permission and consent 2015 to 2017

1.	2.	3.	4.	5. = 3 + 4	6.	7. = 6 /5
Planning authority	**Average number of applications per annum**					**Concurrent applications**
	for PP	**for LBC**	**for CAC**	**Total LBC and CAC**	**Concurrent (both PP and LBC/CAC)**	**as % of all LBC/CAC applications**
Bridgend	798	29.3	1	30.3	25	82.5
Cardiff	1,847	68	12	80	46	57.5
Caerphilly	733	12	2	14	8	57.1
Pembrokeshire	887	31.3	5	36.3	20	55.0
Brecon Beacons NP	348	62.3	0	62.3	33	52.9
Rhondda Cynon Taf	1083	8.6	0	8.6	4.3	50.0
Monmouth	1135	95.3	9	104.3	51	48.8
Pembrokeshire Coast NP	1196	78	5	83	38	45.7
Ceredigion	1042	50	4	54	22	40.7
Swansea	1637	26	6.7	32.7	13.3	40.6
Newport	1359	34	2	36	14	38.8
Carmarthenshire	1340	156	12	168	61	36.3
Powys	1378	83	4	87	28	32.1
Vale of Glamorgan	1048	42	9	51	16	31.3
Total	**15,831**	**776**	**72**	**848**	**380**	**45**

Notes – Figures in columns 2 to 6 are the average numbers of applications per annum over three calendar years (2015 to 2017).

Column 2 gives the total number of applications for planning permission received by the authority (that is, not including applications for development consent under the Planning Act 2008, applications for non-material alterations to existing permissions, notification of works to agricultural buildings etc).

Column 3 gives the number of applications for LBC (excluding development consent). Column 4 gives the number of applications for CAC. Column 5 states the total number of applications for either LBC or CAC.

Column 6 gives the number of "concurrent applications" (that is, applications for PP and LBC, or for PP and CAC in respect of the same development). Column 7 states the number of concurrent applications as a proportion of all applications for LBC or CAC.

Source: data collected from planning authorities by South Wales Conservation Group and Mid and West Wales Conservation Group.

13.12 The table relates to almost all of the planning authorities in South and Mid Wales – 14 out of the 25 authorities in the whole of Wales – and covers three years. There is no reason to suppose that it does not present a representative picture of the position in Wales as a whole. It shows that the fourteen planning authorities typically received between them some 15,831 applications per annum for planning permission. And there were on average 848 applications per annum for either LBC or CAC – the great majority of which (776) were for LBC.

13.13 Column 6 shows that, of the 848 applications for LBC/CAC, some 380 were submitted concurrently with applications for planning permission. We do not know how many of the 380 were for LBC and how many were for CAC. It seems likely that many applications for CAC will be concurrent applications; so even assuming that all 72 CAC applications were included in the figure of 380, that still leaves 308 applications for LBC that were concurrent with applications for planning permission – that is, 40% of the 776 applications for LBC.

13.14 The figures in Table 13-1 relate to slightly over half the authorities in Wales. they suggest that, in Wales as a whole, there are likely to be around 1,380 applications for LBC in a typical year. Of these, at least 550 (40%) will be concurrent applications for LBC and planning permission, and the remaining 830 will be applications for LBC alone.

UNIFYING PLANNING PERMISSION AND LISTED BUILDING CONSENT

We provisionally proposed that the control of works involving historic assets be simplified by amending the definition of "development", for which planning permission is required, to include "heritage development" which would include the demolition of a listed building and its alteration or extension in any manner likely to affect its character as a building of special architectural or historic interest; removing the requirement for listed building consent to be obtained for such works; and implementing the additional measures outlined in Consultation Questions 13-2 to 13-8 to ensure that the existing level of protection is retained (Consultation Question 13-1 (part)).

Existing law

13.15 As noted above, by virtue of section 7 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act") "listed building consent" must be obtained for the carrying out of any works for:

8) the demolition of a listed building (including a pre-1948 structure in its curtilage); or

9) for the alteration or extension of a listed building in any manner that would affect its character as a building of special architectural or historic interest.[9]

[9] Listed Buildings Act 1990, s 7. See Consultation Paper, paras 13.22 to 13.28.

13.16 A failure to obtain LBC for such works is a strict liability criminal offence.[10]

13.17 The demolition of any building is "development", requiring planning permission. But permission is granted for demolition by the General Permitted Development Order (GPDO).[11] So the demolition of a listed building only requires an application for LBC.

13.18 The alteration or extension of a listed building is a building operation, and thus development requiring planning permission, unless it affects only the interior of the building. Internal works therefore require LBC but not planning permission.

13.19 All alterations or extensions to the exterior of a listed building (other than those so minor that they do not materially affect its external appearance) constitute development requiring planning permission. External alterations to a listed building therefore require both LBC and planning permission. Planning permission for some minor works is granted by the GPDO, but in many cases this does not apply in the case of a listed building. It follows that almost all external works to a listed building require both LBC and planning permission. And this also applies to works affecting a building considered to be part of a listed building by virtue of section 1(5) of the Listed Buildings Act.[12]

13.20 The duties laid on those determining applications for LBC and planning permission are as follows:

> "In considering whether to grant listed building consent for any works, the local planning authority or the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses." (Listed Buildings Act 1990, section 16(1))
>
> "In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses." (Listed Buildings Act 1990, section 66(1))

13.21 The statutory duties under the two regimes are thus identical.

13.22 The policy basis for the two types of application is identical.[13] Paragraph 1.1 of TAN 24 states that:

> PPW, the TAN, and the Welsh Government's Historic Environment Service (Cadw) Best Practice Guides should be taken into account by local planning authorities in the preparation of their development plans and during the determination of planning applications. They may be material to decisions on individual planning, listed building, scheduled monument and conservation

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10 P(LBCA)A 1990, s 9.

11 TCP (General Permitted Development) Order 1995, Part 31. See Consultation Paper, paras 13.16 to 13.18.

12 Consultation Paper, para 13.35.

13 Consultation Paper, paras 13.47 to 13.57.

area consent applications, and will be taken into account by the Welsh Ministers and Planning Inspectors in the determination of applications and appeals that come before them.[14]

13.23 Planning Policy Wales (PPW) contains policies relating to both planning applications and applications for LBC.[15] It builds on *Conservation Principles*, produced by Cadw, which contains very few references to either. In spite of the statement in para 1.1 quoted above, TAN 24 contains detailed policies explicitly relating to LBC[16], but not to planning permission.

Proposed reform

13.24 In our Consultation Paper we suggested that LBC and planning permission could be unified into a single system – by extending the definition of "development" to include "any works for the alteration or extension of a listed building in any manner that would affect its character as a building of special architectural or historic interest". The result of that proposed change would be as follows.

13.25 The demolition of any building would remain within the scope of "development", requiring planning permission. But permission would no longer be granted by the General Permitted Development Order (GPDO) for the demolition of a listed building. So the demolition of a listed building would in future require an application for planning permission, instead of an application for LBC. That application would be dealt with by the same officer of the same authority, and would be notified to the same amenity groups and others, and determined on the same criteria (both statutory and non-statutory.

13.26 The alteration or extension of a listed building, affecting only its interior, would in future be development, and would therefore require planning permission. And permission would not be granted for such works by the GPDO. As with demolition, internal works would therefore in future require an application for planning permission, instead of an application for LBC – which would be dealt with in the same way.

13.27 All alterations or extensions to the exterior of a listed building (other than those so minor that they do not materially affect its external appearance) would continue to be development requiring planning permission. Planning permission would not be granted by the GPDO for any works affecting the character of a listed building. External alterations to a listed building would therefore in future continue to require an application for planning permission, but would not also require LBC.

13.28 This would mean that all of the legislation relating to LBC could be repealed.

13.29 However, we recognised that, in order to ensure that there would be no loss of control, it would be necessary to retain criminal liability for unauthorised works, and make

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14 See also TAN 24, para 1.4.

15 PPW, ninth edition, paras 6.5.1, 6.5.10 to 6.5.18.

16 TAN 24, paras 5.9 to 5.32

some minor changes to the legislation relating to planning permission, so as to take on board the special features of the LBC regime.

13.30 Some 91 consultees responded to this proposal. Of those, 31 agreed and 60 disagreed.

RESPONSES IN FAVOUR OF THE PROPOSAL

13.31 The Planning Inspectorate ("PINS") in its response stated as follows:

> PINS agrees that the control of works to historic assets could be simplified by amending the definition of 'development' to include 'heritage development'. … It is agreed that removing the requirement for LBC and CAC to be obtained would certainly simplify the process of obtaining permission, and avoid unnecessary duplication which is an inevitable consequence of two systems of control which overlap. It would also be clearer to those seeking to obtain consent if there were only one regime. PINS see no reason why these measures would not ensure that the existing level of protection for historic assets is retained, since it would represent a change to the regime only and not the principles of conservation.

13.32 The Planning and Environment Bar Association (PEBA) and the Law Society also supported the proposal. The latter commented that experience that experience with nationally significant infrastructure projects (where a grant of development consent also acts as a grant of LBC, CAC and scheduled monument consent) has not led to any problems. Nigel Hewitson (formerly the legal director of English Heritage) observed that:

> Provided that a combined s.16 / s. 66 / s. 72 duty applies to the consideration of all applications involving heritage development or other development involving any impact on the setting of a historic asset, I consider there will be adequate legal safeguards, and what one calls the consent needed to do works affecting the character of listed buildings and conservation areas is largely irrelevant.

13.33 Martin Goodall, a planning solicitor and blogger on planning law, commented:

> There would be considerable merit in unifying the three control regimes … within the overall development management system. .. there would appear to be no difficulty or disadvantage in making this change. On the contrary, it would obviate the need to make separate applications where planning permission and LBC are both required for the same works. There is no reason why this change should be seen as weakening the protection of listed buildings and conservation areas in any way.

13.34 Neath Port Talbot CBC commented as follows:

> Whilst NPT are a member of POSW and they have opposed the merger of the consenting procedures, we do not share that view. Whilst option 5 is the

most radical, it is also the most sensible way of making the development process more efficient. It is not accepted that the merger of the two consenting procedures would dilute the protection of the historic environment if the legislation imposed strict/strong criteria upon planning authorities when determining planning applications involving listed buildings. i.e. there is no reason to dilute the issues requiring consideration just because the procedures have been merged. This should be viewed as a procedural change and not a dumbing down of the importance associated with protecting our historic environment.

13.35 Others supported the proposed simplification, in many cases stressing the importance of ensuring that the special measures to protect historic buildings were not watered down. For example, Huw Williams (Geldards LLP) highlighted the importance of maintaining the current position where a breach of LBC / CAC is a criminal offence. And Rhondda Cynon Taf CBC agreed, subject to the Welsh Government funding authorities appropriately, or Cadw retaining its power of direction. The Historic Houses Association, too, suggested that it would be important to retain the procedure whereby Cadw is consulted in relation to applications for LBC in respect of Grade I and II* buildings.

13.36 As well as those mentioned above, the following also supported our proposal: Flintshire, Denbighshire, Gwynedd and Ynys Mon Legal Services; Lawyers in Local Government; six town councils; the North and Mid Wales Association of Local Councils; Douglas Hughes Architects Ltd; the Society of Antiquaries in London; the Chartered Institute of Architectural Technologists; the Institution of Civil Engineers; Llandaff Conservation Area Advisory Group; National Grid; Mineral Products Association; Glamorgan Gwent Archaeological Trust; Keith Bush QC; and Andrew Ferguson, a senior planning consultant writing in a personal capacity.

13.37 An equivocal response was received from the Canal & River Trust.

RESPONSES DISAGREEING WITH THE PROPOSAL

13.38 As noted above, out of the 92 consultees who responded to this question, 60 disagreed with the proposed reform. These included

1) POSW, the South Wales Conservation Group and the Mid and West Wales Conservation Officers Group;

2) 11 planning authorities, and two community councils;

3) the Royal Town Planning Institute (RTPI), the Chartered Institute of Archaeologists, the Institute of Historic Building Conservation (IHBC) and the Chartered Institute of Building (CIOB);

4) the Royal Commission on the Historical Monuments of Wales, and some of the national amenity societies (the Society for the Protection of Ancient Buildings (SPAB), the Ancient Monuments Society (AMS), and the Council for British Archaeology (CBA));

5) two archaeological trusts;

6) the Wales Heritage Group, Save Britain's Heritage, RESCUE, the National Trust, the Theatres Trust, the Aberystwyth & District Civic Society, the Manchester Civic Society;

7) 20 individuals (including 15 who are qualified as architects or in some other relevant profession); and

8) the Country Land and Business Association (CLA), Redrow Homes, and Monmouth Diocesan Advisory Committee.

13.39 Those who disagreed, in several cases strongly, did so for a variety of reasons; as would be expected, some points were made in a number of responses. In the discussion below we have grouped together the responses under headings relating to each group of topics raised – broadly ranging from the general to the more specific. And some overlapped. We have not mentioned every point made by each objector, but we have attempted to refer (if only briefly) to all of the points made, whether by one consultee or many, albeit in some cases in general terms.

There is no problem to be solved

13.40 The first ground on which consultees disagreed with our proposal was that there is no problem to be solved. Some of the planning authorities who responded suggested that applicants were not challenging the requirement for two applications.

13.41 The Chartered Institute of Archaeologists commented that the large number of legislative amendments required suggests that the proposed change would not simplify the legislative framework. The Royal Commission also feared that the merged system would be more complex, not less; and the Wales Heritage Group and the CBA also feared increased bureaucracy, leading to a system that would be confusing and less accessible, especially for the public.

Difference in concept between LBC and planning permission

13.42 The second ground of disagreement, raised by a number of respondents – including the Chartered Institute of Building, the IHBC, the SPAB, and the AMS – was that the essential nature of planning permission and that of LBC are fundamentally different. The Royal Commission summed it up as follows:

> Put simply, Planning Permission is permissive – its aim is to 'encourage sustainable development' – in other words the aim is not to stop development, but to try to ensure that is managed effectively. In planning, it is perfectly possible to say 'yes' to developments that result in the destruction or demolition of existing buildings in the interests of a greater benefit to society. Listed Building Consent is different: listed buildings have been specifically singled out for protection: society has made a decision that these very special buildings will not be demolished or altered even if persuasive arguments can be made that something better can take their place.

13.43 IHBC (Wales) observes that "to have a single regime for the construction of a household garage and the demolition of a listed building would downgrade the

significance of the listed building". Similar points were made by the Wales Heritage Group, the SPAB, the AMS, the National Trust and some individual respondents.[17] The Manchester Civic Society noted:

13.44 At the moment, any impact a proposal has on heritage issues is crystal clear to all concerned - the planners, any conservation officer, the councillors, the man in the street and the developer – because its status is flagged up by the procedure of listed building consent.

13.45 Andrew Goodyear summed up this argument:

> The underlying assumption to the proposal to merge listing building consent with planning consent seems to be that they are logically trying to meet the same ends. This is patently not so. Planning is about managing development; listed building consent concerns the protection of our built heritage.

13.46 Mark Teale described the provisional proposal as "a damaging development free-for-all in Wales".

Loss of protection for the heritage

13.47 The third general point raised by a number of those who disagreed was that to do away with LBC would diminish or dilute the protection given to listed buildings. As the CLA put it,

> There is significant concern in the heritage sector that a merger, by abolishing the separate consent and making the special interest of listed buildings simply one of many planning considerations which might be material, would dilute the protection of listed buildings. We have some sympathy with that view.

13.48 The RTPI expressed the fear that "there would be significant risks that historic environment considerations would be diluted by, or become subordinate to, the wider considerations that would be material to the determination of a unified application".

13.49 Torfaen CBC suggested that "the special status and protection of listed buildings could be undermined and diluted if they are subject to the need for planning permission rather than separate LBC". Merthyr Tydfil CBC agreed. Monmouthshire CC stated that the heritage will no longer be the primary focus where it is being balanced against other heritage issues rather than being a standalone consideration. SAVE Britain's Heritage and the Theatres Trust echoed such concerns, particularly given the overarching presumption in favour of sustainable development set out in PPW.

13.50 Newport Council observed:

> It is clear that [planning permission and listed building consent] are very separate processes. It is considered that the proposed approach would make the impact on the historic asset merely one part of the assessment and that when weighing up the proposal as a whole, the impact on the historic asset

[17] Including some who did not wish to be named.

could be outweighed by matters such as economic investment, regeneration or the delivery of affordable homes.

13.51 Pembrokeshire CC summarised its position as follows:

> Over and above every other consideration we are worried that the special consideration given to a listed building under the Listed Buildings Act 1990 would be lost, and that loss of focus would undo the increase in profile and protection the historic environment and its proven benefits for tourism, the economy, sense of place, education etc. as well as recognition of its intrinsic historic and cultural value since the inception of the 1990 Act.

13.52 Barry Town Council observed that it would appear that Chapter 13 is attempting to downgrade heritage sites in Wales.

13.53 Wales Heritage Group argued:

> Without the specific Listed Buildings Act 1990, which triggers the need for LBC and for authorities to have 'special regard to the desirability of preserving the [listed] building or its setting or any features of special architectural or historic interest which it possesses', this duty would fail and the protection of the historic environment would be diluted in favour of the overarching planning principle of sustainable development. Listed buildings would simply become another 'material consideration' of equal or lesser weight.

13.54 RESCUE believed that the merging of the two consents risks the special nature of listed buildings being subsumed by the bulk of the planning process. Aberystwyth & District Civic Society observes that the merging of the two consents will inevitably erode the special public status of listed buildings.

13.55 The directors of the national amenity societies also sent a letter to *The Times*, expressing concern about our proposal on these grounds.[18]

13.56 Dr Martin Cherry FSA argued that:

> By placing conservation generally within planning, LBC was seen by legislators as the key element in safeguarding those features of a listed building that gave it its 'special architectural or historic interest'. It is the only statutory mechanism that requires that specific consideration be given to a listed building's special interest. It takes specific (and carefully defined) conservation considerations temporarily out of the planning process which is concerned primarily with development

13.57 Pippa Richardson argued that the proposal to merge consents would dilute the special status of listed buildings, in due course leading to the loss and damage of listed buildings all over Wales.

13.58 Similar points were made, in many cases strongly, by many of the individuals who responded (largely conservation professionals). Sir Donald Insall, for example,

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[18] *The Times*, 28 February 2018

suggested that “the procedural changes under consideration would undeniably be most damaging for Wales and its unique heritage, while also incidentally in practice, by raising so many new problems, only make today’s planning control situation more difficult and complex, rather than less so”.

Other points of principle

13.59 Many respondents were very supportive of the Historic Environment (Wales) Act 2016, as a progressive step in the management of the historic environment in Wales, but saw this proposal as a step backwards. And a number (including Monmouthshire CC, Bridgend CBC, Gwynedd CC, Ceredigion CC, Pembrokeshire CC, the AMS) pointed out that the 2016 Act, and associated guidance in TAN 24, had only just been issued, along with a full suite of guidance documents. Its effectiveness would be undermined if the law were to be changed.

13.60 Similar points were made by Pembrokeshire Coast NPA, POSW, Wales Heritage Group, Churches’ Legislation Advisory Service, Monmouth DAC, and Andrew Goodyear.

13.61 The Mid and West Wales Conservation Officers Group and Carmarthenshire CC, observed that Wales, for the first time, now has a Historic Environment Act, which demonstrates the value that the political community place on the built heritage. And historic tourism is a benefit to the economy, as was pointed out by IHBC (Wales), the CBA, Janet Finch-Saunders AM and others.

Loss of relevant expertise

13.62 Many of those who objected to this proposal did so on the basis of a fear that it would lead to the loss of relevant professional expertise, particularly within planning authorities. A number of authorities (including Pembrokeshire Coast NPA and Monmouthshire CC) raised this point, as did the South Wales Conservation Group and the IHBC, and local amenity groups (Manchester Civic Society, and Aberystwyth & District Civic Society).

13.63 As the SPAB put it:

> Any perceived diminution of the value of listed buildings, their status within the planning system and the regime that controls them can only aggravate the already alarming cuts to historic environment expertise in local authorities. The review makes it clear that it would be the role of guidance to ensure that beleaguered and resource-starved authorities do not cut or by-pass conservation officers but we wholly disagree with this assertion. It is the responsibility of the review not to introduce reforms that would diminish the existing levels of protection, and whilst it might be convenient to state that that responsibility stops at writing robust legislation, changes to legislation should not be made in a vacuum. It is well documented that the heritage expertise in local authorities is declining and it is simply obvious to those working in the sector that in the current environment, this reform would inevitably lead to cuts to specialist staff who are currently protected by being experts in heritage and a separate consent regime.

13.64 CBA Wales observed as follows:

> If these proposals were enacted, we are concerned that there would be further loss of local authority conservation and archaeology specialists as conservation is side-lined and applications decided by planners with little or no experience or expertise in building conservation. The current trend of reducing specialist staff and making savings through staff reduction makes this a very real possibility.
>
> There would therefore be a serious risk that consideration for preserving the historic environment is not given the 'considerable weight' or 'special regard' that is required in decision making, simply through lack of specialist knowledge and expertise. This would lead to a side-lining of heritage concerns, a reduction in the quality of decision making and would not fulfil the legal requirements for the protection of our heritage assets.

13.65 Wales Heritage Group, the National Trust, RESCUE, British Archaeological Trust, the AMS, Gwynedd Archaeological Trust, Civic Trust Cymru and Monmouth Town Council raised similar concerns.

13.66 Ceredigion CC commented that:

> It is difficult to envisage a single officer – whether a planner or heritage professional – successfully determining an application for 'heritage development' in all but the simplest of cases. This of course is in the face of the required eight-week turnaround, and economic/political pressures. … Also, as a single application conservation officers would have to deal with all aspects including ecology, flooding, highways etc during determination of an application.

13.67 Some drew attention to research carried out by the RTPI in 2017 indicating that, of 4,225 respondents, only 15% had been involved with heritage and conservation issues in the previous three years.[19]

13.68 Several of the individuals who objected to this proposal mentioned the potential loss of specialist expertise. Lydia Inglis noted that "while [planning officers] are very skilled, they do not possess specialist knowledge of Welsh historic buildings". Others put it more strongly: "The further loss of the irreplaceable skills that Conservation Officers bring to decision making in the historic environment would be catastrophic to the fabric of this nation."

13.69 Further, as the Chartered Institute for Archaeologists observed, "such risks [are not] likely to be avoided by the use of guidance. Such guidance has sought to protect the historic environment throughout the UK, but it does not have the force of statute, and has not prevented the loss of local authority and other historic environment services".

13.70 Linked to the above arguments, the Association of Local Government Archaeological Officers agreed with our observation that there is considerable variation between

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[19] *The Planner*, 8 December 2017. The survey presumably related to planning authority staff in England and Wales.

authorities as to the emphasis given to heritage issues, and considered that the loss of LBC would give those authorities giving them low priority an excuse for giving them even less emphasis, and shedding staff accordingly.

13.71 Wales Heritage Group also observed that "over 90% of the historic environment is undesignated", and argued that the loss of LBC would lead to a loss of local authority expertise, which might in turn result in potentially significant assets being unrecognised and lost.

13.72 Sir Richard Buxton, a former Law Commissioner and Lord Justice of Appeal, also wrote to share the concern expressed by various amenity bodies, not least because of the likely degradation of specialist staff. He considered that we were being extremely optimistic in saying in the Consultation Paper that the reduction in the salience of listed building protection will not reinforce the attitudes of authorities who do not give a high priority to protecting the heritage. He also expressed the view that it would be wrong to recommend such a proposal for Wales only.

Need for consent / permission

13.73 Ceredigion CC questioned how the proposed new system would operate in cases where, at present, LBC is required but not planning permission. The AMS also drew attention to internal works.

13.74 We had suggested that it would be possible to seek authorisation for just one element of a complex proposal.[20] The CLA indicated that this would be essential; others indicated that it would be helpful where, for example, essential repair works needed to be authorised in advance of a larger development scheme. The same point was made by the Mid and West Wales Conservation Officers Group, and Pembrokeshire Coast NPA.

13.75 The term "heritage development", which we used in the Consultation Paper to describe the categories of works that currently needed LBC or CAC[21], was disliked by a number of consultees (including the Mid and West Wales and the South Wales Conservation Groups, and the Association of Local Government Archaeological Officers. Several (including Bridgend CBC and Carmarthenshire) pointed out that "heritage" covers a wider remit than just buildings, so the term could cause confusion. And the Chartered Institute for Archaeologists expressed concern, as "it would be unhelpful to have such a definition in legislation which on its face excludes development affecting such a large proportion of historic assets (both designated and undesignated)".

13.76 Several consultees pointed out that there would be some categories of development – such as new development in a conservation area, in or near a world heritage site, or affecting the setting of a listed building – that would not be "heritage development", as we defined it.

13.77 Neil McKay, who was strongly concerned, observed that "in my experience householders are already frequently unclear as to the difference between LBC and

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20 Consultation Paper, para 13.107.

21 See **para 13.7** above.

planning permission. Merging them will only add to the confusion. And Mr Edward Lewis, a conservation architect who found the proposal "deeply disturbing", noted that LBC is already at risk of being ignored by building owners because of a popular misconception of its complexity and stifling requirements.

13.78 A number of respondents referred to permitted development rights; we deal with this below, in relation to Consultation Question 13-2.

Processing of applications

13.79 Linked to the concern as to the loss of professional expertise with authorities is the concern raised by some (Pembrokeshire Coast NPA, Monmouthshire CC and Mid and West Wales Conservation Officers Group) as to the importance of ensuring the retention of a robust system whereby applications can be referred to Cadw and, if appropriate, called in for decision by the Welsh Ministers. At present, there are only five authorities to whom Cadw has delegated powers to determine certain categories of works to listed buildings; this would need to be rethought if the consents were to be unified.

13.80 The South Wales Conservation Group and the Mid and West Wales Conservation Officers Group observed that the majority of submissions would be likely to be large and complicated, with numerous supporting documents required. This is likely to present a more complex package of information for consultees to consider, and therefore a higher risk of heritage issues being downgraded or lost in the overall balance. Bridgend CBC, Pembrokeshire Coast NPA, Carmarthenshire CC agreed.

13.81 Newport City Council pointed out that application validation requirements are different in respect of heritage impact assessments and design and access statements.

13.82 The South Wales Conservation Group, Bridgend CBC, the CLA, the Chartered Institute for Archaeologists and Mr Peter Thomas pointed out that, in practice, the online application system already generates an option for a single application for both PP and LBC, so that the benefit a merged system would not be as great as it would have been in the days of paper applications with two sets of drawings. Monmouth CC made the same point, suggesting that there are only very few cases where duplicate applications, forms, reports, decisions, appeals, and enforcement notices would actually be involved.

13.83 Finally, we sought data as to the number of cases where both types of consent were required – "concurrent applications, as defined in Table 13.1 – to see how often they resulted in a decision to refuse one form of consent and grant the other. It appears that there were very few. However, the South Wales Conservation Group, who supplied the figures in the Table, commented that split decisions were generally avoided by various procedural techniques.

13.84 Thus in some cases applicants were given advice at pre-application stage that they would receive a split decision, which either caused the application to be not submitted, or amended to make it acceptable – for example, where a listed pub was proposed to be converted to a house, this could be acceptable from a historic buildings point of view, but not compliant with planning policy as to the loss of a community facility. In other cases, both applications (for LBC and planning

permission) were refused on listed buildings grounds, given the same statutory duty to have special regard to such considerations – rather than the planning application being approved. In some cases, split decisions resulted from applications submitted to regularise works that had been carried out not in accordance with submitted plans.

Fees

13.85 At present, an application for planning permission attracts a fee, calculated according to the scale of the project. An application for LBC does not. As the RTPI put it

> Unification of listed building and planning consents would result in an application fee for works to a listed building where there is currently no fee. There is a risk that some owners will avoid applying for consent due to a fee. Detecting internal works would be difficult and once these historic elements are destroyed/altered, it is very difficult if not impossible to replace them.

13.86 A similar point, relating to the increased likelihood of unauthorised minor works generally, was made by the SPAB, Gwynedd Archaeological Trust, IHBC (Wales), Theatres Trust, CBA Wales, and Andrew Goodyear. Others (including Dr Martin Cherry and Caroline James) argued that the absence of a fee recognised that owners of listed buildings were being asked to apply for consent for works that would not require consent if carried out to unlisted buildings.

13.87 The AMS noted that one reason why fees are not charged for LBC applications is that where LBC and planning permission are both required, an applicant should not have to pay twice for the same proposal.

13.88 Monmouthshire CC, on the other hand, argued that if the consent regimes were to be merged, that would provide an opportunity to consider whether heritage developments should be exempt. It noted that:

> Work is being carried out in North Wales looking at cost recovery of LBC applications which should be taken into consideration. The cost to authorities is not insignificant and therefore, in the light of limited resources, due consideration should be given to the opportunity to look an element of cost recovery, however small.

Ecclesiastical exemption from listed building control

13.89 At present, the need for planning permission applies to works to churches, of any denomination, as it does in the case of any other building type. Where a church of one of the six exempt denominations[22] is listed – as is often the case – LBC is not required for works to the building itself or to any structures in its curtilage, provided they have been authorised by the internal procedure of the denomination concerned (such as a faculty granted by the Church in Wales).[23]

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22 The Church in Wales, the Roman Catholic Church, the Baptist Union, the Methodist Church and the United Reformed Church

23 P(LBCA)A 1990, s 60; Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994, currently under review.

13.90 A number of consultees made the point that the Consultation Paper did not mention the effect of a possible unification of consents on the ecclesiastical exemption from listed building control. The Churches' Legislation Advisory Service[24] explained the thinking behind the exemption, and observed that it would not wish the issue to be swept up into any more general considerations. In particular, it noted that the exemption is currently under review, so that it would be premature to make any recommendation until that review is complete.

13.91 The Monmouth Diocesan Advisory Committee, and the Diocese of Llandaff made similar points. Cardiff Council stated that it was not clear how the new system would operate, and suggested that it was difficult to envisage a system that would be simpler then the existing.

13.92 IHBC (Wales), the AMS, Wales Heritage Group, and the CBA noted that the exemption was from LBC, not planning permission, suggested that it would lapse along with LBC, and sought clarification.

Other points

13.93 IHBC (Wales), the AMS, the CBA and others pointed out that carrying out works without LBC is a criminal offence, whereas a breach of planning permission is only a civil matter. Wales Heritage Group considers that this would be simply confusing to the public.

13.94 Pembrokeshire Coast NPA observed that:

> In terms of the demolition of a listed building – a relatively rare event – we disagree that a single regime would be beneficial. The current requirements of listed building legislation are comprehensive in terms of requiring any proposal to be considered against the conservation principles and heritage values, based on a proper understanding of the listed building itself. This is balanced against the justification of the proposal to see whether it is desirable or necessary. It is only right and proper that the loss of a building of national architectural and historic importance should be properly and specifically considered under special legislation.

13.95 The Theatres Trust observed that if, contrary to their representations, the proposals do go ahead, at the very least the special regard for heritage assets should not be diluted, so that their protection continues to be given considerable weight in all decision-making.

13.96 Monmouth CC noted that there is no scope in the legislation for making non-material amendments to listed building consents. It also commented as to the need to advertise applications in the press (a point we have considered earlier[25]).

13.97 The RTPI and Allan Archer both drew attention the example of Blackpool Mill (in the Pembrokeshire Coast National Park), where LBC was granted for restoration works

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24 The CLAS is an ecumenical body providing advice to all Christian churches in England and Wales.

25 See **para 8.79**.

to the listed building, but planning permission was refused for a major proposal for leisure development.

13.98 The Association of Local Government Archaeological Officers drew attention to the importance of works to undesignated historic assets, as did the Wales Heritage Group, and the SPAB.

13.99 Finally, the CLA raised a slightly different point:

> The principal practical objection to the proposal by the CLA is that it would 'freeze' the LBC system, preventing any other reform for a decade or more. Merger of LBC and planning permission would not be politically plausible without a firm guarantee that there would be 'no dilution of heritage protection'[26] this would prevent not only actual change, but even the discussion of possible change, for a decade or more. This matters, because the system needs considerable change.

CONSIDERATION: POINTS OF PRINCIPLE

13.100 We have set out above, in some detail, the views of those responding to our proposals – and particularly the points raised by those who did not agree with our approach. We fully recognise that many consultees feel strongly (in some cases very strongly) on this issue, and so we have considered carefully, from first principles, all of the points that have been made – whether by one consultee or by several.

13.101 It will be a matter for the Welsh Government and the National Assembly whether to proceed with the unification of LBC and planning permission in view of the concern expressed. However, it remains our view, on balance, that merging the two types of consent would be a desirable simplification of the regime controlling works to listed buildings, removing duplication of processes and procedures. If done in accordance with our recommendations in this Chapter, it should not in our view produce the adverse effects feared by those consultees who oppose it.

13.102 In particular, it should go without saying that we have no intention of lessening the protection afforded by the planning system to the historic environment. Clearly historic buildings are rightly cherished by many, and that is recognised by the special place given to them in the planning system; including the following features –

1) specific authorisation is needed to demolish a listed building; in other cases, demolition is permitted by the GPDO;

2) authorisation is needed for internal works to a listed building (but not for internal works to an unlisted building);

[26] As suggested in Consultation Paper, para 13.10, and guaranteed in Scoping Paper, para 6.61.

3) authorisation is needed for all external works to a listed building that affect its character, including quite minor works that would otherwise be permitted by the GPDO;

4) carrying out unauthorised works to a listed building is a criminal offence;

5) proposals for works to listed buildings are given extra publicity and notified to specialist amenity bodies; and

6) there is a strong policy presumption against the demolition of listed buildings, and against unsuitable alterations, stated clearly in national and local policy and strongly emphasised on many occasions by the courts.

13.103 We have no intention of altering or watering down any of those key features. And we have been careful to ensure that our proposals retain intact the existing level of protection.

13.104 However, as we noted in the Consultation Paper, many commentators have pointed out that the system that has grown up over the last seventy years to protect historic buildings is now very complex[27] – as is the planning system as a whole. We have sought in this Report to identify ways in which to simplify the planning system generally, whilst not jeopardising the key aims that it is designed to achieve. In the same way, we have sought in this Chapter to simplify the system designed to control works to historic buildings, whilst not losing the protection that it affords.

13.105 We have therefore sought to design legislation that retains all of the key features of the existing regime, whilst reducing its complexity. We recognise that many (though not all) of those familiar with the existing system fear that some element of protection will be lost. However, we are satisfied that the system that would result from our recommendations would be significantly simpler than the existing system, without the loss of any of the special protective features that it affords. We explain below our reasons for that view by reference to the points of concern that have been raised.

The principle of unifying consent regimes

13.106 The first argument against the proposal to unify LBC and planning permission was that there is no problem at present; and that the proposed changes would make the system more complicated rather than simpler. We consider that the existing system is only straightforward to those used to operating it; and we note that most of the concerns raised come from planning authorities, amenity groups, other specialist bodies and relevant professionals, all of whom are familiar with it. We share the view of the Planning Inspectorate – which is, in short, that the proposed change would simplify the system, remove duplication, and make it clearer to applicants; and it

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27 See for example House of Commons ODPM Housing, Planning, Local Government and the Regions Committee, *The Role of Historic Buildings in Urban Regeneration*, eleventh report of session 2003-04, Volume I – Report, recommendation 81; *Barker Review of Land Use Planning – Final Report*, 2006, Recommendation 16; *Penfold Review of Non-planning Consents*, Dept of Business Innovation and Skills, July 2010, para 4.57 – summarised at Consultation Paper, paras 13.58 to 13.63.

would retain the existing level of protection for historic assets, since it would be a change to the legislative regime, and not to the principles of conservation.[28]

13.107 We see no reason to expect that the proposed change to the legislation would result in any change to the outcome of any particular application. Authorisation (albeit of only one kind) would be needed for precisely the same categories of proposals that currently need to be authorised. Applications for permission would be dealt with by precisely the same officers within the same authorities as at present. They would be notified to the same specialist bodies as at present. They would be determined by the same officers or committees as at present. The same statutory duties (currently under the Listed Buildings Act) would apply as at present.[29] The same rights of appeal would be available (although only one appeal would need to be submitted, rather than two as at present). And unauthorised works would remain an offence, as at present.

Difference in concept between LBC and planning permission

13.108 The second ground of concern, raised by a number of consultees, was that planning permission and LBC are fundamentally different in concept – planning permission is to encourage development; LBC is to protect the heritage. We do not share that view of the planning system. As with a decision whether to grant LBC, a decision whether to grant planning permission involves a balance of considerations militating in favour of change (for example, in the case of a listed building, adapting it to modern patterns of use) against those militating in favour of conservation (specifically, preserving the significance of a listed building as a building of special architectural or historic interest).

13.109 As noted above, the statutory requirements to have special regard to the desirability of preserving a listed building, its setting and its features of special interest[30] - applying to the determination of applications for either planning permission or LBC – would be retained in the new Bill.[31] And planning policy documents (notably PPW, TANs and development plans) contain many statements of policy in favour of conservation – whether in relation to listed buildings, conservation areas, national parks, AONBs or world heritage sites.

13.110 In other words, we consider that it is the listing system that protects buildings of special architectural or historic interest in Wales, not the listing building consent system. Anyone who owns a listed building is entitled to make an application for consent to alter or demolish it, however unreasonable it may be to expect success; just as anyone who owns any land can make an application for planning permission to develop it, however unsuitable may be the proposed development. And we have made no suggestion for changing the listing system itself.

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28 See **para 13.31**.

29 Listed Buildings Act 1990, ss 16, 66; see **para 13.20**.

30 See fn 29.

31 See **Recommendation 5-4**.

Loss of protection for the heritage

13.111 Linked to that, many of those opposed to the unification of consents raised the point that an authority, when determining an application for planning permission, will balance a whole range of factors, of which the protection of the heritage will be only one. In determining an application for LBC, by contrast, an authority will be solely concerned with protecting the heritage. As one consultee put it, "[LBC] is the only statutory mechanism that requires that specific consideration be given to a listed building's special interest."[32] If the two consent regimes are merged, therefore, the importance of the heritage will be downgraded or, as some put it, "side-lined".

13.112 We do not see why the merger of the two regimes should have that effect. In reality, although the historic environment is only one of many material considerations to be considered by authorities and inspectors dealing with applications for planning permission for development affecting it, the courts have on many occasions emphasised that it is a matter of "considerable importance and weight".

> Parliament in enacting section 66(1)[33] intended that the desirability of preserving the settings of listed buildings should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given "considerable importance and weight" when the decision-maker carries out the balancing exercise.[34]

13.113 The same principle applies with even greater force to a proposal affecting a listed building itself rather than merely its setting.

13.114 At present, the officers of an authority dealing with such a proposal – and making recommendations as to the determination of the applications for planning permission and LBC – will include a conservation officer or consultant (if one is available) alongside other officers as appropriate. And conservation issues will be balanced against others; in some cases they may indicate that both planning permission and LBC should be refused, and in others they may both be granted. It is noticeable that there is little evidence as to authorities making split decisions – some suggest that they might do, but in practice they are rare.

13.115 We see no reason why the proposed change of legislation would alter any of that. Where only LBC is required at present – for the demolition of a listed building or for the carrying out of internal alterations and certain external alterations – the scrutiny will remain as at present, and the heritage issues will almost always be the only consideration; the only change will be the name of the resulting permission. Where both LBC and planning permission are required at present, there will usually be a range of issues to be considered, and conservation will remain as important an issue as it is at present.

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32 See **para 13.56**.

33 The duty to have special regard to the desirability of preserving listed buildings when determining planning applications; see **para 13.20**.

34 *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137, [2015] 1 WLR 45, at [24]; see also *R (Williams) v Powys CC* [2017] EWCA Civ 427, [2018] 1 WLR 439 at [66].

13.116 We also note that there are a number of other categories of protected land – notably national parks, areas of outstanding natural beauty (AONBs) and (in England) green belts. These are perfectly adequately protected by the need for planning permission to be obtained for development, and the great difficulty in practice in obtaining permission in such cases. This is the result of a raft of restrictive national and local planning policies, similar to the restrictive national and local planning policies strongly discouraging development harmful to listed buildings and conservation areas. But there is no additional "national park consent", "AONB consent" or "green belt consent".

Loss of specialist expertise

13.117 We have noted that a number of consultees were concerned as to the possible loss of specialist expertise.[35] Here too, we understand the concern, but we do not see any reason why the change in the legislation will be used as a justification for shedding specialist staff – given that the procedures, and the criteria to be applied, will not alter.

13.118 We note in particular the comment of CBA Wales, quoted above:

> we are concerned that there would be ***further*** loss of local authority conservation and archaeology specialists as conservation is side-lined and applications decided by planners with little or no experience or expertise in building conservation. The ***current*** trend of reducing specialist staff and making savings through staff reduction makes this a very real possibility.[36]

This suggests – as is supported by the comments from some of the other consultees – that the problem of declining emphasis on conservation already exists. But it need not be made any worse by the suggested change in legislation.

Points of principle: conclusion

13.119 We have considered carefully all of the various points of principle raised above. We recognise that many of those with specialist expertise are concerned at a possible loss of protection for the historic environment – and, as already explained, we would not be pursuing this proposal if we thought that that would be the result.

13.120 We reiterate that the result of our proposal would be as follows:

1) where at present only LBC is required, in future planning permission will be required – which will be obtained from the same authority and considered by the same officers (and consultees) as at present;

2) where at present both LBC and planning permission are required, in future only planning permission will be required – which will be obtained from the same authority and considered by the same officers (and consultees) as consider the two applications at present.

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35 See **paras 13.62 to 13.72** above.

36 See **para 13.64** above; emphasis added.

13.121 We see no reason why the outcome of an application for planning permission should be any different from the outcome of an application for LBC, or applications for planning permission and LBC, at present. We therefore remain of the view that there need be no loss of protection. But there would be a considerable benefit in a major simplification of the legislation. We accordingly see no reason in principle why the two types of consent could not be merged.

13.122 However, many of those supporting the proposal (and by implication all of those opposed to it) emphasised that, if the consents are to be unified, it would be important to ensure that the existing protective measures are not watered down. We agree, and therefore consider below the various specific points raised by consiultees, and further in the context of Consultation Questions 13-2 to 13-8.

CONSIDERATION: POINTS OF DETAIL

Need for consent / permission

13.123 Our recommendation would have the effect that would mean that all works to a listed building that currently require to be authorised by the planning authority would still require to be authorised, but that in every case only one form of authorisation will be required. The entire legislative code about LBC could then be repealed (the regime for listing would of course be retained).

13.124 That could be achieved simply by extending the definition of "development" to include "any works for the alteration or extension of a listed building in any manner that would affect its character as a building of special architectural or historic interest". That would obviously include works to the interior of the building as well as those to the exterior.

13.125 Works for the demolition of any building already come within the scope of development, and require planning permission, so no change to primary legislation would be required to ensure that the demolition a listed building remains within control. But it would be appropriate to ensure that permission cannot be given by a development order for the demolition of a listed building.

13.126 We accept that to introduce a concept of "heritage development" – as proposed in the Consultation Paper – is probably unhelpful, as that might seem to include a wider category of works than those that presently require LBC. We therefore do not pursue that element of our proposal, and instead suggest simply including in "development" works for alteration etc of a listed building.

13.127 We noted that a few consultees were tending to suggest that the need for works to be authorised should be extended to those affecting undesignated heritage assets. Such proposals may require planning permission in any event; and the status of the relevant building can therefore be taken into account in that context. However, where at present works need neither an application for planning permission nor one for LBC

– for example, the demolition of a locally listed building[37] – we consider that it would not be appropriate as part of this exercise to suggest bringing them within control.

13.128 In more complex schemes, there would be nothing to prevent an owner submitting a series of planning applications – just as, at the moment, it is possible to submit an application for LBC and then one for planning permission.

Application procedure

13.129 The processing of applications would be precisely as at present, with those in certain categories (to be prescribed in secondary legislation) being referred to Cadw or other specialist consultees – notably the national amenity societies – as appropriate.

Fees

13.130 Some consultees were concerned that the proposal would lead to the imposition of fees for applications for planning permission in cases where at present only LBC is required. And a few suggested that the imposition of fees in such cases might be helpful. Elsewhere in this report we recommend that the Welsh Ministers should have a power to impose fees for the performance of any functions under the Planning Act; and that would apply to all planning applications.

13.131 However, merely because Ministers have such powers does not mean that they will necessarily exercise them. There already exists an exemption in relation to applications for planning permission made necessary only as the result of an article 4 direction;[38] a similar provision could be introduced, if that was considered desirable, to exempt applications for works to the interior of a listed building, or applications for development that would be permitted by a development order in the case of an unlisted building – in other words for works that would currently require only LBC. That would remove the cause for concern; and it would also continue to identify listed buildings as being granted special treatment.

13.132 In practice, any new Fees Regulations will be the subject of public consultation, and the concerns that have been aired in the context of the present exercise can be raised at that time.

Ecclesiastical buildings and scheduled monuments

13.133 We have noted that some consultees drew attention to the absence of any reference in the Consultation Paper to the ecclesiastical exemption.[39] We accept that this was an oversight; we had no intention of changing the substance of the law from the position that exists at present. To achieve that, all that is required would be to introduce a provision to the effect that, although planning permission is (under the new system) generally needed for all works for the alteration of a listed building, either external or internal[40], permission would not be required for works affecting only the interior of an ecclesiastical building in ecclesiastical use by one of the denominations

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37 This would normally be development permitted by the GPDO.

38 See TCP (Fees [etc]) Regulations 2015 (SI 1522), reg 5.

39 See **paras 13.89 to 13.92** above.

40 See **para 13.123** above.

specified in regulations. That would replace section 60 of the Listed Buildings Act 1990.

13.134 Equally, there was no mention of the provision, currently in section 61 of that Act, whereby LBC is not required for works to a listed building that is also a scheduled monument under the Ancient Monuments Act 1979. That could be replaced with a provision to the effect that planning permission is not required for such works.

Ensuring no loss of control

13.135 As will hopefully be clear from our comments earlier in this Chapter, we are very well aware of the concern underlying a number of the responses to this proposal, that it would lead to a loss of protection for listed buildings. We have therefore considered carefully all of the provisions in the Listed Buildings Act 1990 relating to LBC, and the corresponding provisions of the TCPA 1990 that would replace them, to ensure that they would indeed provide for an equally effective system of control, retaining all of the key features we have identified above. [41]

13.136 First, the general provision in section 7 of the Listed Buildings Act as to the need for consent for works to listed buildings would be replaced by an amendment of the definition of development currently in TCPA 1990 to include works for the alteration or extension of a listed building.[42] The need for LBC, in section 8, would then be replaced by the need for planning permission (in section 56 of the TCPA 1990). A new provision would be required – either in the Planning Bill or in secondary legislation – to ensure that an application for permission to demolish a listed building is notified to the Royal Commission.

13.137 The criminal sanction against unauthorised works to listed buildings, currently in section 9 of the Listed Buildings Act 1990, would need to be replaced with a new provision in the Bill such that the demolition or alteration of a listed building without planning permission is an offence – with penalties and defences equivalent to those currently in section 9. This would be similar to section 196D of the TCPA 1990, which relates to penalties for the unauthorised demolition of an unlisted building in a conservation area in England. We briefly consider the issue of unauthorised works to listed buildings below, in the context of Recommendations 13-6 and 13-7.

13.138 There is currently no procedure to enable anyone to obtain a binding decision as to the need for LBC in Wales.[43] This is considered below in relation to Recommendation 13-4 (certificates of lawfulness).

13.139 The provisions of sections 10 to 12, 16, 18 and 19 of the Listed Buildings Act, relating to applications for LBC, would be replaced by the restatement of the broadly similar provisions in sections 62, 65, 77, 70, 91, 73 of the TCPA 1990, which would be restated in the Bill. Provisions similar to sections 13 and 15 of the Listed Buildings Act 1990 (notification of applications to Welsh Ministers) would need to be included

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41 See in particular **para 13.102** above.

42 See **para 13.124** above.

43 The unsatisfactory provisions in sections 26H to 26K apply only in England.

either in the Bill or in the GDMPO. And a provision similar to section 17, providing a power to impose specific types of conditions, would need to be included in the Bill.[44]

13.140 The provisions as to LBC appeals (in sections 20 to 22 of the Listed Buildings Act) are very similar to the more extensive provisions in sections 78 to 79 of the TCPA 1990 relating to planning appeals, which would be restated within the Bill, as noted in Chapter 11. A new provision would be required to replicate sections 21(3), (4) and 22(1)(b) of the Listed Buildings Act, providing grounds of appeal relating to listed buildings, and the powers of the Welsh Ministers in determining appeals; we consider this below in relation to Recommendation 13-5.[45]

13.141 Sections 23 to 26, 28, 30 and 31 of the Listed Buildings Act 1990 relate to the revocation or modification of LBC. These are very similar to the provisions of sections 79 to 100, 107 and 117 of the TCPA 1990 relating to the revocation etc of planning permission, which will be restated in the Bill.[46]

13.142 Sections 26C to 26G, 28A and 31 provide for orders granting LBC (made either by planning authorities or the Secretary of State), but only in England. We consider these at Recommendation 13-2 below.[47]

13.143 The provisions of sections 32 to 36 of the Listed Buildings Act 1990 relating to the service of a purchase notice following the refusal or revocation of consent are virtually identical to those of sections 137 to 143 of the TCPA 1990, relating to purchase notices following planning decisions, which will be included in the Bill. But a provision would be required (either in the Planning Bill or in the Historic Environment Bill) to replace section 37 of the Listed Buildings Act, which reduces the amount payable in response to a listed building purchase notice where compensation has been claimed for the imposition of a building preservation notice.

13.144 The enforcement provisions in the Listed Buildings Act 1990, in sections 38 to 46, are virtually identical to those in the TCPA 1990. The only new provisions that would be required would be to extend the time limit in cases involving listed buildings, and to introduce new grounds of appeal equivalent to grounds (a), (d), (i), (j) and (k) in section 39(1) and a power for the Welsh Ministers to remove a building from the list on determining an enforcement appeal (currently in section 41(6)(c)). These provisions are considered briefly in relation to Recommendation 13-7 and 13-8 below.

13.145 The provisions in sections 62 to 65 of the Listed Buildings Act 1990, which provide for High Court challenges to decisions under the Act, are in effect more or less identical to those of sections 284, 285, 288 and 289 of the TCPA 1990 (challenges to decisions under that Act). We recommend in Chapter 17 that those provisions should not be restated in the new Bill; sections 62 to 65 equally need not be restated either in the Planning Bill or in the Historic Environment Bill.

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44 See **Recommendation 8-12** above.

45 See **paras 13.206 to 13.213** below.

46 See **para 13.215** below.

47 See **paras 13.173 to 13.183** below.

13.146 It follows that, once the few new provisions noted above have been enacted, it would then be possible to repeal 52 sections of the Listed Buildings Act 1990 as they apply in Wales.[48] We still consider that this would be a significant simplification of the law.

13.147 Heritage partnership agreements in Wales are the subject of sections 26L and 26M of the Listed Buildings Act 1990, considered at Recommendation 13-3 below. Replacements for those provisions would be included in the Historic Environment (Wales) Bill. That Bill would also restate sections 28B and 29 (compensation for loss or damage caused by interim protection or service of building preservation notice).

Recommendation 13-1A.

We recommend that the control of works to listed buildings should be simplified by:

(1) amending the definition of "development", for which planning permission is required, to include the carrying out of works for the alteration or extension of a listed building in any manner likely to affect its character as a building of special architectural or historic interest;

(2) providing that planning permission is not required for works to

- **the interior of an ecclesiastical building in ecclesiastical use by one of the exempt denominations; or**
- **a scheduled monument.**

(3) ensuring that the carrying out without permission of works for the demolition of a listed building, or for its alteration or extension in any manner likely to affect its character as a building of special architectural or historic interest, remains a criminal offence;

(4) removing the requirement for listed building consent to be obtained for works to a listed building; and

(5) implementing the additional measures outlined in Recommendations 13-2, 13-3 and 13-5 to 13-8, to ensure that the existing level of protection for listed buildings is maintained.

UNIFYING PLANNING PERMISSION AND CONSERVATION AREA CONSENT

We provisionally proposed that the control of works to historic assets is simplified by amending the definition of "development", for which planning permission is required, to include "heritage development", [to include] the demolition of a building in a conservation area; removing the requirement for conservation area consent to be obtained for such works; and implementing the additional measures outlined in

[48] Listed Buildings Act 1990, sections 7 to 13, 15 to 26, 27 to 44D, 46, and 60 to 67. Sections 14, 26A to 26K, and 68 apply only in England.

consultation questions 13-2 to 13-8, to ensure that the existing level of protection for listed buildings would be maintained (Consultation Question 13-1 (part)).

Existing law

13.148 It has already been noted that planning permission is required for the demolition of any building. However, permission for the demolition of a building, including demolition in a conservation area, is granted by the GPDO.[49]

13.149 In addition, conservation area consent (CAC) is required for the demolition of the whole or most of an unlisted building in a conservation area in Wales; and failure to obtain consent is an offence.[50]

13.150 CAC is, however, not needed for the carrying out of certain categories of demolition listed in a direction by the Welsh Ministers – notably those that are relatively insignificant, or have been authorised under other procedures.[51]

13.151 The details as to the submission and determination of applications for CAC are provided for by applying the legislation as to LBC (summarised at paragraphs 13.124 to 13.132 above) to CAC, subject to amendments set out in regulations[52] – which is a particularly convoluted statutory scheme.

13.152 In England, the requirement to obtain CAC for demolition was recently abolished, by the Enterprise and Regulatory Reform Act 2013. However, the requirement to obtain planning permission for such demolition remained, and a new offence was therefore introduced of failure to obtain planning permission for "relevant demolition" – that is, demolition of an unlisted building in a conservation area.[53] The automatic planning permission for demolition granted by the GPDO specifically excludes demolition within a conservation area in England.[54]

13.153 In Wales, by contrast, the requirement for CAC still exists. As a result, the position in Wales is generally as follows:

1) planning permission (only) is required for a material change of use of any building in a conservation area;

2) both CAC and planning permission are required for the demolition of an unlisted building in a conservation area, but planning permission is granted by the GPDO; and

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49 TCP (General Permitted Development) Order 1995, art 3 and Sch 2, Part 31. See **paras 7.7 to 7.12** above.

50 Listed Buildings Act 1990, s 74. The demolition of a listed building in a conservation area requires LBC.

51 The current direction is the Conservation Area (Disapplication of Requirement for Conservation Area Consent for Demolition) (Wales) Direction (2017 No 27). A direction in similar terms exempts minor demolition in England from the need for planning permission – see Conservation Areas (Applicability of section 74 of the Planning (Listed Buildings and Conservation Areas) Act 1990) Direction 2015.

52 P(LBCA)A 1990, s 74(3); Planning (Listed Buildings and Conservation areas) (Wales) Regs 2012, reg 16, Sch 3.

53 TCPA 1990, s 196D, inserted by Enterprise and Regulatory Reform Act 2013, Sched 17.

54 GPDO 2015, Sched 2, Part 11, para B.1(b).

3) planning permission (only) is needed for almost all other building works in a conservation area (either the erection of a new building or the alteration of an existing unlisted one) – granted in some cases by the GPDO.

13.154 There is no category of works that requires CAC but not planning permission (although this is the practical result of category (2) above).

Proposed reform

13.155 We suggested merging CAC with planning permission, so that planning permission (only) is required for each of the three categories of proposals in paragraph 13.147 above. This would, in effect, bring the law in Wales into line with the law in England, noted above.

Responses from consultees

13.156 All of those who agreed with the merger of LBC and planning permission also agreed with the merger of CAC and planning permission – either explicitly, and for the same reasons, or implicitly.

13.157 In addition, several consultees who disagreed with the merger of LBC nevertheless did agree with the merger of CAC with planning permission. The CLA commented as follows:

> Merging CAC and planning permission would not be transformational: it does not greatly reduce workload either for the applicant or the local authority, because in practice where there are two applications they are usually identical and handled identically by the local authority. It would however appear to be a worthwhile simplification. This change has already been made in England, where it appears to have been generally effective and popular, attracted little opposition, and does not seem to have led to any reduction in heritage protection or other substantive problems. In the absence of any such issues, this would (we assume) be uncontroversial in Wales, and the amendments made to English legislation should provide a helpful prototype for Welsh legislation.

13.158 Carmarthenshire CC, Monmouthshire CC, Pembrokeshire Coast NPA, Merthyr Tydfil CBC, Ceredigion CC, Gwynedd Council, the Mid and West Wales Conservation Officers Group and Mr Allan Archer also supported this proposal.

13.159 The response of Pembrokeshire CC was equivocal:

> There is merit in placing the demolition of a building in a conservation area (Conservation Area Consent) under the umbrella of planning permission (although maybe not the proposed and confusing moniker “heritage development”) as the current system for dealing with Conservation Area Consent for demolition is effectively a replication of the system for dealing with listed building consent for demolition. This provides a blanket approach for this kind of application in a Conservation Area and means that structures of poor quality and relatively modern construction are brought into it also. It could effectively be dealt with via a planning condition, and consultation with the Conservation Officer in most cases. We do not agree with the proposal for it to

be brought under the definition of development for which planning permission is required.

13.160 The SPAB and the Chartered Institute of Archaeologists were not opposed, but suggested that the changes that had been made in England should be given a chance to bed down in practice.

13.161 Many of the 60 or so consultees objecting to our suggested reform in Consultation Question 13-1 (which related to both LBC and CAC) did so predominantly by reference to listed buildings; few mentioned conservation areas one way or the other. However, it seems likely that most of those consultees would have been equally, or at least to some extent, opposed to the merger of CAC. Overall, 31 respondents to question 13-1 explicitly mentioned conservation area consent. Of those, 16 agreed with merging CAC and planning permission, 10 disagreed, and five were equivocal.

13.162 The South Wales Conservation Group and Bridgend CBC, whilst appreciating the position in England, expressed concern that keeping the approvals separate retains the focus on the two separate issues of demolition and development; otherwise there is unlikely to be special regard for the character and significance of the conservation area. Cardiff Council took a similar line.

13.163 And the AMS suggested that the fact that the change that had occurred in England had not occurred in Wales in the Historic Environment (Wales) Act 2016 presumably reflected fears about perceived loss of control and the downgrading of conservation areas.

Conclusion

13.164 Demolition in a conservation area may sometimes take place as a standalone operation. But it is more likely to be followed by the erection of a new building, in which case the two operations will be considered together, with the planning authority granting CAC for the demolition only where it is also content to grant planning permission for a suitable replacement.

13.165 Under our suggested reform, planning permission would be required for the demolition, and for the replacement (if any). The two operations could form the subject of a single, composite application; or two separate applications could be submitted. Which approach will be most appropriate would depend on all the circumstances.

13.166 We do not repeat here all the arguments raised above in the context of LBC, but they apply equally to the consideration of doing away with CAC.

13.167 Indeed, the arguments for removing an entire consent regime seem stronger in the cases of CAC, given that the number of applications for CAC would seem to be only a tenth of the number of LBC applications – between 100 and 150 throughout Wales

in a typical year.[55] And the existing statutory mechanism regulating CAC is particularly unsatisfactory.[56]

13.168 Further, the demolition of a building is already development requiring planning permission, so no change to primary legislation is required to bring within planning control all demolition in a conservation area. And we accept that there would be no need to introduce a new concept of "heritage development", as proposed in the Consultation Paper.

13.169 It would be possible to ensure that permission cannot be given by a development order for the demolition of an unlisted building in a conservation area – as we recommend in relation to the demolition of listed buildings.[57] However, there is already a power for Ministers to prescribe (in a direction) certain categories of demolition for which CAC does not need to be obtained.[58] That result could most easily be replicated under the new system by granting permission for those categories of works in the general development order.

13.170 As with LBC, we accept that the special features of the existing consent regime must be retained. But, here too, we do not think that this raises any insuperable problems; we have touched on the changes that would be necessary in the following sections of this Chapter.

13.171 We therefore consider that CAC and planning permission should be unified.

13.172 Recommendations 13-2, 13,3 and 13-5 relate solely to LBC; we have adjusted the wording of Recommendation 13-1B accordingly.

Recommendation 13-1B.

We recommend that the control of demolition in conservation areas should be simplified by:

(1) removing the requirement for conservation area consent to be obtained for the demolition of an unlisted building in a conservation area;

(2) ensuring that the carrying out without planning permission of works for the demolition of an unlisted building in a conservation area, remains a criminal offence; and

(3) implementing the additional measures outlined in Recommendations 13-6 to 13-8, to ensure that the existing level of protection for unlisted buildings in a conservation area is maintained.

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55 See **Table 13.1**.

56 See **paras 13.148 to 13.154**.

57 See **para 13.125, Recommendation 13-2**.

58 See **para 13.150**.

THE NEED FOR PERMISSION

Works permitted by development order

We provisionally proposed that the power to make general and local development orders be extended to enable planning permission for heritage development to be granted by such an order (Consultation Question 13-2).

13.173 We noted in the Consultation Paper that one of the consequences of merging LBC and CAC is that the existing power (in the TCPA 1990) to grant planning permission for development in certain categories, by the use of general and local development orders, would automatically apply to works that currently require only LBC or CAC.

13.174 We have suggested above that this should not apply to works for the demolition of a listed building, to ensure that such works should always be authorised only in response to a specific application.[59]

13.175 We also noted in the Paper that provisions equivalent to general and local development orders were introduced into the Listed Buildings Act in relation to England in 2013, but that no corresponding provisions were introduced in Wales by the Historic Environment (Wales) Act 2016. We suggested that a similar result could be achieved in Wales by extending the power to make general and local development orders to authorise works to listed buildings.

13.176 Of 39 consultees who responded to this suggestion, 15 were in agreement; 24 disagreed.

13.177 Those in agreement included the CLA and the Historic Houses Association, each of whom suggested that such a provision should be introduced (as in England) whether or not the unification proposal goes ahead.

13.178 The Canal & River Trust indicated that it would be helpful to have such a power, which could be used in relation to works to historic buildings in particular categories, such as the 223 locks and other listed structures that it owns across Wales. The Trust pointed out that it was pursuing a LBC order authorising such works across its estate in England.

13.179 Of those who disagreed, around half did so on the basis of opposition to the principle of unifying consents. The remainder disagreed on the basis of the need for more focussed control over works to historic buildings. Blaenau Gwent CBC, for example, noted:

> It is difficult to envisage a scenario where an LDO would be a suitable approach given that listed buildings are often unique or require an individual approach rather than a generalised one.

13.180 Nigel Hewitson, who agreed with the principle of unifying consents, commented:

> I think granting planning permission for heritage development by development order is potentially problematic. If one takes minor residential extensions as an

[59] See **para 13.125**.

example, the current GPDO focuses on the size of the extension and its proximity to neighbouring properties. In the case of heritage development, there would need, on a case by case basis, to be consideration of the effect of an extension on the special architectural or historic interest the historic asset possesses which might be difficult to provide for in a development order. I would err on the side of caution and say heritage development should not be permitted by a development order. Indeed, I would go further and say that the opportunity should be taken to amend the existing GDPO to exclude works to or development affecting the setting of historic assets from ALL permitted development rights. As things stand there is a good deal of inconsistency as to which permitted development rights apply to historic assets and which do not.

13.181 The IHBC, the Council for British Archaeology, and the Wales Heritage Group also raise general concerns as to the relationship of permitted development rights with listed buildings. The latter points out that the use of Article 4 directions, by which such rights can be withdrawn in particular cases, is often difficult in practice.

13.182 In the case of unlisted buildings, the ability to carry out minor works without permission is helpful to property owners, particularly householders, and this advantage outweighs the drawback that it may occasionally lead to the carrying out of unsuitable development. However, that does not apply in the case of works to listed buildings or in their curtilage, where it will often be helpful to retain the power to exercise detailed design control over almost all works.

13.183 On reflection, therefore, we see merit in the suggestion that general and local development orders should not be able to permit development consisting of works for the demolition, alteration or extension of a listed building or works in its curtilage (including the construction or alteration of a boundary wall).

Recommendation 13-2.

We recommend that the power to make general and local development orders should be limited so that they may not grant permission for development consisting of

(1) the demolition, alteration, or extension of a listed building;

(2) the carrying out of any operational development in the curtilage of a listed building; or

(3) the construction, rebuilding or alteration a gate, fence or wall bounding the curtilage of a listed building.

Heritage partnership agreements

We provisionally proposed that heritage partnership agreements should be capable of granting planning permission by order for heritage development in such categories as may be prescribed (Consultation Question 13-3).

13.184 We noted in the Consultation Paper that, once the relevant provisions of the Historic Environment (Wales) Act 2016 are in force, it will be possible for LBC to be granted by a heritage partnership agreement.[60] If LBC is merged with planning permission, it would be necessary to provide that such an agreement can in principle grant planning permission (rather than LBC). It might be appropriate to limit the works for which permission can be granted in this way, by specifying that planning permission can only be granted for such categories of works as may be prescribed.

13.185 We received 37 responses to this suggestion. Of those, 20 agreed, although six did so whilst making plain their opposition to the principle of unifying consents. One suggested that it could be delayed to see how heritage partnership agreements work out in practice – both in England and in Wales. A further 17 disagreed, largely on the basis of their opposition to the principle of unifying consents.

13.186 We consider this a modest reform, consequential on Recommendation 13-1. All that would be required would be an amendment to section 26L(6) of the Listed Buildings Act 1990 (inserted by the Historic Environment (Wales) Act 2016) to replace the words "listed building consent" in subsection (6)(a) and (7) with "planning permission" and "consent" in subsection (6)(b) with "permission". The law would then be precisely as at present. It also deals with the point made by the Canal & River Trust in response to Consultation Question 13-2,[61] in that a heritage partnership agreement could relate to a range of listed properties in a particular category.

Recommendation 13-3.

We recommend that heritage partnership agreements should be capable of granting planning permission for development in such categories as may be prescribed.

Uncertainty as to the need for permission

We provisionally proposed that the provisions (currently in sections 191 and 192 of the TCPA 1990) relating to certificates of lawfulness should be extended to include works that currently require only listed building consent or conservation area consent (Consultation Question 13-4).

13.187 In the Consultation Paper, we noted that the need to discover whether LBC or CAC is required for works is even more pressing than in the case of "ordinary" planning permission, since the carrying out of works without such consent, where it is required, is not just a breach of planning control but a criminal offence. Further, it can be particularly difficult to be certain as to whether consent is required, due to the potential uncertainty as to

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60 A heritage partnership agreement is an agreement between the owner of a listed building and a planning authority, to ensure its long-term management; the agreement may grant LBC for certain works, or specify that certain works do not require the grant of LBC. The relevant legislation (Listed Buildings Act 1990, ss 26L, 26M) is to be introduced by in Historic Environment (Wales) Act 2016, s 28 from a date to be announced.

61 See **para 13.178** above.

1) what is included in a listing, by virtue of section 1(5) of the Listed Buildings Act 1990, and

2) whether particular works to a listed building would affect its special character.

13.188 Provisions enabling a person to obtain a certificate of lawfulness of proposed works to a listed building were introduced in England in 2013.[62] Corresponding provisions have not been introduced in Wales. In any event, the model used in England is not satisfactory, in that it only relates to the question of whether proposed works would affect the special character of a listed building – the second of the two questions posed above. They do not enable the resolution of the first, which may be at least as tricky. The Court of Appeal has thus recently confirmed that the new procedure is significantly more limited than applies in connection with the obtaining of a certificate of lawfulness of proposed use or development (CLOPUD) or existing use of development (CLEUD).[63]

13.189 We noted that, if LBC and CAC were to be subsumed into planning permission, as proposed earlier in the Chapter, the provisions as to CLOPUDs and CLEUDs (explained in Chapter 7[64]) would automatically extend to works that currently only require LBC or CAC. We considered that that would be a welcome step forward, removing uncertainty without the need for an application to the court for a declaration.

13.190 Some 35 consultees responded to this question, of whom 21 were in agreement, and 5 provided equivocal responses.

13.191 Those who supported the unification of consents generally were, not surprisingly, in favour of this proposal. But some of those who were in principle opposed to the unification of consents nevertheless supported this. Torfaen CBC, for example, noted that "this would be helpful, as it is not always clear what does and does not need LBC. Such applications should be subject to a fee". Caerphilly CBC, Neath Port Talbot CBC, Rhondda Cynon Taf CBC, POSW South East Wales, the CLA, and the Historic Houses Association, all supported the proposal; and the Theatres Trust, the SPAB, and the Chartered Institute for Archaeologists, whilst opposed to the principle of unification, accepted that this would be a welcome result.

13.192 A few respondents objected to this proposal simply on the basis of opposition to the principle of unification. Others expressed concern as to whether it was right to have a certificate procedure as an alternative to an application for LBC. And a number suggested that it might be appropriate to have a certificate procedure in relation to proposed works, but not where works have been carried out – that is, they supported an equivalent to the CLOPUD procedure, but not to the CLEUD procedure.

13.193 Our intention in putting forward this proposal was not to deal with the question of whether particular works to a listed building (or to an unlisted building in a conservation area) would be desirable or otherwise. We entirely accept that this is

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62 As sections 26H to 26K of the Listed Buildings Act (introduced by section 61 of the Enterprise and Regulatory Reform Act 2013).

63 *France v Kensington and Chelsea RBC* [2017] EWCA Civ 429, 1 WLR 3206.

64 See **paras 7.64 to 7.72**; and Consultation Paper, para 7.83 to 7.91.

be a matter that can only be resolved by an application for LBC – either prospectively or, occasionally, after the works have been carried out.[65]

13.194 However, the question still sometimes arises as to whether LBC or CAC is required. That is a wholly separate question from whether, if consent is (or was) required, it should be granted. So, for example, where the owner of a listed house wishes to remove some panelling from one of the secondary rooms in the house, that may or may not require LBC, depending on a number of factors (including the history of the building, and an analysis of its special character). In the absence of a certificate procedure, the owner can ask the planning authority for an opinion, but that may not be binding in the event of a subsequent dispute.[66] And the courts are likely to decline to grant a declaration.[67]

13.195 Where it appears to the owner that consent is not required, therefore, there may be no option but to carry out the works, and hope that there is no prosecution. That is a very unsatisfactory conclusion, from the point of view of the owner; but it also leaves the decision as to what requires consent – and thus the liability to criminal conviction – in the hands of the criminal courts, who are not well equipped to make such a decision.

13.196 If there were to be a certificate procedure, an owner could apply for a certificate; the application would be determined by the planning authority (or on appeal by a planning inspector) on the basis of professional judgment (including a site inspection in most cases). If a certificate is forthcoming, that is not saying that the works in question are desirable, but merely that, as a matter of law, they do not need consent. That would mean that the owner could proceed with no fear of conviction. But if a certificate is sought but is not forthcoming, then that is a clear statement that consent is required; and if the works proceed anyway, without consent having been obtained, it would be difficult for those responsible to avoid conviction.

13.197 An application to the planning authority for a certificate might lead to advice being given to the effect that consent would be required if the works were to be carried out as proposed, but not if carried out in a different way – probably because they would then not affect the special character of the building. That could be a desirable outcome.

13.198 Where works have already been carried out, without consent, the same considerations still apply. If consent was needed, and not obtained, a criminal offence has occurred; but if it was not needed, there was no offence. It would still be preferable for the need for consent to be determined by the planning authority or an inspector rather than by the criminal courts.

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65 P(LBCA)A 1990, s 8(1)-(3).

66 *East Sussex CC v Reprotech (Pebsham) Ltd* [2002] UKHL 8, [2003] 1 WLR 348; also *Postermobile v PLC v Brent LBC* (1997) *The Times*, 8 December.

67 *Chambers v Guildford BC* [2008] EWHC 826 QB), [2008] JPL 1459.

13.199 In either case, the question is thus not whether the works are desirable, but simply who makes the decision as to whether they require authorisation – should it be the criminal courts, as at present, or the planning authority (or an inspector on appeal)?

13.200 Clearly it would be necessary for such a certificate, if granted, to make clear precisely the works to which it relates – no doubt by reference to drawings and specifications. It would then be conclusive in any proceedings – as with a CLEUD and a CLOPUD.[68] Authorities would be able to decline to determine an application for a certificate if they consider that insufficient information has been supplied. And no doubt a fee would be chargeable, as with applications for CLOPUDs and CLEUDs.

13.201 If LBC and CAC are merged with planning permission, as recommended above, this change would occur automatically. But even if the consents are not unified, we still consider that it would be desirable to introduce a certificate procedure.

Recommendation 13-4.

Regardless of whether planning permission is unified with listed building consent and conservation area consent, we recommend that the provisions (currently in sections 191 and 192 of the TCPA 1990) relating to certificates of lawfulness should be extended to include works that currently require only such consent.

APPLICATIONS, APPEALS AND OTHER SUPPLEMENTARY PROCEDURE

Applications

13.202 In the Consultation Paper, we noted that our proposals regarding planning applications in earlier chapters would generally apply to applications for planning permission for works affecting listed buildings and conservation areas as to any others, whether or not planning permission is merged with any other consents.

13.203 However, we drew attention to a few detailed points that would arise if the consents were to be merged. These concerned:

1) the submission of applications;[69]

2) the notification of applications to the national amenity societies;[70]

3) categories of applications to be referred to or decided by Cadw;[71]

4) the payment of application fees;[72] and

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68 TCPA 1990, ss 191(6), 192(4).

69 Consultation Paper, paras 13.149 to 13.151; paras 13.76 to 13.79 above.

70 Consultation Paper, paras 13.152 to 13.154.

71 Consultation Paper, paras 13.152 to 13.154; see **paras 13.79, 13.129** above.

72 Consultation Paper, paras 13.155 to 13.158; see **paras 13.85 to 13.88, 13.130 to 13.132**.

5) the imposition of conditions.[73]

13.204 In each case, we indicated that the existing position could simply be rolled forward, as a feature of the law and procedure related to planning permission, attached to the planning permission rather than LBC. We therefore made no specific proposals in the Consultation Paper, and make no recommendations now.

13.205 A number of consultees mentioned one or more of these specific points, in the context of the unification of consents generally. We have therefore dealt with these points earlier in this Chapter, in that context. We also touched upon them in our brief summary of the consent procedures.[74]

Appeals

We provisionally proposed that the Bill include provisions to the effect that, (1) where a planning appeal relates to works to a listed building, it may contain as a ground of appeal that the building in question is not of special architectural or historic interest, and ought to be removed from the list of such buildings maintained by the Welsh Ministers; and the Ministers, in determining such an appeal, may exercise their powers to remove the building from the list; and (2) where an appeal relates to a building that is subject to a building preservation notice, it may contain a claim that the building should not be included in the list; and in determining such an appeal, they may exercise their powers not to include it in the list (Consultation Question 13-5).

13.206 We made it clear in the Consultation Paper that our intention was that the unification of consents should not change the substance of the law more than strictly necessary. We therefore recognised that we would need to introduce into the provisions relating to planning appeals special provisions equivalent to those now applying in the case of LBC appeals.[75]

13.207 We received 38 responses to this proposal; 16 agreed. Four consultees disagreed on the basis of their objection in principle to the unification of consents. A further 11 disagreed, largely on the basis that an appeal was not the appropriate point in the procedure at which to challenge the listing of a building.

13.208 The Planning Inspectorate ("PINS") observed:

> the Bill should include provisions which allow appeals to be made on the same basis as the current position. That is, equivalent powers should be retained.

13.209 We note the concern that an appeal is not the appropriate forum for a claim that a building should not be listed, and an appeal decision is not the appropriate place for a decision as to whether the listing should be cancelled. However, such provisions already exist in relation to LBC appeals. Our intention was thus not to change the

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73 Consultation Paper, para 8.131, 8.132, 13.159 to 13.161.

74 See **paras 13.135 to 13.146** above.

75 P(LBCA)A 1990, ss 21(3), (4), 22(1)(b).

law, but merely to ensure continuity by transferring those provisions across to the planning permission regime.

13.210 In any event, it seems to us reasonable that an appeal relating to a listed building – whether against the refusal of planning permission or the refusal of listed building consent – could in some cases be based on a claim that the building is of little interest, and should not be listed. That claim may be wholly unmerited, in which case it will fail, but nothing is lost by including it.

13.211 Equally, once an inspector has heard a great deal of evidence as to the merit of a building – as is likely in the context of an appeal – that is an ideal time to consider whether it should continue to be listed.

13.212 Equivalent provisions should be retained to deal with appeals relating to buildings subject to building preservation notices. At present, there is a provision enabling an appeal relating to such a building to include as a ground of appeal a claim that it should not be listed. But there is no explicit power for the Welsh Ministers to decline to list such a building as part of their decision – only a general power for them to notify the planning authority that they do not intend to list the building.[76]

13.213 But there is no equivalent provision relating to CAC appeals, presumably because it is not realistic for an appellant to request that a building is removed from a conservation area.

Recommendation 13-5.

We recommend that the Bill should include provisions to the effect that:

(1) any appeal relating to works to a listed building may contain as a ground of appeal that the building in question is not of special architectural or historic interest, and ought to be removed from the list of such buildings maintained by the Welsh Ministers;

(2) where a building is subject to a building preservation notice (provisional listing), the notice of appeal may contain a claim that the building should not be included in the list;

(3) the Welsh Ministers, in determining an appeal relating to a listed building, may exercise their powers to remove the building from the list; and

(4) in determining an appeal relating to a building subject to a building preservation order, they may state that they do not intend to include it in the list.

[76] P(LBCA)A 1990, s 3(4)(b).

Other supplementary provisions

13.214 In the Consultation Paper, we considered briefly various miscellaneous and supplementary provisions relating to listed building consent, to ensure the merger with planning permission would have no unintended consequences.[77] We have carried out a similar exercise earlier in this Chapter.[78]

13.215 As noted earlier, the provisions in the Listed Buildings Act 1990 relating to the modification and revocation of listed building consent are almost identical to those in the TCPA 1990 relating to the modification etc of planning permission.[79] It follows that, if the three consents are unified, no new provision will be needed to ensure that the law continues to operate as at present. The same is true of the service of listed building purchase notices.[80]

13.216 No consultees suggested that this analysis was inaccurate.

UNAUTHORISED WORKS AFFECTING LISTED BUILDINGS AND CONSERVATION AREAS

The existing law

13.217 The carrying out of development without planning permission is a breach of planning control, but not a criminal offence. If such development has been carried out, the planning authority may if it considers it expedient issue an enforcement notice; and non-compliance with such a notice is an offence. By contrast, the carrying out of works that require LBC or CAC without such consent having been obtained is from the outset a criminal offence, under the Listed Buildings Act 1990.[81] It is a defence to a charge of such an offence that the works were urgently necessary for health or safety, and limited to the minimum necessary.[82]

13.218 As we noted in the Consultation Paper, the logic behind that distinction may have reflected a policy decision by Parliament to emphasise the importance of the heritage. Alternatively, it may reflect the obvious fact that the unauthorised erection of a building can be regularised simply by requiring its removal, whereas the unauthorised removal of a historic building cannot be regularised by requiring it to be reinstated.

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77 Consultation Paper, paras 13.166, 13.177.

78 See **paras 13.135 to 13.147** above.

79 See **para 13.141**.

80 See **para 13.143**.

81 P(LBCA)A 1990, s 9.

82 "It shall be a defence to prove the following matters: (a) that works to the building were urgently necessary in the interests of safety or health or for the preservation of the building; (b) that it was not practicable to secure safety or health or, as the case may be, the preservation of the building by works of repair or works for affording temporary support or shelter; (c) that the works carried out were limited to the minimum measures immediately necessary; and (d) that notice in writing justifying in detail the carrying out of the works was given to the local planning authority as soon as reasonably practicable." (Listed Buildings Act 1990, s 9(3).

And if the latter is not subject to a criminal penalty, there is nothing to deter future transgressors.

13.219 Since the coming into effect of the changes made by the Enterprise and Regulatory Reform Act 2013, the demolition of a building in a conservation area in England remains a criminal offence (subject to a similar defence) – but under section 196D of the TCPA 1990 rather than the Listed Buildings Act.[83]

13.220 Where unauthorised works are carried out to a listed building that are reversible, that may lead to the issue of a listed building enforcement notice (either as an alternative to prosecution or as a supplement to it). Where such works also required planning permission, as with the construction of an extension to a listed house, that may result in the issue of two notices – a mainstream planning enforcement notice and a listed building enforcement notice. That in turn will require two appeals, which may rely on slightly different grounds[84], and in due course two decision notices.

13.221 The carrying out of building works without planning permission is generally immune from enforcement action after four years; whereas there is no time limit for the taking of enforcement action in relation to the carrying out of building works without LBC or CAC.

13.222 Where unauthorised demolition works are carried out in a conservation area, that may lead in theory to the issue of a conservation area enforcement notice. However, that will not often occur, as demolition on a scale sufficient to require CAC[85] is likely to be incapable of being reversed.

13.223 Our general proposals relating to unauthorised development, in Chapter 12 of the Consultation Paper, would apply to cases relating to listed buildings and conservation areas just as to any others. In Chapter 13, we indicated the changes to the enforcement regime that would be necessary to ensure that the unification of consents, outlined earlier there and in this Chapter, would not lead to any loss of protection.

Possible change: prosecution

We provisionally proposed that the Bill include provisions to the effect that the carrying out without planning permission of heritage development – defined along the lines indicated in Consultation Question 13-1 – should be a criminal offence, and that the defence to a charge of such an offence should be the same as currently applies in relation to a charge of carrying out works without listed building consent (Consultation Question 13-6.)

13.224 We noted in the Consultation Paper that, if LBC and CAC were to be merged with planning permission, as outlined earlier in this Chapter, it would be necessary to ensure that unauthorised works to listed buildings and demolition in conservation areas should be made a criminal offence, for the reasons noted above.

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83 TCPA 1990, s 196D, introduced by Enterprise and Regulatory Reform Act 2013, Sch 17, para 6.

84 See **paras 13.234 to 13.238** below.

85 See Consultation Paper, para 13.30.

13.225 We therefore proposed that a new provision should be inserted at the appropriate point in the Bill (presumably in the Part dealing with enforcement) to the effect that the carrying out of such works without planning permission is an offence. That would be similar to section 196D of the TCPA 1990 in England (providing that the demolition of an unlisted building in a conservation area without planning permission is an offence), but extended to include works to a listed building. The penalties for such an offence, and the defence to a charge, would be the same as currently apply to an offence under section 9 of the Listed Buildings Act 1990.

13.226 Thirty-nine consultees responded to this proposal, of whom 32 agreed – albeit that 13 reserved their position as to the principle of unifying consents. Seven disagreed, largely on the basis of opposition to unification.

13.227 We understand the concern of those opposed to the principle of unification. However, it follows from our Recommendation 13-1 earlier in this Chapter to unify the consents, and from our commitment to ensure that such a change should not lead to any loss of protection for historic buildings and areas, that the criminal sanctions currently available under the Listed Buildings Act should continue to be available under the new Bill.

13.228 It may be noted that such a sanction would also apply to unauthorised works to a building that is subject to a building preservation notice, or interim protection.[86]

Recommendation 13-6.

We recommend that the Bill should include provisions to the effect that:

(1) it is an offence to carry out without planning permission works for

- **the demolition of a listed building;**
- **for the alteration or extension of a listed building in any manner likely to affect its character as a building of special architectural or historic interest; or**
- **the demolition of an unlisted building in a conservation area;**

(2) such an offence is punishable:

- **on summary conviction by imprisonment for a term not exceeding six months or a fine or both; or**
- **on conviction on indictment by imprisonment for a term not exceeding two years or a fine or both; and**

(3) the defence to a charge of such an offence is the same as currently applies in relation to a charge of carrying out works without listed building consent.

86 P(LBCA)A 1990, ss 3(5) and 2B(2).

Possible changes: enforcement action

We provisionally proposed that the Bill include provisions to the effect that heritage development be excluded from the categories of development that are subject to time limits as to the period within which enforcement action may be taken (Consultation Question 13-7).

13.229 In order to ensure that the unification of consents does not lead to any relaxation of protection, it would need to be made clear that there is no time limit for the taking of enforcement action in relation to unauthorised development consisting of the carrying out of works for the demolition, alteration or extension of a listed building or the demolition of an unlisted building in a conservation area. We proposed that this could be achieved by excluding such development from the categories of development that are subject to various time limits (currently specified in section 171B of the TCPA 1990) as to the period within which enforcement action may be taken.

13.230 Of the 39 consultees who responded to this proposal, 31 agreed, although about a third of those made clear their opposition to the principle of unification. But generally respondents accepted that the substance of the existing law, whereby there was no time limit for prosecution, should be retained.

13.231 Nigel Hewitson, who supported the principle of unification, queried the lack of a time limit on the basis that it might be in breach of article 6 of the ECHR, which provides for a right to a fair trial within a reasonable time. However, all indictable offences may be prosecuted without limit of time; and the limitation under article 6 applies to avoid undue delay once a prosecution has started, rather than delay in bringing the prosecution in the first place.[87]

13.232 The Central Association of Agricultural Valuers and the Historic Houses Association, along with Mr Hewitson, also queried whether an absence of time limit might be unfair to purchasers of listed buildings who may become liable to remedy the results of unauthorised works carried out by previous owners. The Court of Appeal has accepted that this is the position.[88] We accept that this may seem unfair, but if the works were carried out by a previous owner, the purchase price should have been adjusted to reflect the liability of the new owner to repair it in the event of subsequent enforcement action; if it was done by a vandal or trespasser, a conscientious property owner should carry appropriate insurance.

13.233 We therefore remain of the view that this proposal is no more than a minor consequential change to ensure that the effect of the law does not change as a result of the unification of consents.

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87 Archbold, *Criminal Pleading, Evidence and Practice*, 2018, para 16-98.

88 *Braun v Secretary of State* [2003] 2 PLR 90, CA, at [14], [15].

Recommendation 13-7.

We recommend that the Bill should include provisions to the effect that the categories of development that are subject to time limits as to the period within which enforcement action may be taken exclude works for:

(1) the demolition of a listed building;

(2) for the alteration or extension of a listed building in any manner likely to affect its character as a building of special architectural or historic interest; and

(3) the demolition of an unlisted building in a conservation area.

We provisionally proposed that the Bill include provisions to the effect that: (1) Where an enforcement notice is issued in relation to the carrying out of heritage development in breach of planning control, the grounds on which an appeal may be made against such a notice include grounds equivalent to grounds (a), (d), (i), (j) and (k) as set out in Section 39 of the Listed Buildings Act 1990; and (2) the Welsh Ministers, in determining an enforcement appeal relating to a listed building, may exercise their powers to remove the building from the list; and in determining an appeal relating to a building subject to a building preservation order, they may exercise their powers not to include it in the list (Consultation Question 13-8).

13.234 If the consents were to be unified, the grounds on which an appeal may be brought against a planning enforcement notice would need to be adjusted to incorporate those on which an appeal may currently be made against a listed building enforcement notice or a conservation area enforcement notice. Thus an appeal against a listed building enforcement notice may rely on the following grounds (in addition to those applying in the case of an appeal against a normal enforcement notice):

1) that the building is not of special architectural or historic interest;

2) that the works were urgently necessary for health or safety, and limited to the minimum necessary;

3) that the required works would not restore the building to its previous state;

4) that the required steps to alleviate the harm are excessive.[89]

13.235 Where a conservation area enforcement notice is issued, and is the subject of an appeal, ground (a) becomes "that retention of the building is not necessary in the interests of preserving the character or appearance of the conservation area in which it is situated"; and ground (i) does not apply.[90]

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89 P(LBCA)A 1990, s 39(1)(a), (d), (i), (j), (k) (summarised).

90 SI 2012/793, Sched 3

13.236 We accordingly proposed that such grounds of appeal should be available to those appealing against planning enforcement notices in appropriate cases.

13.237 Of the 37 consultees who responded to this question, 28 agreed with our proposal (including eight who restated their opposition to the principle of unifying consents). Four disagreed, on the basis of opposing unification in principle. We remain of the view that the introduction into the Planning Bill of grounds of appeal equivalent to those currently in the Listed Buildings Act merely continues the effect of the existing law, and is not a change of substance.

13.238 Five made no comment as to the grounds of appeal, but disagreed with giving the Welsh Ministers an explicit power to remove a building from the list. We have dealt with this argument earlier in this Chapter, in the context of appeals against the refusal of planning permission / listed building consent.[91] Here too, we remain of the view that this merely continues the effect of the existing law, and is not a change of substance.

Recommendation 13-8.

We recommend that the Bill should include provisions to the effect that:

(1) where an enforcement notice is issued in relation to the carrying out of works for

- **the demolition of a listed building; or**
- **for the alteration or extension of a listed building in any manner likely to affect its character as a building of special architectural or historic interest;**

the grounds on which an appeal may be made against such a notice include grounds equivalent to grounds (a), (d), (i), (j) and (k) as set out in Section 39 of the Listed Buildings Act 1990;

(2) where an enforcement notice is issued in relation to the carrying out of works for the demolition of an unlisted building in a conservation area, the grounds on which an appeal may be made against such a notice include grounds equivalent to grounds (a), (d), (j) and (k) as set out in Section 39 of that Act, as amended by SI 2012/793;

(3) the Welsh Ministers, in determining an enforcement appeal relating to a listed building, may exercise their powers to remove the building from the list.

(4) in determining an enforcement appeal relating to a building subject to a building preservation order, they may state that they do not intend to include it in the list.

[91] See **paras 13.210 to 13.212**.

WORKS TO SCHEDULED MONUMENTS

We provisionally proposed that planning permission should not be unified with scheduled monument consent (Consultation Question 13-9).

13.239 In the Consultation Paper, we noted that scheduled monuments are much less commonly encountered in practice than listed buildings and conservation areas. They are almost always uninhabited; and they are equivalent in importance to listed buildings of Grades I and II*.[92]

13.240 Under the Ancient Monuments and Archaeological Areas Act 1979, "scheduled monument consent" is required for the carrying out of almost any works to a scheduled monument, in addition to any planning permission that may be needed. Failure to obtain consent is an offence. By virtue of the nature of a scheduled monument, and its importance, it is rare for an application for scheduled monument consent to be made for anything other than minor restoration works or visitor facilities. Applications the Welsh Ministers for consent are thus relatively infrequent, and only rarely overlap with applications to the planning authority for planning permission.[93]

13.241 Planning permission, LBC and CAC are normally obtained from the planning authority (or the Welsh Ministers on appeal). But scheduled monument consent is obtained directly from the Welsh Ministers.[94]

13.242 We observed that it would be possible to take one step further the process of unifying consents, outlined above, by including within the definition of "development" all works to a scheduled monument. – which would obviate the need for scheduled monument consent to be obtained. That was the approach taken by the Planning Act 2008.[95] However, we suggested that, if every application for consent were to be made to and determined by a planning authority, authorities would need to be appropriately resourced, or to have arrangements in place to receive assistance from Cadw or the regional archaeological trusts.

13.243 We therefore considered that to include within the definition of development all works that currently require scheduled monument consent under the 1979 Act would be a step too far, as it would have the result of transferring decisions relating to works to scheduled monuments, which are rare and require specialist expertise, from Cadw to planning authorities.

13.244 44 consultees responded to this question. Almost all agreed with our approach – for the reasons given in the previous paragraph.

13.245 On the other hand, three disagreed. The Mineral Products Association considered that the unification process could extend to include scheduled monuments. The

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92 WO Circular 60/96, Annex 1, para 4. See now Annex A to TAN 24.

93 There were 57 applications for scheduled monument consent in Wales in the year 2013-14 – compared to 525 applications for LBC received by Cadw, and 907 consultations on applications for planning permission (Cadw Annual Report, 2013-14, p 13).

94 Or granted by a heritage partnership agreement (see the Ancient Monuments Act 1979, s 9ZA, to be inserted by HE(W)A 2016).

95 Planning Act 2008 , 33(1); see Consultation Paper, para 13.93.

Planning Inspectorate also saw no reason why scheduled monument consent could not be merged with planning permission, but only provided that specialist expertise was available to planning authorities from Cadw or regional archaeological trusts. And one of those trusts (the Glamorgan Gwent AT), noted that the scheduled monument consent consultation process is slow compared with the planning process.

13.246 The Society for the Protection of Ancient Buildings raised the question of how applications for scheduled monument consent should be treated, and whether they should be publicised or notified to the national amenity societies. We would go further, observing that there is no requirement for an application to be publicised – ether to neighbours, or on site, in the press or on the web.

13.247 We understand that Cadw does in practice consult local authorities and regional archaeological trusts; but we can see the advantage of a statutory requirement as to consultation. However, if scheduled monument consent is not to be unified with planning permission, any changes to procedures (for example, by empowering the Welsh Ministers to make regulations as to the handling of applications) would have to be included within the Historic Environment Bill, which is outside our remit.

13.248 The Central Association of Agricultural Valuers suggested that planning authorities should be required to notify applicants for planning permission of any possible requirement for scheduled monument consent. We can see the force of this suggestion, but consider that it would be best incorporated as a recommendation in guidance, rather than made a statutory obligation.

13.249 We consider that, if the process of scheduling were to be greatly expanded, so that many more monuments were to be affected, leading to a greater overlap with planning permission, there might be a case for unification of consents. The same might apply if planning authorities were to be given access to appropriate specialist expertise. Neither of those seems likely for the foreseeable future; and we therefore remain of the view that it is best to leave the position as it is.

Recommendation 13-9.

We recommend that scheduled monument consent should not be replaced by planning permission.

THE HISTORIC ENVIRONMENT: OTHER POINTS

13.250 As noted above and in the Consultation Paper, our brief did not extend to the reform of historic environment legislation generally. However, we did note two detailed points that have consequences for mainstream planning control.

Definition of "listed building"

We provisionally proposed that the definition of "listed building" should be clarified by making plain that it includes pre-1948 objects and structures if they were within the curtilage of the building in the list as it was (1) in the case of a building listed prior to 1 January 1969, at that date; or (2) in any other case, at the date on which it was first included in the list (Consultation Question 13-10).

13.251 In the Consultation Paper, we noted that the definition of "listed building" (in section 1(5) of the Listed Buildings Act 1990) includes a reference to pre-1948 objects and structures in the curtilage of the building in the list, and suggested that it would be helpful if the law could be simplified by making plain the date at which the extent of the curtilage should be considered.

13.252 Case law makes it clear that the relevant date is generally the date on which the building was first included in the list.[96] We consider that it would be helpful for that to be made plain on the face of the statute, to distinguish the position from that which arises in relation to provisions such as those governing permitted development rights, where what is to be considered is the extent of the curtilage as at the date of the development in question.[97]

13.253 Secondly, the provision that is now section 1(5) was introduced in the TCPA 1968, and came into effect on 1 January 1969. It would appear that, in the case of buildings listed earlier, the curtilage to be considered was as at that date, although the point has never been definitively decided by the courts. But that too could be clarified, for the avoidance of unnecessary litigation.

13.254 We therefore suggested that the definition of "listed building" could be amended accordingly.

13.255 Of the 34 consultees who responded to this question, the overwhelming majority agreed. Pembrokeshire Coast NPA, for example, agreed, commenting that "this may be done in isolation of the proposal to merge consents, however – the subject has been frequently aired among professionals over the years."

13.256 Two disagreed. The IHBC pointed out that the proposal might seem to imply that the curtilage rule does not apply at all in the case of buildings listed before 1969. That was not our intention. And the Historic Houses Association indicated that curtilage structures should be listed in their own right. We agree that, if resources were available, that would be desirable, but it is wholly impracticable for the foreseeable future; in the meanwhile, therefore, the curtilage rule should remain in place.

13.257 Also relevant to the definition of a listed building is our discussion of the definition of "curtilage" generally; we consider this later in this Report.[98]

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96 *Watts v Secretary of State* [1991] 1 PLR 61 at p 72F; *R v Camden LBC, ex p Bellamy* [1992] JPL 255; *Morris v Wrexham CBC and the National Assembly* [2002] 2 P&CR 7.

97 See, for example, *Collins v Secretary of State* [1989] EGCS 15; *James v Secretary of State* [1991] 1 PLR 58; *McAlpine v Secretary of State* [1995] 1 PLR 16; *Lowe v The First Secretary of State* [2003] 1 PLR 81.

98 See **paras 18.91 to 18.99**.

Recommendation 13-10.

We recommend that the definition of "listed building" should be clarified by making plain that it includes pre-1948 objects and structures if they were within the curtilage of the building in the list as it was

(1) in the case of a building listed prior to 1 January 1969, at that date; or

(2) in any other case, at the date on which it was first included in the list.

Areas of archaeological importance

13.258 Where the site of proposed development is within an area of archaeological importance, designated as such under the Ancient Monuments and Archaeological Areas Act 1979, the planning application needs to be specially notified, to enable the "investigating authority" (in practice, a local archaeological unit) to consider whether it wishes to carry out archaeological investigations.

13.259 In the Scoping Paper and the Consultation Paper, we noted that five areas of archaeological importance were designated in 1984 in England, and that no areas had ever been designated in Wales.[99] We also noted that the UK Government had proposed over 20 years ago that Part 2 of the Act would be repealed at the first appropriate legislative opportunity.[100]

13.260 We therefore suggested that this would be a good opportunity to amend the 1979 Act so that Part 2 no longer applies in Wales.

13.261 Of the 40 consultees who responded to this question, 35 were in agreement – largely on the basis that archaeological areas had never been used in Wales, and were unlikely to be in the future. However, several wondered whether this was the right time, some suggesting that such areas might be designated at some point in the future.

13.262 Of the three archaeological trusts responding, two were in favour of the proposed abolition, and one against – the latter on the basis that the lack of areas in Wales might be due to administrative reluctance rather than because the legislation was inherently flawed.

13.263 We acknowledge that of course any legislation of this kind might be used one day; but we still consider its use most unlikely. We are not aware of any intention by the Welsh Government to designate an area of archaeological importance; and we note that none of the planning authorities has suggested that it has ever considered doing so, or is contemplating doing so in the future.

13.264 We therefore continue to recommend that this procedure is abolished in Wales.

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99 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 5.79.

100 House of Commons Environment Committee, Session 1986-1987 (ref 146) vol 2, p 19.

Recommendation 13-11.

We recommend that the Ancient Monuments and Archaeological Areas Act 1979 should be amended so that Part 2 (areas of archaeological interest) does not apply in Wales.

Chapter 14: Outdoor advertising

INTRODUCTION

14.1 Legislation relating to advertisements is contained in Chapter 3 of Part 8 of the TCPA 1990, which empowers the Welsh Ministers to make provision (by regulation) for restricting or regulating the display of advertisements so far as appears to be expedient to them, in the interests of amenity and public safety. The current regulations are the TCP (Control of Advertisements) Regulations 1992 ("the 1992 Regulations").[1]

14.2 The regulations provide for three categories of advertisement;

1) those which are excluded from control;[2]

2) those which normally benefit from "deemed consent", which can be withdrawn by planning authorities in certain circumstances;[3] and

3) those which require express consent from the planning authority (or, on appeal, from the Welsh Ministers).[4]

14.3 Displaying an advertisement without the required consent is not just a breach of planning control – as with unauthorised development – but constitutes a strict liability criminal offence.

14.4 In our Consultation Paper, we made some suggestions as to the potential reforms of the TCPA 1990 in relation to outdoor advertising. In addition, although the majority of the Paper focussed on primary legislation, we noted that the substantive law on advertising is almost entirely contained in secondary legislation. The 1992 Regulations are now 25 years old, and are likely to be updated in due course,[5] and we therefore made some suggestions about detailed reforms which could be made to them when that occurs.

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1 SI 1992 No 666.

2 1992 Regulations, reg 1. Advertisements falling within this category refer to items that are generally unobjectionable, including advertisements inside buildings, promotional material on vending machines and traffic signs.

3 1992 Regulations, reg 6, which grants deemed permission for advertisements that fall within any of the categories listed in Sch 3, including brass plates outside doctors' surgeries, estate agents' boards, and shop fascia signs.

4 1992 Regulations, part 3. Advertisements falling within this category include poster-panels, signage at petrol stations and car dealerships, and signs on buildings more than 4.6m above ground level.

5 The Regulations originally applied both in England and in Wales; they were replaced in England ten years ago (see the TCP (Control of Advertisements) (England) Regulations 2007, No 783).

BASIC CONCEPTS

Definition of "advertisement"

We provisionally proposed that the definition of "advertisement" in the TCPA 1990 should be clarified, and included in the Code alongside other provisions relating to advertising (Consultation Question 14-1).

14.5 Section 336 of the TCPA 1990 provides a wide-ranging definition of "advertisement". It means "any word, letter, model, sign, placard, board, notice, awning, blind, device or representation, whether illuminated or not, in the nature of, and employed wholly or partly for the purposes of, advertisement, announcement or direction". It also *includes* "any hoarding or similar structure used or designed, or adapted for use, and anything else principally used, or designed or adapted principally for use, for the display of advertisements".

14.6 The definition in the Act applies also for the purposes of interpreting the 1992 Regulations. The Regulations also provide a definition, which *excludes* "anything employed wholly as a memorial or as a railway signal".[6]

14.7 In our Consultation Paper, we noted that the definition in the Act was to some extent a circular one. It focusses on the physical means by which the message is being put forward, rather than the nature of the message itself.[7] We suggested that the Act should include a single definition of "advertisement", which would also apply to the interpretation of the Regulations, along the following lines

> "advertisement" means any sign, placard, board, notice, hoarding, awning, blind, or other object or structure, whether illuminated or not, that is:
>
> – designed or adapted for use for the purpose of announcement, publicity or direction, and
>
> – used wholly or partly for such a purpose;
>
> but excludes a memorial (including funerary memorial) or a railway signal.[8]

14.8 All 31 of the consultees who responded to this proposal agreed with it. Neath Port Talbot CBC suggested that it would "reduce misinterpretation from the public, advertisers and planning authorities". The Management Committee of the National Association of Planning Enforcement ("NAPE") also noted that "advertisements have moved on somewhat from 1992" and suggested that an updated definition might therefore be helpful.

14.9 Consultees expressed concern that clarifying the proposed definition would result in the exclusion of the more "high-tech" means of advertisement. The Theatres Trust noted that "advertisements on buildings use light projections are becoming more frequent as is the use of audio" and emphasised that "it is important that the definition

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6 1992 Regulations, reg 2.

7 Consultation Paper, paras 14.13 to 14.15.

8 Consultation Paper, paras 14.16, 14.17.

covers these types of advertisements". We agree, although we note that the advertising industry is constantly evolving, and a more generic definition may be more useful than one that attempts to include specific types of advert.

Recommendation 14-1.

We recommend that the definition of "advertisement" in the TCPA 1990 should be clarified, and included in the Code alongside other provisions relating to advertising.

We provisionally proposed that the reference to the display of advertisements currently included in the statutory definition of "advertisement" in the TCPA 1990 be omitted (Consultation Question 14-2).

14.10 We noted in the Consultation Paper that there is no definition of the term "display of adverts". In the light of the discussion above in relation to Recommendation 14-1, and particularly bearing in mind the constantly evolving nature of advertising, and thus the difficulty of arriving at a satisfactory definition of the term, we suggested that a specific reference to the term "display" is unhelpful. We therefore proposed to remove the reference to it.[9]

14.11 As with Consultation Question 14-1, the 31 consultees who responded to this proposal unanimously supported it. The Law Society noted that "'display' is inherent in the nature and purpose of an advertisement … and can therefore be omitted".

Recommendation 14-2.

We recommend that the reference to the display of advertisements currently included in the statutory definition of "advertisement" in the TCPA 1990 should be omitted.

Definitions: the site of a display of advertisements

We provisionally proposed that the word "land" be used in place of "site" and "sites", both in the provisions of the Bill relating to the control of advertisements and in the Regulations when they are next updated (Consultation Question 14-3).

14.12 The legislation relating to advertisements refers to the place where an advertisement is to be found. The 1992 Regulations refer to the "site" on which it is displayed, and defines it as "any land or building, other than an advertisement, on which an advertisement is displayed".[10] Section 336 of the TCPA 1990 defines land as "any corporeal hereditament, including a building, and…any interest in or right over land".

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9 Consultation Paper, para 14.19.

10 1992 Regulations, reg 2(1).

14.13 We suggested in our Consultation Paper that the existence of the two terms, "site" and "land", leads to additional uncertainty and unnecessary complexity.[11] We noted that there was no instance in either the Act or the Regulations where the word "land" could not be used in place of "site". We therefore suggested that references to the term "site" should be replaced with "land".

14.14 All of the 32 consultees who responded to this question agreed with our proposal to integrate the two terms. The Royal Town Planning Institute (RTPI) noted that "section 336 of the Act succinctly defines the word 'land' and it potentially will avoid confusion if there is simply one word used, with one definition".

14.15 Ten consultees (largely planning authorities), while agreeing in principle, expressed concern about the definition's capacity to capture new forms of advertisement like searchlight beams. Allan Archer noted that as these methods of advertisement do not take place on land, they do not fit easily within the definition, creating difficulties with respect to other aspects of the legislation.

14.16 We understand the reason for such concern. However, a display of advertising, if it is to come within the Regulations, must involve land (or a building) at some point. And the definition of "site", which might at first sight seem to be a wider term than "land", is in fact drafted by reference to "land or building".

14.17 The searchlight display in the *Great Yarmouth* case was projected by a unit that was moveable but currently located on the flat roof of a bingo and amusement centre.[12] And in *Wadham Stringer (Fareham) Ltd v Borough of Fareham*, a balloon displaying an advertisement was tethered to a stationary vehicle standing on the forecourt of a car showroom. Both were found by the courts to be advertisements displayed on land, and thus within the scope of the Regulations.[13]

14.18 We remain of the view that it would be helpful to do away with the term "site" in the Act and the Regulations. However, we consider that, to minimise the problems caused by novel forms of advertising, it would be helpful for the relevant statutory references to be drafted, where appropriate, by reference to advertisements being displayed "on or at" land, rather than just "on" land. The reference in section 220(2)(a) would thus become "the land on or at which advertisements may be displayed and the manner in which they may be displayed to it". And Standard Condition 4 in Schedule 1 to the 1992 Regulations would become "no advertisement is to be displayed without the permission of the owner of the land on or at which it is displayed or of any person with an interest in that land entitled to grant permission".

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11 Consultation Paper, para 14.22.

12 "Sign" includes an unfocussed beam of light pointing into the sky (*Newport BC v Secretary of State*; *Great Yarmouth BC v Secretary of State* (1997) 74 P&CR 147 at p 155).

13 Advertisements on or attached to untethered balloons or aeroplanes are subject to Civil Aviation Act 1982, s 82, and Civil Aviation (Aerial Advertising) Regulations 1995. Advertisements on vehicles are generally outside the scope of the TCPA 1990 and regulations made under it (see **paras 14.39 to 14.46**.

Recommendation 14-3.

We recommend that the word "site" should be used in place of "land":

(1) in the provisions of the Bill relating to the control of advertisements; and

(2) in the Regulations when they are next updated; and

that the Bill and the Regulations are, where appropriate, drafted by reference to advertisements being displayed "on or at" land.

Definitions: the person displaying an advertisement

We provisionally proposed that a definition of "person displaying an advertisement" in the TCPA 1990 be included in the Code alongside other provisions relating to advertising, to include (1) the owner and occupier of the land on which the advertisement is displayed; (2) any person to whose goods, trade, business or other concerns publicity is given by the advertisement; and (3) the person who undertakes or maintains the display of the advertisement (Consultation Question 14-4).

14.19 Section 224(4) of the TCPA 1990 provides that a person is deemed to display an advertisement (and thus to be liable for any breach of the Regulations) if:

1) they are the owner or occupier of the land on which the advertisement is displayed; or

2) the advertisement gives publicity to their goods, trade, business or other concerns.

14.20 Regulation 2(3)(b) of the 1992 Regulations provides a more extensive non-exhaustive definition, which also includes "the person who undertakes or maintains the display of the advertisement".

14.21 We suggested in our Consultation Paper that the advertising contractor should be included within the statutory definition as they will usually have primary responsibility for ensuring compliance. We therefore suggested that the two definitions should be merged into one, to be included in the Act, but based on the definition in the Regulations.[14]

14.22 Of the 33 consultees responding to this proposal, 31 agreed, with the RTPI noting that "the definition provided in the Regulations is more robust and encapsulates all relevant interested parties". The Planning Inspectorate (PINS) also emphasised the "need for consistency in defining a person displaying an advertisement" and suggested that it was "logical to include the person who undertakes or maintains the display of the advertisement in the definition".

[14] Consultation Paper, paras 14.27 to 14.29.

14.23 Two consultees, the Central Association of Agricultural Valuers and Sirius Planning, disagreed. Both argued that the owner and occupier of land should not "automatically be considered to be a person displaying an advertisement for the purposes of the definition". The Association suggested that the owner may have "little control over … the terms of the tenancy or other occupation … and may perhaps be as anxious as the planning authority to have an advertisement removed".

14.24 We agree that questions of actual control should be taken into account when considering whether or not a person should be prosecuted for displaying an advertisement without consent. However, section 224 of the TCPA 1990 already provides room for consideration of such questions, in that it provides a defence to prosecution where a person is able to "show that the advertisement was displayed without his knowledge and that he took all reasonable steps to prevent the display or, after the advertisement had been displayed, to secure its removal".[15]

14.25 We therefore do not consider it necessary to remove them from the scope of the definition altogether.

Recommendation 14-4.

We recommend that a definition of "person displaying an advertisement" in the TCPA 1990 should be included in the Bill alongside other provisions relating to advertising, to include:

(1) the owner and occupier of the land on or at which the advertisement is displayed;

(2) any person to whose goods, trade, business or other concerns publicity is given by the advertisement; and

(3) the person who undertakes or maintains the display of the advertisement.

CONSENT FOR ADVERTISEMENTS

Deemed consent

14.26 For advertisements falling within the categories of advertising prescribed in the 14 Classes in Schedule 3 to the 1992 Regulations, permission is deemed to have been granted. Where a planning authority wishes to revoke such permission, however, they may serve discontinuance notices, which revoke deemed consent for particular displays and require that a particular display be removed or that a site is no longer to be used for such a display.

We provisionally proposed that a discontinuance notice under the advertisements regulations: (1) should contain a notice as to the rights of any recipient to appeal against it; (2) should come into force on a particular date specified in it (rather than at

[15] TCPA 1990, s 224(5), (6).

the end of a specified period from the date of service); and (3) should be "issued" (rather than "served" as at present), with a copy served on all those deemed to be displaying the advertisement in question (Consultation Question 14-5).

14.27 The 1992 Regulations require that a discontinuance notice specify the advertisement or site to which it relates, a period within which the display is to be continued and state the reasons why action has been taken.[16] But there is no requirement for the notice to state the recipient's right to appeal against it – an omission described in the courts as "curious".[17] We suggested in the Consultation Paper that this omission should be rectified.[18]

14.28 A discontinuance notice must specify the period at the end of which it is to come into effect – starting on the date on which the notice is "served".[19] We noted in the Consultation Paper that this may cause problems where a notice is served on more than one person, and suggested that the Regulations should be amended to provide for a notice to be "issued", with copies being "served", each coming into force on the particular date specified within it.[20]

14.29 We received 31 consultation responses to this proposal. All were in agreement with it. PINS described it as a proposal which would "provide clarity for all parties…would remove uncertainty and avoid prejudice". The RTPI also argued that it was "logical to bring this procedure in line with the process relating to enforcement notices".

Recommendation 14-5.

We recommend that a discontinuance notice under the advertisements regulations:

(1) should contain a notice as to the rights of any recipient to appeal against it;

(2) should come into force on a particular date specified in it (rather than at the end of a specified period from the date of service); and

(3) should be "issued" (rather than "served", as at present), with a copy served on all those deemed to be displaying the advertisement in question.

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16 1992 Regulations, reg 8(2).

17 By the High Court in *Swishbrook Ltd v Secretary of State for the Environment* [1989] JPL 137, upheld in the Court of Appeal at [1990] JPL 824.

18 Consultation Paper, para 14.35.

19 1992 Regulations, reg 8(3).

20 A similar change was made to the provisions as to enforcement notices, by the Local Government and Planning (Amendment) Act 1981; see *Nahlis v Secretary of State* [1995] 3 PLR 95.

Powers to make advertisements regulations

We provisionally proposed that section 220(2), (2A) and (3) be replaced with a provision enabling regulations to be made that provides for the matters relating to advertising that may be controlled by regulations (Consultation Question 14-6).

14.30 The Regulations controlling the display of advertisements are more important in practice than the relevant primary legislation. However, as we noted in the Consultation Paper, the powers in the TCPA 1990 enabling the Welsh Ministers to make such regulations are far from satisfactory. In particular, section 220(2)(c) enables the Ministers to make provision as to express consent, by applying various provisions of the Act subject to such adaptations and modifications as may be specified in the Regulations. By contrast, section 220(2A) simply enables the Ministers to make regulations as to various categories of matters, with no need to do it by way of modifications of the Act.

14.31 We suggested in the Consultation Paper that the approach taken in section 220(2A) was more straightforward.[21] Adopting this approach would make the enabling provisions in the Act slightly longer, but clearer; and the Regulations much clearer, and briefer. And those enabling provisions need only refer to the types of provisions that have in fact been included in regulations made since 1948.

14.32 All of the 31 consultees who responded to this proposal were in agreement with it. PINS commented: "Whilst the enabling provisions in the Act might be longer, it would facilitate a more straightforward approach and allow the Regulations to be shorter and clearer to the benefit of all".

[21] Consultation Paper, para 14.46.

Recommendation 14-6.

We recommend that section 220(2), (2A) and (3) should be replaced with a provision enabling regulations to be made providing for:

(1) the dimensions, appearance and position of advertisements that may be displayed, and the manner in which they are to be affixed to the land;

(2) the prohibition of advertisements being displayed or land being used for the display of advertisements without either deemed or express consent;

(3) the discontinuance of deemed consent;

(4) the making and determination of applications for express consent, and the revocation or modification of consent;

(5) appeals against discontinuance orders and decisions on applications for express consent;

(6) areas of special control over advertising; and

(7) consequential and supplementary provisions.

Overlap with planning permission

We provisionally proposed that deemed consent under the advertisements regulations should be granted for a display of advertisements that has the benefit of planning permission (Consultation Question 14-7).

14.33 We noted in the Consultation Paper that there will be a few cases in which planning permission is granted for a building project that necessarily includes an element of advertising. We suggested that in those circumstances it should not be necessary also to obtain advertisements consent.[22]

14.34 We cited as one example the erection of a new shopfront that includes a fascia sign – although in many cases such a sign would already benefit from deemed consent under Class 4B (if illuminated), or Class 5 in other cases). But a development proposal might, for example, include an advertisement panel, whose desirability would be considered in the course of the determination of the planning application.

14.35 Further, as pointed out by the Law Society, there are increasing numbers of large structures designed specifically, or at least primarily, to house advertising – for example, next to motorways in urban areas. Such a structure would not benefit from deemed consent under the advertising regulations; and arguably it would be more appropriately assessed as a development project rather than just as an "advertisement".

[22] Consultation Paper, para 14.55.

14.36 Of the 33 consultees responding to this question, 31 agreed, with PINS noting that it would "streamline the system" and "help simplify the situation". The Theatres Trust also agreed, suggesting that it would "simplify the planning process and reduce costs for applicants by removing unnecessary duplication".

14.37 Three consultees, who agreed in principle, expressed concern about the scope of the proposed deemed consent regime. The NAPE Management Committee suggested that it was necessary to define the circumstances in which deemed consent arising from planning permission would arise. However, planning permission will have only been granted on the basis of drawings and other material, and it will be the advertising element of the scheme shown on those drawings that would benefit from the proposed deemed consent.

14.38 We suspect that such a class of deemed consent, if introduced, would not often be required; but it would remove a minor overlap of controls.

Recommendation 14-7.

We recommend that deemed consent under the advertisements regulations should be granted for a display of advertisements that has the benefit of planning permission.

Advertisements on and in vehicles

We provisionally proposed that the display of advertisements on stationary vehicles and trailers be brought within control by the Regulations being amended so as to provide that: (1) no consent (express or deemed) be required for the display of an advertisement inside a vehicle, or on the outside of a vehicle on a public highway; and (2) deemed consent be granted for the display of an advertisement on a vehicle, provided that the vehicle is normally employed as a moving vehicle and is not used principally for the display of advertisements (Consultation Question 14-8).

14.39 We noted in the Consultation Paper that one category of display causing problems is advertising on and in vehicles. At present, consent is not required for an advertisement displayed on a vehicle; and the Regulations put the matter beyond doubt by providing that the display of an advertisement "on or in a vehicle" does not require consent – express or deemed – provided that the vehicle is "normally employed as a moving vehicle" and is not used principally for the display of advertisements.[23]

14.40 This is designed to permit advertising in the form of paper posters on the outside or the inside of buses or taxis and the display of the operator's name and other promotional artwork on commercial vehicles generally.

14.41 However, the same provision also permits advertising on stationary vehicles and trailers parked in fields next to major roads and railways, which may be detrimental

[23] TCP (Control of Advertisements) Regulations 1992, Sch 2, Class C.

to amenity in rural areas, provided that the vehicle or trailer is capable of being driven or towed on and off the land. This was confirmed by the Divisional Court in *Calderdale MBC v Windy Bank Dairy Farm Ltd and Quinn*.[24]

14.42 We suggested that one way to avoid the problem of unsightly advertising on parked vehicles would be to amend the Regulations so as to provide that consent would be required, but deemed consent granted, for the display of an advertisement on a vehicle when not on a highway.

14.43 This would mean that in the great majority of cases such advertising could continue to be displayed without the need for an application to be made to the planning authority for express consent under the Regulations. However, a planning authority could issue a discontinuance notice in respect of the use of a particular piece of land for such advertising, which would bring the display to an end (subject to a right of appeal to the Welsh Ministers).

14.44 If there were to be a persistent problem, the authority could seek a direction from the Welsh Ministers withdrawing the deemed consent altogether – either in relation to a particular plot of land, or over a larger area.[25]

14.45 Of the 32 consultees who responded, all were in agreement with the principle underlying this proposed reform, which attempts to deal with a well-known and longstanding problem. However, the Law Society, the RTPI and Torfaen CBC pointed to problems that could be caused by advertising on vehicles parked for an extended period on the highway (including lay-bys, footways and grass verges).

14.46 We have modified our recommendation accordingly; and no doubt the detailed wording will be given further consideration when the 1992 Regulations next come to be updated or replaced.

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24 [2010] EWHC 2929 (Admin), [2011] JPL 754.

25 Consultation Paper, paras 14.60-14.63.

Recommendation 14-8.

We recommend that the display of advertisements on stationary vehicles and trailers should be brought within control by the Regulations being amended so as to provide that:

(1) no consent (express or deemed) is required for the display of an advertisement

- **inside a vehicle, or**
- **on the outside of a vehicle on a public highway, other than one remaining stationary for more than 21 days;**

(2) deemed consent is granted for the display of an advertisement on the outside of a vehicle not on a highway, provided that the vehicle is normally employed as a moving vehicle and is not used principally for the display of advertisements.

Need for consent

We provisionally proposed that: (1) a provision be introduced in the advertisements regulations to enable a certificate of lawfulness to be issued in relation to a display of advertisements; and (2) an appropriate enabling provision be included in the Bill, in line with the approach indicated in Consultation Question 14-6 (Consultation Question 14-9).

14.47 We noted in the Consultation Paper that there can be considerable uncertainty as to whether consent is required for a particular display of advertisements, and particularly as to whether the advert falls within one or more of the classes benefiting from deemed consent. This arises not least as a result of the constantly changing nature of modern advertising, which means that it is not always clear whether new types of display are within such a class. It is possible to seek an informal opinion from the relevant authority. However, such an opinion will not necessarily bind it in the event of subsequent enforcement proceedings, which is particularly unfortunate given that the display of advertisements without consent is a criminal offence.

14.48 We suggested, therefore, that it would be more straightforward for there to be a mechanism, similar to that governing applications for certificates of lawfulness of development (CLEUDs and CLOPUDs),[26] whereby anyone can seek a binding decision as to the lawfulness of an existing or proposed display of advertisements – that is, as to whether it amounts (or, if carried out, would amount) to an offence under section 224 of the TCPA 1990. Such a certificate, if issued, would then prevent the authority from instituting a prosecution.[27]

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[26] See **paras 7.64 to 7.72**.

[27] Consultation Paper, paras 14.64-14.69.

14.49 We received 30 responses to this suggestion. 18 agreed, including six planning authorities, the Planning Inspectorate ("PINS"), the Law Society, PEBA, and the NAPE Management Committee ("NAPE"). NAPE commented as follows:

> This is a particular area of control where uncertainty currently exists. Developers/public will contact the LPA asking whether or not permission is needed for the display of an advertisement, but there is no formal mechanism available to give an 'answer'. This is left to informal opinion by an officer outside of an application process.… A certificate route would reduce uncertainty and, given the fact prosecution could be pursued for an offending advertisement, is important. Whilst it could be argued that it produces another layer it would give LPA certainty and a fee for those applications which it otherwise would not get when giving general feedback.

14.50 As for the resources implications, Blaenau Gwent CBC suggested that it did not anticipate this would result in many applications; Rhondda Cynon Taf CBC observed that:

> the procedure for applying for certificates of lawfulness generates comparatively few applications as a proportion of the total planning related applications to the Council, therefore the resource implications are unlikely to be significant.

14.51 Twelve consultees (including eight planning authorities, POSW and the RTPI) disagreed, largely on the basis that it adds another stream to the process, making it more complicated.

14.52 We still consider it important that there should be a straightforward process by which anyone can find out whether consent is required. We accept that this would be an additional procedure for planning authorities, but once uncertainty has arisen it has to be resolved somehow. A certificate procedure is greatly preferable to relying on an informal opinion from an officer; and it should not be significantly more time-consuming. Nor is it preferable to allow the matter to be resolved in the magistrates' court.

14.53 If it is argued that it is more expensive to issue a certificate than to give an informal opinion, this is likely to be because the officer will consider the matter less carefully if only offering an informal opinion – which rather supports the case for a more formal procedure, resulting in a certificate on which the applicant can safely rely. In any event, we too consider that there are unlikely to be many applications for certificates under the proposed procedure; and the authority would of course be able to charge a fee for such an application, which it cannot do for answering an informal enquiry.

Recommendation 14-9.

We recommend that:

(1) **a provision should be introduced in the advertisements regulations to enable a certificate of lawfulness to be issued in relation to a display of advertisements; and**

(2) **an appropriate enabling provision should be included in the Bill, in line with the approach indicated in Recommendation 14-6.**

BREACH OF ADVERTISEMENTS CONTROL

14.54 There are three mechanisms to deal with unauthorised displays of advertising:

1) deemed consent is granted for advertisements which have been used for many years;

2) a planning authority may be able to remove the display; or

3) it can prosecute those responsible.

Deemed consent for advertisements in place for many years

We provisionally proposed that Class 13 in Schedule 3 to the 1992 Regulations be amended to provide that deemed consent is granted for the display of advertisements on a site that has been used for that purpose for ten years, rather than by reference to a fixed date (currently 1 April 1974) (Consultation Question 14-10).

14.55 The first of the three mechanisms above regularises displays that should have been the subject of express consent some years ago, but were not – without the need for any action by either the planning authority or the advertiser. The deemed consent granted by Class 13 can be withdrawn by the planning authority serving a discontinuance notice, but until then, the advertiser can be assured that there will be no prosecution. This mechanism has been in place for a long time; the question is simply what should be the length of the relevant period.

14.56 Until 1987, deemed consent was granted for an advertisement (in England or Wales) that had been in place since 1 August 1948. The cut-off date was then rolled forward to 1 April 1974 – apparently to reflect the date of local government reorganisation. The 2007 Regulations (in England)[28] then replaced the reference to a fixed date by a rolling ten-year period, reflecting the rolling period applicable to other forms of planning enforcement provisions, under which unauthorised development is immune from enforcement action after four or ten years.[29]

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28 The Town and Country Planning (Control of Advertisements) (England) Regulations (SI 2007/783).

29 Four years for unauthorised building works, ten years for unauthorised change of use or breach of conditions.

14.57 We suggested that a rolling ten-year period was more appropriate than reference to a fixed date, which would inevitably recede into history.

14.58 Of the 30 consultees who responded to this proposal, 29 agreed with it. The Law Society described it as "sensible 'future-proofing'", and as being consistent with other enforcement provisions. The RTPI suggested that:

> this is a logical approach to take and we welcome the proposed change. The current fixed date of 1 April 1974 has lost all relevance, simply due to the passage of time. The ten-year approach fits well with other current timescales within the legislation.

14.59 Only one consultee, Torfaen CBC, objected to the proposal. They argued that the number of advertisements which are put up without consent could mean that granting deemed consent to these could result in problems. While they noted that discontinuance notices could be served, this could require the use of greater resources.

14.60 We remain convinced that a ten-year period seems sufficient to enable action to be taken. Indeed, even after that period has elapsed, it is still possible to serve a discontinuance notice to bring the deemed consent to an end – and such action is subject to a right of appeal, but no automatic right to compensation.

Recommendation 14-10.

We recommend that Class 13 in Schedule 3 to the 1992 Regulations should be amended to provide that deemed consent is granted for the display of advertisements on or at land that has been used for that purpose for ten years.

Removal of unauthorised advertising

We provisionally proposed that the power (currently in section 224) for the Welsh Ministers to include in Regulations provisions similar to those governing enforcement notices not be restated in the Code (Consultation Question 14-11).

14.61 We noted that, in most cases where advertisements are displayed without consent, the principal concern of the planning authority is not so much to punish those responsible as to remove the offending display.

14.62 Section 224 of the TCPA 1990 (in common with all its predecessors) provides that regulations may apply the general enforcement provisions of the Act to the control of advertisements, to enable a planning authority to issue an enforcement notice to bring about the removal of any unauthorised advertising.[30] However, none of the regulations applying in England or Wales since 1948 have contained such a procedure; other procedures, considered below, have been used instead. We

[30] Consultation Paper, para 14.76.

suggested that this procedure is not necessary, and that the enabling powers in the TCPA 1990 need not be restated in the Code.

14.63 Of the 30 consultees who responded to this suggestion, 26 agreed with it. Allan Archer expressed support on the grounds that, as proposal 14-12 (below) makes suggestions as to the alternative powers which may be utilised, the provision is likely to remain obsolete. Rhondda Cynon Taf CBC also described it as a "helpful simplification of the powers of planning authorities" in relation to the removal of unauthorised advertisements.

14.64 Two planning authorities and the Planning Officers' Society of South-East Wales disagreed, on the basis that they considered that the proposal would place the burden on authorities to remove unacceptable signage, whereas the offender should be required to remove it.

14.65 We consider that, in the case of larger or more valuable advertisements (such as electronic hoardings), the threat of the authority taking action to remove them is likely to cause the advertiser to take the necessary action itself. In the case of less elaborate advertising, a demand from the authority for the advertiser to take action is likely to lead nowhere, with the unauthorised advertisement remaining in place indefinitely. We therefore remain of the view that the only powers that are likely to be of any practical use are those enabling an authority to take direct action and those enabling it to prosecute – both of which we consider below.

14.66 The use of enforcement powers, as envisaged by section 224(1) and (2), is thus likely to be of little value, and we are not surprised that no regulations have ever been made to bring them into use.

Recommendation 14-11.

We recommend that the power (currently in section 224(1) (2) of the TCPA 1990) for the Welsh Ministers to include in Regulations provisions similar to those governing enforcement notices should not be restated in the Bill.

Removal of advertisements

We provisionally proposed that the powers currently in section 225 of the TCPA 1990 and in section 43 of the Dyfed Act 1987 be replaced with a new single procedure allowing the removal of any unauthorised advertisements, subject to: (1) no advertisement being removed without notice having first been given to those responsible; (2) a right of appeal being available against the notice; (3) compensation being payable for damage caused by the removal of the advertisement; and (4) protection for statutory undertakers to be afforded (Consultation Question 14-12).

14.67 At present, section 225 of the TCPA 1990 allows any planning authority to "remove or obliterate placards and posters". But it does not allow the removal of the hoardings or other structures to which the posters or placards are attached.

14.68 Section 43 of the Dyfed Act 1987 provides additional powers for planning authorities in areas of special control and conservation areas in the former county of Dyfed (now Ceredigion, Carmarthenshire and Pembrokeshire).[31] In such areas, the authority can remove any unauthorised advertising, other than a poster or placard (covered by section 225 of the TCPA 1990).

14.69 We described these procedures in the Consultation Paper, along with section 225A of the TCPA 1990, which applies only in England and allows a planning authority to remove any structure used for the purpose of the display of advertisements which do not have consent under the advertisements regulations.[32] We observed that there was clearly a need for planning authorities to be able to remove unauthorised advertisements. But the existing powers available in most of Wales, other than parts of West Wales, are limited to the removal (or obliteration) of posters and placards – they do not enable the removal of the structures used for their display. In England and in West Wales, by contrast, it is possible to remove any unauthorised "advertisement" – in the broadest sense of that term.

14.70 We therefore suggested replacing the existing provisions in section 225 of the TCPA 1990 and section 43 of the Dyfed Act 1987 by a single procedure allowing for the removal or obliteration of ***any*** advertisement displayed without consent or in breach of conditions attached to consent, subject to provisions on notices, rights of appeal, compensation and protection for statutory undertakers.

14.71 Of the 28 consultees who responded to this proposal, one community disagreed, without giving any reasons; all the others agreed.

14.72 The Law Society suggested an additional ground of appeal against such a notice, that consent should be granted for the offending display (equivalent to a ground (a) appeal against an enforcement notice).[33] In the Consultation Paper we suggested that, as with the existing procedure under section 225A in England, the appeal should be to the magistrates' court, and limited to technical grounds (principally relating to the lawfulness of the display, and the service of the notice). Since an appeal to PINS, possibly including an additional ground as suggested, it would be more likely to be used as a means of delaying the removal.

14.73 Two authorities suggested that the proposal to require a 21-day period to elapse before taking action would be ineffective in the case of fly-posting. We recognise the need for rapid action in some cases, and consider that it would be possible to allow a shorter period of, say, two days in the case of posters and placards, and 21 days in other cases – in effect retaining the features of both the existing regimes – on the grounds that the removal or obliteration of a poster or placard which requires a rapid response, and the advertiser can always replace it if appropriate, whereas the removal of a billboard is a more major operation.

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31 The county of Dyfed was created on 1 April 1974, as an amalgamation of Cardiganshire, Carmarthenshire and Pembrokeshire. It was abolished on 1 April 1996.

32 Consultation Paper, paras 14.75-14.82.

33 See **paras 12.88 to 12.96**.

14.74 The RTPI also noted that the section 225 procedure is relatively quick, and normally achieves a positive result with little paperwork involved, whereas the new procedure would be more drawn-out, with a right of appeal.

14.75 Torfaen CBC pointed out that there would need to be appropriate powers to enable planning authorities to enter land.

14.76 On reflection, rather than a single procedure as proposed in the Consultation Paper, we consider that it would be more straightforward:

1) to restate in the Bill, unamended, the provisions currently in section 225 of the TCPA 1990, allowing the removal or obliteration of unauthorised posters and placards (with no right of appeal), and

2) to introduce alongside them a new procedure equivalent to that available under the Dyfed Act (and under section 225A in England) to allow the removal of other unauthorised advertisements, with a right of appeal to the magistrates' court.

14.77 We have formulated our recommendation accordingly.

14.78 As for the resource implications of this proposal, the new power to remove advertisements would be entirely discretionary. Further, the mere threat of an unauthorised hoarding being removed is likely to lead to it being removed by the advertiser in many cases. The new procedure would therefore probably not be much used in practice – so as to involve an authority actually removing advertisements, as opposed to merely threatening to do so. We therefore do not consider the resource implications would be major.

Recommendation 14-12.

We recommend that the powers currently in section 43 of the Dyfed Act 1987 (removal of other unauthorised advertisements) should be replaced with a new procedure, applying to all areas in Wales, allowing the removal of any unauthorised advertisement other than a poster or placard, subject to:

(1) no advertisement being removed or obliterated without 21 days' notice having first been given to those responsible;

(2) a right of appeal being available to recipients of such a notice and to owners and occupiers of the site of the offending advertisement – on grounds relating to the lawfulness of the advertisement, the service of the notice, and the time for its removal;

(3) compensation being payable by the planning authority for damage caused to land or chattels by the removal of the advertisement (other than damage to the advertisement itself); and

(4) protection for statutory undertakers to be afforded in similar terms to section 225K of the TCPA 1990).

Prosecution

We provisionally proposed that the maximum sentence on conviction for unauthorised advertising be increased to an unlimited fine (Consultation Question 14-13).

14.79 Those who display advertisements without the necessary authorisation commit a criminal offence under section 224(3) of the TCPA 1990, punishable by a fine on summary conviction. We suggested in the Consultation Paper that the power to prosecute – rather than merely to take enforcement action – exists as a result of the ease with which advertisements may be erected, the substantial financial benefits accruing to those responsible,[34] and the cost to planning authorities of bringing about their removal.

14.80 However, we noted that the level of fines imposed as a result of prosecutions for unauthorised advertisement have substantially fluctuated since their introduction under s 32(3) of the TCPA 1947 – from a low of around £350 (at today's values), just before the introduction of the standard scale, up to £3,730, and now down to £2,500.[35] And it is 25 years since the last order was made increasing the fine at each level on the standard scale, so the maximum fine is likely to continue to fall in real terms.[36]

14.81 By way of comparison, the penalties for other offences under the TCPA 1990 – the carrying out of unauthorised works to a listed building and the felling of a protected tree – used to be a maximum fine of £20,000 on summary conviction and an unlimited fine on indictment.[37] Since 2015, the penalty in each case is an unlimited fine, either on summary conviction or on indictment.[38]

14.82 We therefore proposed that, for future offences, the maximum fine be replaced be an unlimited one. We suggested that this would be more appropriate, especially for offences committed by corporate defendants.

14.83 Of the 33 consultees commented on this proposal, 31 agreed with it, largely without further comment. The RTPI described how:

> excessive time and resources are used to take prosecution proceedings, with the result being a small fine. This proposal will potentially deter larger companies from undertaking unauthorised advertising. For some companies the displaying of unauthorised advertisements is lucrative. The additional income raised normally far exceeds any current maximum fine given.

14.84 Huw Williams (Geldards LLP) also agreed that "the penalties should be consistent with other planning enforcement crimes".

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34 Consultation Paper, para 14.75, fn 43

35 Consultation Paper, para 14.86.

36 Consultation Paper, para 14.86.

37 Listed Buildings Act 1990, s 9(4); TCPA 1990, s 210(2).

38 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on Summary Conviction) Regulations 2015 (SI 664), Sch 4, paras 18, 19.

14.85 Two consultees disagreed with the proposal. Both the Theatres Trust and the Canal & River Trust suggested that increasing the potential sentence for such convictions could result in the imposition of disproportionate fines. The former suggested that "many instances of unauthorised advertising are undertaken unknowingly, particularly where they relate to community and voluntary groups", and that a degree of discretion should be reserved for such offenders.

14.86 We agree that, in some cases, unauthorised displays of advertisements are the result of ignorance of the law, particularly in the case of individuals and community groups. But it would rarely be expedient for an authority to mount a prosecution in such a case. In any event, the amount of the fine actually imposed in any particular case will be determined in accordance with normal criminal sentencing principles, which enable the court to take into account all the circumstances of the particular case.

Recommendation 14-13.

We recommend that the maximum sentence on conviction for unauthorised advertising displayed on or after the date of the enactment of the Bill should be increased to an unlimited fine.

Policy basis for action against unauthorised advertising

We provisionally proposed that it be made clear on the face of the Bill, rather than (as at present) in the Regulations, that all statutory powers relating to advertising should be exercised in the interests of amenity and public safety (Consultation Question 14-14).

14.87 Regulation 4 of the 1992 Regulations provides that a planning authority exercising its powers under the Regulations must do so only in the interests of amenity and public safety, taking into account any material change in circumstances. But that does not apply to functions under the TCPA 1990 – including, in particular, functions relating to enforcement of control against unauthorised signs.[39]

14.88 We suggested that, in practice, functions relating to advertisements, including prosecutions brought under section 224 and removal of unauthorised advertisements under section 225 are generally only exercised in circumstances where they are necessary for reasons of amenity and public safety. And it does not seem appropriate for an authority to bring a prosecution where there is merely a technical breach.

14.89 We therefore suggested that the requirement for planning authorities to exercise their functions in the interests of amenity and public safety should be moved from secondary legislation to the Act, so that it would govern all relevant functions, including action against unauthorised advertising.

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[39] *Kingsley v Hammersmith and Fulham LBC* (1991) 62 P&CR 589 at p 592; see Consultation Paper, paras 14.91 to 14.93.

14.90 All 31 consultees who responded to this proposal agreed with it, largely without comment. Huw Williams suggested that the proposal would be a "useful clarification and restatement of the current position".

Recommendation 14-14.

We recommend that it should be made clear on the face of the Bill, rather than (as at present) in the Regulations, that all statutory powers relating to advertising should be exercised in the interests of amenity and public safety.

MISCELLANEOUS AND SUPPLEMENTARY PROVISIONS

14.91 In our Consultation Paper, we identified three areas of the law which were partially or wholly obsolete and suggested that they not be included in the Code. Our proposals were as set out below.

Advisory committees and tribunals

We provisionally proposed that the provisions in section 220 of the TCPA 1990 relating to advisory committees and tribunals not be included in the Code (Consultation Question 14-15).

14.92 Section 220(2)(d) of the TCPA 1990 provides that advertisements regulations may provide for special advisory committees and independent tribunals to determine appeals in place of the Welsh Ministers.[40] We noted in our Consultation Paper that no such provision has ever been made, either in England or Wales, in the seventy years since its first appearance.[41] We therefore proposed that the provision be removed.[42]

14.93 The 29 consultees who responded to this proposal unanimously agreed with it, almost entirely without comment. PINS noted that:

> In view of the role administered by the Planning Inspectorate on behalf of the Welsh Ministers there would appear to be no need for provision to be made for special advisory committees or independent tribunals.

Recommendation 14-15.

We recommend that the provisions in section 220 of the TCPA 1990 (relating to advisory committees and tribunals) should not be included in the Bill.

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40 TCPA 1990, s 220(2)(d), (4).

41 Note that it was originally set out in the TCPA 1947, s 31(1)(e), (2).

42 Consultation Paper, para 14.96.

Experimental areas

We provisionally proposed that the provisions in section 221(1)(b), (2) of the TCPA 1990 relating to experimental areas not be included in the Code (Consultation Question 14-16).

14.94 Section 222(1)(b) provides that advertisements regulations may make special provision for deemed consent to be given for the display of advertisements in "experimental areas". In our Consultation Paper, we noted that only one such "experimental area" had been designated, for a two-year period from 1987 to 1989.[43] After the period had lapsed, the area was not renewed, and the relevant class of deemed consent was accordingly withdrawn. Since then, section 221(1)(b) has remained unused; we accordingly suggested that it should not be restated in the Code.

14.95 Of the 29 consultees commenting on this proposal, 28 were in agreement, with PINS suggesting that there was no "need or justification for them", and Huw Williams (Geldards) describing the provision as "falling into desuetude".

14.96 Accessible Retail opposed the recommendation, arguing that it is valuable to have a mechanism to enable new ideas to be tried out. We can see the attraction of this in theory, but consider that it is very unlikely that this power would ever be used in practice.

Recommendation 14-16.

We recommend that the provisions in section 221(1)(b), (2) of the TCPA 1990 relating to experimental areas should not be included in the Code.

Compensation for removal of advertisements

We provisionally proposed that section 223 of the TCPA 1990, providing for the payment of compensation in respect of the costs of removing advertisements on sites that were in use for advertising in 1948, should not be included in the Code (Consultation Question 14-17).

14.97 Compensation is not normally payable when the use of a site for advertising has to be discontinued, or when a particular advertisement has to be removed. However, we noted in the Consultation Paper that it may be possible to claim very limited compensation in certain cases, where the site in question was being used for advertising on 1 August 1948, or the particular advertisement was being displayed on that date, under section 223 of the TCPA 1990.[44] In either case, it does not matter what happened in the years between 1948 and the date on which the removal or discontinuance has to take place.

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[43] The area was in Kent: see Consultation Paper, para 14.99.

[44] The significance of that date is that that was when the first advertisements regulations came into effect in (England and) Wales.

14.98 Further, the amount that can be claimed is very limited. It is restricted to expenses reasonably incurred in discontinuing the advertising (or removing the advertisement, as the case may be).[45] It does not, in particular, extend to loss of income from the use of the site for advertising – which may, in the case of a prominent site, be considerable. There has never been any compensation for such loss under the Regulations.

14.99 In the Consultation Paper, we suggested that few, if any, claims for compensation are now made under section 223.[46] We therefore provisionally considered that it need not be restated in the Bill.

14.100 Of the 30 consultees responded to this proposal, 29 agreed, largely without comment. PINS agreed in principle, but expressed concern that "it may be seen as prejudice if the right to make a claim was no longer available".

14.101 However, the entitlement to compensation under this provision was only ever designed to protect landowners who were displaying advertisements in 1948, when the present system of control came into existence. Preserving this entitlement some seventy years later seems anomalous.

Recommendation 14-17.

We recommend that section 223 of the TCPA 1990, providing for the payment of compensation in respect of the costs of removing advertisements on sites that were in use for advertising in 1948, should not be included in the Bill.

45 TCPA 1990, s 223(1).

46 Consultation Paper. paras 14.102 to 14.103.

Chapter 15: Protected trees and woodlands

INTRODUCTION

15.1 In the Consultation Paper, we explained the existing position relating to the control of works to trees of value in Wales. The relevant legislation is to be found in Chapter 1 of Part 8 of the Town and Country Planning Act ("TCPA") 1990 and the Town and Country Planning (Trees) Regulations 1999 (the 1999 Regulations).[1]

15.2 We explained that Chapter 1 of Part 8 is due to be substantially amended by the sections 192 and 193 of the Planning Act 2008. The new system came into force in England in 2012, but is yet to be brought into force in Wales. We have assumed that it will be brought into force (along with new regulations) at the same time as the new Bill that is the subject of this Report, subject to any changes that may be made as a result of this project.

15.3 Under the new system, a Tree Preservation Order ("TPO") is made under section 198 of the TCPA 1990, taking effect immediately but needing to be confirmed within six months. Any works need consent from the planning authority; the carrying out of works without consent is a criminal offence, under section 210. The regulations, made under powers in sections 202A to 202G of the TCPA 1990, prescribe the procedure for the making of a TPO, the exceptions to the need for consent for works; and the procedure for obtaining consent.[2]

15.4 Works to a tree in a conservation area must be notified to the authority, under section 211 of the TCPA 1990, which then has six weeks to decide whether to impose a TPO.[3] Failure to notify works is an offence – again, subject to a range of exceptions prescribed in regulations.

15.5 In addition to the controls under the TCPA 1990, the Forestry Act 1967 requires a felling licence to be obtained from Natural Resources Wales.[4]

15.6 We noted that the three statutory codes (TPOs, trees in conservation areas, and felling licences) are linked to each other, in such a way as to avoid overlapping control.[5] Further, since works to trees are often (although by no means always) linked to development proposals, each code is also linked to mainstream planning legislation, in that no consent needs to be obtained for tree works that are required in

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1 SI 1999 No 1892, revoked insofar as they apply to England by SI 2012 No 605, reg 26(1).

2 Consultation Paper, paras 15.3 to 15.14.

3 Consultation Paper, para 15.15.

4 The Forestry Act 1967 applies in Great Britain, but in England and Scotland a licence is required from the Forestry Commission. Once the Forestry and Land Management (Scotland) Act 2018 has been brought into force, probably in 2019, felling north of the border will require "felling permission" from the Scottish Ministers.

5 See, in particular, Forestry Act 1967, s 15.

order to carry out development that has been permitted in response to a planning application.

Possible reforms

15.7 In the Consultation Paper, we focussed particularly on the relevant primary legislation. However, as with the control of advertisements, much of the detail as to the management of works to trees is contained in secondary legislation, and we therefore also raised some points that could be considered for reform when regulations are being drafted to underpin the introduction of the new system.

15.8 We realise that this might not seem to be a high priority for new legislation. However, the changes introduced in the Planning Act 2008 have not yet been brought into force in Wales, and it would be perverse to restate in the Bill the relevant provisions of the TCPA 1990 in their unamended form. But when the new primary legislation is brought into force there will be a need for new regulations. And six years' experience has now been obtained of how such regulations operate in England. We therefore consider that this exercise provides a good opportunity to bring the tree preservation order system up-to-date. We understand that any such regulations will be the subject of a further consultation exercise before they are introduced.

15.9 It may also be noted that our proposals relating to the control of works to trees attracted a large number of responses, including a number from specialist bodies such as the Institute of Chartered Foresters ("ICF"), the Arboricultural Association ("AA"), the Woodland Trust, the Ancient Trees Forum, and the Association of Local Government Ecologists ("ALGE") and the London Tree Officers' Association ("LTOA").

TREE PRESERVATION ORDERS

What may be protected

We provisionally proposed that it would not be helpful to define a "tree" or a "woodland", in the context of what can be protected by a tree preservation order (Consultation Question 15-1).

15.10 The first obvious question is what may be protected by a tree preservation order – what is a tree? The question was considered, in the context of references to "trees" in planning legislation, by Cranston J in *Palm Developments v Secretary of State*.[6] He adopted the approach of Phillips J in *Bullock v Secretary of State*:

> Bushes and scrub nobody, I suppose, would call "trees", nor, indeed, shrubs, but it seems to me that anything that ordinarily one would call a tree is a "tree" within this group of sections in the 1971 Act [the predecessor of Chapter 1 of Part 3 of the TCPA 1990].[7]

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6 [2009] EWHC 220 (Admin), (2009) 2 P&CR 16, at [1].

7 (1980) 40 P&CR 246 at p 251. See also Technical Advice Note (TAN) 10, para 5.

15.11 And he concluded that a "sapling" (of any size) is a tree, and are capable of being protected by a woodland order.[8] His decision on that point has been upheld by the Court of Appeal in *Distinctive Properties (Ascot) v Secretary of State.*[9]

15.12 After examining the relevant case law, we concluded that there is not likely to be any exclusive definition of "tree" that will be entirely satisfactory. We considered a partial definition, stating that a "tree" does not include a bush or a shrub.[10] On balance we provisionally concluded that such a definition – if in the form of a legislative provision – would create as much uncertainty as it would avoid and that the term "tree" should not be defined in primary or secondary legislation.

15.13 A TPO may also protect a "woodland" – and the law relating to woodland orders is slightly different from that applying to orders protecting individual trees and groups. The Court of Appeal has noted that a woodland order is "a different animal" from an area order.[11] Here too, we considered that a statutory definition would not assist.[12] We return to the question of woodlands below.[13]

15.14 Of the 41 consultees who responded to this question, all but one agreed. Some agreed that a statutory definition might at first sight appear to be useful, but accepted that it appeared to be impossible to find one that would be satisfactory.

15.15 Mark Mackworth-Praed was attracted by the idea of a negative definition of a tree, so as to exclude a hedge, bush or shrub. He also suggested some criteria for identifying a woodland, as did Andy Lederer of the Institute of Chartered Foresters (ICF). The Woodland Trust and the Ancient Tree Forum emphasised the importance of protecting various other categories of wooded landscapes and special habitats – notably wood pasture and parkland.

15.16 We continue to be of the view that a statutory definition of the terms "tree" and "woodland" would be of little value, and might indeed be unhelpful. But that would still leave open the possibility of non-statutory guidance as to what types of trees, groups of trees and woodlands may appropriately be protected, and some of the suggestions we received could usefully be included in such guidance – which would be updated when the new system is introduced.

Recommendation 15-1.

We recommend that the Planning Act should not attempt to define a "tree" or a "woodland", in the context of tree preservation orders.

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8 Consultation Paper, paras 15.22 to 15.26.

9 [2016] 1 WLR 1839.

10 Consultation Paper, Chapter 15, fn 17.

11 *Evans v Waverley BC* [1995] 3 PLR 81, CA, per Hutchinson LJ at p 93D. As to area orders, see **para 15.24 to 15.38**.

12 Consultation Paper, para 15.28.

13 See **paras 15.30 to 15.32**.

Policy basis for protection

We provisionally proposed that the Bill should provide that: (1) that functions under the Code relating to the protection of trees should be exercised in the interests of amenity; (2) that "amenity" for that purpose includes appearance, age, rarity, biodiversity and historic, scientific and recreational value; and (3) that tree preservation regulations may prescribe matters considered to be relevant to amenity (Consultation Question 15-2).

15.17 A planning authority may only make a TPO where it appears to the authority that it is expedient to protect a tree or woodland "in the interests of amenity".[14] Unfortunately, the meaning of the term "amenity" is not entirely clear, and its usage in everyday speech has gradually changed over the last 70 years. In the Consultation Paper, we noted that the courts have tended to encourage wider definitions, such as "visual appearance and the pleasure of its enjoyment";[15] and "pleasant circumstances or features [and] advantages".[16] One dictionary definition suggests that it means "the pleasantness or attractiveness of a place".[17]

15.18 The general perception as to the value of trees, both by professionals and the public, is now based on a significantly wider range of factors than visual amenity alone. This is particularly so in relation to ancient, veteran and heritage trees. We thus considered that it would be desirable to make it plain that a tree preservation order may be made on the basis of factors other than visual appearance. To do so would both clarify the law and bring it into line with current thinking as to the basis on which an order ought to be made.[18]

15.19 We therefore suggested that the Bill could state that the functions in and under the Act are to be exercised in the interests of amenity, that "amenity" for these purposes includes appearance, rarity, biodiversity and historic, scientific and recreational value; and that the Welsh Ministers may provide in regulations a list of factors relevant to amenity. That would enable the legislation to be changed more readily to reflect changing policy imperatives.

15.20 Of the 47 consultees who responded to this question, 39 agreed. Several suggested additional criteria to be included – "landscape value", "green infrastructure value", and "cultural value". These are good examples of the sort of terms that could be included in secondary legislation. Mark Chester suggested that the word "amenity" should be replaced with "public good"; but we consider that this could be interpreted as restricting the use of TPOs to trees that are publicly visible.

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14 TCPA 1990, s 198(1). This will not be affected by the changes to be made by the Planning Act 2008 (see **para 15.2**).

15 *Cartwright v Post Office* [1968] All ER 646 at p 648.

16 *FFF Estates v Hackney LBC* [1981] QB 503, CA, per Stephenson LJ at p 517, citing with approval the dictum of Scrutton LJ in *Re Ellis and Ruislip-Northwood UDC* [1920] 1 KB 343 at p 370.

17 *Oxford Living Dictionary* (website accessed September 2018)

18 Consultation Paper, paras 15.30 to 15.38.

15.21 The Planning Inspectorate (PINS) and Julian Morris found widening the definition of "amenity" in the way proposed to be somewhat contrived. PINS suggested that the legislation could refer to "amenity and the special value of a tree in terms of age, rarity [etc]". Mr Morris went further, arguing that it was in principle wrong to use TPOs to protect trees that cannot be seen by the public.

15.22 Given the approach of the courts, noted above, to the meaning of the word "amenity", and the increasing awareness of factors other than merely visual amenity – and in particular the recognition by both the UK Parliament and the National Assembly of the value of biodiversity – we still consider that the inclusion of a wider definition of amenity would be of assistance. We note the view of Mr Morris, and suspect that many tree owners would share it; but we consider that such arguments are better made in the context of specific proposals to carry out works to particular trees.

15.23 As with the definition of "tree", this is clearly a matter where guidance should play a major role. However, we consider that it would be helpful, by one means or another, to confirm in legislation the broad principle that trees may be protected for reasons other than just their appearance.

Recommendation 15-2.

We recommend that the Bill should provide

(1) that functions under the Code relating to the protection of trees must be exercised in the interests of amenity; and

(2) that amenity for that purpose includes appearance, age, rarity, biodiversity and historic, scientific and recreational value; and

(3) that tree preservation regulations may prescribe matters considered to be relevant to amenity.

The making of tree preservation orders

We provisionally proposed: (1) that the Bill should make it clear that tree preservation orders can in future be made to protect trees – specified either individually or by reference to an area – or groups of trees or woodlands; (2) that area and group orders only protect only those trees that were in existence at the time the order was made; (3) that new area orders provide protection only until they are confirmed, at which time they must be converted into orders specifying the trees to be protected either individually or as groups; (4) that existing area orders, already confirmed as such, cease to have effect after five years; and (5) that woodland orders protect all trees, of whatever age and species, within the specified area, whether or not they were in existence at the date of the order (Consultation Question 15-3).

15.24 The TCPA 1990 provides that a planning authority may make an order to preserve "trees, groups of trees or woodlands".[19] The 1999 Regulations require that an order "shall specify the trees, groups of trees or woodlands to which it relates".[20] And the current model order (in the Schedule to those Regulations) prohibits the cutting down of "any tree specified in Schedule 1 to this Order or comprised within a group of trees or in a woodland so specified". All orders must be confirmed if they are to have effect for more than six months after they are made.

15.25 In the Consultation Paper we explored the distinction between the various categories of TPOs.[21] In particular, we noted uncertainty as to which trees are protected by area, group and woodland orders. We considered that it would be helpful to make explicit that area orders protect only those trees in existence at the time the order was made, whereas woodland orders protect all trees (including saplings) within the woodland, of whatever age.[22] This became points (2) and (5) of our Consultation Question.

15.26 We also noted that area orders are in a number of cases used on a precautionary basis to protect all trees on a large site on which development seems likely. The hope is that, once the development has been approved and completed, the remaining trees (including any new ones planted in pursuance of landscaping conditions) can then be protected by individual or group orders as appropriate. But in many cases the old area order remains in place indefinitely, even though the position on the ground will be completely different from when the order was made.

15.27 The use of area orders has for many years been discouraged by the UK Government. TAN 10 says that "the area classification should only be used exceptionally, and only until the trees can be given individual or group classification".[23] The courts too have urged authorities to avoid "blanket TPOs".[24] The United Kingdom Government proposed in 1994 to introduce a new provision requiring that area orders, after they had been confirmed, should be converted to orders specifying the trees protected individually or by reference to groups; and that existing area orders would cease to have effect after a five-year transitional period.[25] We suggested that that is a sensible approach. This became points (3) and (4) of our Consultation Question.

15.28 Of the 47 consultees who responded to this question, 16 were in agreement to all five of the suggested reforms. A further 16 agreed to all except (4); and a further 13 provided equivocal responses, including (in most cases) an objection to point (4). The Central Association of Agricultural Valuers queried the practicality of woodland

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19 TCPA 1990, s 198(1).

20 TCP (Trees) Regulations 1999, reg 2(1)(a).

21 Consultation Paper, paras 15.39 to 15.47.

22 *Evans v Waverley BC* [1995] 3 PLR 81, CA, at p 87B and 93C; *R (Plimsoll Shaw Brewer) v Three Rivers DC* [2007] EWHC 1290 (Admin) at [22]; *Palm Developments v Secretary of State* [2009] EWHC 220 (Admin), (2009) 2 P&CR 16, at [42].

23 TAN 10, Annex A, para A.5; see also Welsh Office Circular 64/78, *Memorandum*, para 43.

24 *Robinson v East Riding of Yorkshire Council* [2002] EWCA Civ 1660, (2003) 4 PLR 1, at para 24.

25 *Tree Preservation Orders: Review*, Department of the Environment, 1994, paras 2.16 to 2.19.

orders; and the Canal & River Trust queried the distinction between them and area orders.

15.29 The clarification of the distinction between area and woodland orders – points (2) and (5) in our Consultation Question – obtained widespread support. Indeed, in the light of responses to several Consultation Questions (notably 15-8), we have considered further the question of woodland orders.

15.30 The differences between woodland orders and other types of tree preservation orders are as follows:

1) a woodland order applies to protect all trees within the specified woodland, regardless of whether they were planted (or self-seeded) before or after the order was made, whereas any other order applies so as to protect only individual trees that were in existence when the order was made;

2) there is, arguably, a presumption in favour of consent being granted – at least for operations that accord with the practice of good forestry. For other orders, there is a presumption against consent being granted;[26]

3) there are special provisions as to imposing a requirement to replant woodlands felled with consent under a woodland order in the case of forestry operations;[27]

4) there are special provisions as to the compensation that may be claimed following the imposition of such a requirement;[28] and

5) the duties as to the replacement of trees are slightly less onerous, in that they do not apply to trees felled in a woodland without consent because they are dying, dead or dangerous.[29]

15.31 For these reasons, the Court of Appeal has recognised that a woodland order is a "different animal" from an area order[30] – and, by implication, even more different from an individual or group order. We agree.

15.32 We consider that it would significantly clarify the law if the basic provision in primary legislation stated that an authority may make an order with respect to such individual trees, groups of trees, areas of trees or woodlands as may be specified in the order.[31] Section 198(2) could then provide that an order protecting individual trees, groups of trees, or areas of trees is to be referred to as a "tree preservation order" and an order protecting a woodland is to be referred to as a "woodland preservation order".

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26 TCPA 1990, s 70(1A), applied by sch 2 to 1999 Model Order (at sch 1 to 1999 Regulations).

27 1999 Model Order, art 8; TCPA 1990, s70(1B), applied by sch 2 to 1999 Model Order.

28 TCPA 1990, s 204.

29 TCPA 1990, s 206(1)(b).

30 *Evans v Waverley BC* [1995] 3 PLR 81, CA, per Hutchinson LJ at p 93D; followed by Sir David Keene in *Distinctive Properties (Ascot) v Secretary of State* [2015] EWCA Civ 1250, [2016] 1 WLR 1839, at [16].

31 The relevant basic provision in primary legislation is currently section 198(1) of the TCPA 1990.

15.33 We emphasise that this would not in any way change the law, but it would clarify the distinction between the two types of order, and would enable the regulations to be drafted appropriately. Existing tree preservation orders protecting trees by reference to woodlands would automatically become woodland preservation orders.

15.34 We note the point made by several consultees that some planning authorities use woodland orders to protect groups of trees that were considered not to constitute woodlands. We have sympathy for this point, but it seems to us more suitable to be dealt with by guidance, as woodlands (however conceived or defined) come in all shapes and sizes, and it would be difficult to devise a satisfactory statutory rule to prevent the misuse of woodland orders.

15.35 As to the use of area orders, we observe that it is practical as a means of providing interim protection, sometimes on an emergency basis, where development is in prospect. But when an area order is confirmed,[32] it should then be converted into an individual, group or woodland order. That will not occur particularly often, and can be achieved without an undue burden on authorities.

15.36 We noted that there was little opposition to point (3) – other than from two consultees, on the basis of problems with gaining access to the land, although they themselves pointed to the availability of powers under section 214 to deal with that problem.

15.37 But there was general opposition to the idea of existing area orders ceasing to have effect after five years, due to resource limitations. We understand such concerns, and suggest that guidance should emphasise the desirability of gradually converting existing area orders, so that they can be done away with in the future.

15.38 We have modified our recommendation accordingly.

[32] An area order must be confirmed not later than six months after it was first made.

Recommendation 15-3.

We recommend that the Bill should provide that:

(1) **tree preservation orders can in future be made to protect individual trees, groups of trees, or areas of trees;**

(2) **that a group or area order protects only those trees that were in existence at the time the order was made;**

(3) **that a new area order provides protection only until it is confirmed, at which time it must be converted into an order specifying the trees to be protected either individually or as a group;**

(4) **that woodland preservation orders can in future be made to protect woodlands; and**

(5) **that a woodland preservation order can protect all trees, of whatever age and species, within the specified woodland, whether or not they were in existence at the date of the order;**

and that the new regulations should be drafted accordingly.

Notification of new orders

We provisionally proposed that it should be clarified that a tree preservation order is to be notified to the owners and occupiers of any parcel of land on, in or above which is located any part of any of the trees protected by the order (Consultation Question 15-4).

15.39 Any breach of a tree preservation order is a strict liability offence. In order to minimise the chance of anyone inadvertently committing an offence, it is important that the order is promptly and properly notified to all those likely to be affected, who may be about to carry out works on the tree in question.[33]

15.40 The 1999 Regulations require an order to be notified to the owners and occupiers of any land affected by an order and any neighbouring land.[34] In some cases, this can be a major administrative exercise. It may lead to complaints from the owner of a large estate about a tree which is several miles away.

15.41 We noted that the 2012 Regulations in England had sought to simplify this, by limiting the notification to the owners and occupiers of "the land on which the trees [etc] are situated". However, that leaves unclear precisely what is required in the common situation of a tree growing close to the boundary of a plot, overhanging a neighbouring plot. We suggested that the regulations should make it clear that an order is to be

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[33] See for example *Knowles v Chorley BC* [1998] JPL 593.

[34] Town and Country Planning (Trees) Regulations 1999, reg 1(2).

notified to the owners and occupiers of any parcel of land on, in or above which any part of the protected trees is located.

15.42 Of the 40 consultees who responded to this question, 37 were in agreement, generally without comment. Julian Morris pointed out the difficulties of determining with precision the land in which any part of the tree is located, given the different rooting habits of trees. In practice, however, the planning authority will no doubt err on the side of caution in notifying the owners of land in which the roots might be found, without needing to excavate.

15.43 One consultee pointed to the excessive burden that could arise in relation to an area TPO on a large plot of land, with a number of trees overhanging boundaries. Another suggested specifying a distance.

15.44 We consider that the precise formulation of the requirements as to notification will be finalised when the regulations are being drafted; and the points made in response to this question will be taken into account at that time.

Recommendation 15-4.

We recommend that new trees regulations should require that a tree preservation order is to be notified to the owners and occupiers of any parcel of land on, in or above which any part of the protected trees is located.

WORKS TO PROTECTED TREES

Overlap with planning permission

We provisionally proposed that there would be no benefit in bringing works to trees within the scope of development requiring planning permission (Consultation Question 15-5).

15.45 In the Consultation Paper, we noted that works to trees could arguably be classified as "development", requiring planning permission.[35] However, we are not aware of any reported case in which this is suggested, nor successfully argued. We therefore provisionally considered that there would be no benefit achieved by including tree works within the scope of development.

15.46 All of the 41 consultees who answered this question were in agreement.

[35] Consultation Paper, para 15.54.

Recommendation 15-5.

We recommend that works to trees should not be brought within the scope of development requiring planning permission.

Need for consent

15.47 As would be expected, there are many exceptions to the general rule that consent is required for all works to a tree protected by a tree preservation order. At present, some are in the TCPA 1990, and some are in the relevant order itself (the wording of which will vary depending on when it was made). Under the new system,[36] all exceptions to the need for consent will be in the regulations, which are likely to be amended from time to time.

15.48 However, we noted in the Consultation Paper that there are some difficulties with the present exceptions, which could usefully be resolved when consideration is being given to the exceptions to be included in the new regulations.

Works to dead, dying or dangerous trees

We provisionally propose that the exemption from the need for consent under a tree preservation order relating to works to "trees that are dying or dead or have become dangerous" (currently in section 198(6)(a) of the TCPA 1990) be replaced in the new trees regulations with an exemption relating only to the cutting down, topping, lopping or uprooting of a tree, to the extent that such works are urgently necessary to remove an immediate risk of serious harm, or to such other extent as agreed in writing by the authority prior to the works being undertaken (Consultation Question 15-6).

15.49 Under the current law, section 198(6)(a) of the TCPA 1990 provides that a tree preservation order may not prevent the cutting down, uprooting, topping or lopping of "trees which are dying or dead or have become dangerous".

15.50 In the Consultation Paper, we noted that it has long been recognised that determining whether a tree is "dying" is fraught with uncertainty. And it is often claimed, after a tree has been felled, that it was dangerous.

15.51 When the new system was introduced in England, therefore, the Regulations excepted from the need for consent only the following categories of works:

(a) the cutting down, topping, lopping or uprooting of a tree which is dead;

(b) the removal of dead branches from a living tree;

(c) the cutting down, topping, lopping or uprooting of a tree, to the extent that such works are urgently necessary to remove an immediate risk of

[36] See **para 15.2**. The new system will be introduced when the Planning Act 2008 is brought into force.

serious harm, or to such other extent as agreed in writing by the authority prior to the works being undertaken…"[37]

This effectively removes the "dying" element of the exception in section 198(6)(a), and tightens up the "dangerous" element.[38]

15.52 In Scotland, by contrast, the corresponding exception in the TCP (Scotland) Act 1997 provides that an order is not to prohibit "the uprooting, felling or lopping of trees if it is urgently necessary in the interests of safety".[39] That makes no provision for the felling without consent of trees that are "dying" or "dead". Nor is there any such exception in the current model order.[40] That means that if a tree is dead (or dying) *and* dangerous, consent will not be required to make it safe. But the need for consent cannot be avoided merely because a tree is dead or dying, so long as it is not dangerous.

15.53 We are aware that a dead or dying tree may in some cases be a significant habitat for wildlife; and that its removal may therefore be undesirable. In other cases, the removal of a dead or dying tree may be appropriate where it has become unsightly, possibly followed by the planting of a suitable replacement. Distinguishing between these two situations is a matter best left to the discretion of the planning authority. But there is no reason why such works should be exempt from the need for consent, unless the tree in question is dangerous.

15.54 We provisionally suggested, therefore, that in relation to dead and dying trees, the approach taken in Scotland was preferable. Thus, exceptions equivalent to those in regulation 14(1)(a)(i) and (b) of the new English Regulations need not be included when corresponding regulations are introduced in Wales.[41] However, in relation to dangerous trees, the approach in regulation 14(1)(c) of the new English Regulations (more tightly drafted than the equivalent provision in Scotland) seemed preferable to that envisaged by the current wording of section 198(6)(a) of the TCPA 1990. The former focusses on the necessity of the particular works proposed, rather than on the state of the tree.

15.55 Of the 45 consultees who responded to this question, 40 were in agreement – in several cases strongly. PEBA observed that "this proposal helpfully clarifies and tightens up the scope of the exemption".

15.56 A few consultees disagreed, on the basis that the proposal removed the right – indeed, arguably, the duty – of tree-owners to remove dead branches, and where appropriate dead trees.

15.57 We are aware of the duty of the occupiers of land, under the Occupiers' Liability Acts 1957 and 1984 and the law of negligence, to ensure that those on the land and on

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37 Town and Country Planning (Tree Preservation) (England) Regulations 2012, reg 14(1).

38 Consultation Paper, para 15.63 to 15.65.

39 Town and Country Planning (Scotland) Act 1997, s 160(6)(a).

40 Scottish Government Circular 1 of 2011, *Tree Preservation Orders*, Annex A.

41 *Taking Forward Wales's Sustainable Management of Natural Resources*, Welsh Government, June 2017, p 26 – para (b).

neighbouring land are reasonably safe. This will involve carrying out works to trees when so advised. We have therefore specifically allowed for that, by retaining in the proposed exception "the lopping … of a tree, to the extent that such works are urgently necessary to remove an immediate risk of serious harm".

15.58 That obviously leaves open the meaning of the words "urgent", "immediate" and "serious", but that must be a matter of professional judgment. It may also be noted that the phrase used is "immediate risk" not "immediate certainty".

Recommendation 15-6.

We recommend that the exemption from the need for consent under a tree preservation order relating to works to "trees that are dying or dead or have become dangerous" (currently in section 198(6)(a) of the TCPA 1990) should be tightened up when the trees regulations are next updated. We recommend it should extend only to the cutting down, topping, lopping or uprooting of a tree, to the extent that such works are urgently necessary to remove an immediate risk of serious harm (or to such other extent as agreed in writing by the authority prior to the works being undertaken).

Works to prevent or abate a nuisance

We provisionally proposed that the exemption from the need for consent under a tree preservation order relating to works that are "necessary to prevent or abate a nuisance" (currently in section 198(6)(b) of the TCPA 1990) should not be restated either in the Bill or in the new trees regulations (Consultation Question 15-7).

15.59 Under the current law, section 198(6)(b) of the TCPA 1990 (prior to amendment by the Planning Act 2008) provides that a tree preservation order may not prevent "the cutting down, uprooting, topping or lopping of any trees …so far as may be necessary for the prevention or abatement of a nuisance". The corresponding provision in Scotland is identical.[42]

15.60 In the Consultation Paper, we noted that this provision has given rise to considerable uncertainty.[43] Many trees overhang property boundaries. On one interpretation of s 198(6)(b), the branches or roots of a protected tree that cross a boundary can only be removed without consent where they can be shown to cause "actionable damage" – notably by roots extracting moisture from soil beneath the foundations of a neighbouring building. On the other interpretation (sometimes referred to as "pure encroachment"), they can be removed wherever they encroach into neighbouring airspace or soil, without showing that they have caused damage.

15.61 We summarised the case law on this point, up to the decision in *Perrin v Northampton BC*. At first instance, Judge Peter Coulson QC, sitting in the Technology and

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42 TCP (Scotland) Act 1997, s 160(6)(b).

43 TAN 10, para 26 notes that "the legality of such action is uncertain".

Construction Court, favoured the "actionable nuisance" approach.[44] However, in the Court of Appeal, both Sir John Chadwick and Blackburne J doubted whether it was possible to distinguish between "actionable nuisance" and "pure encroachment". However, the Court allowed the appeal on other grounds, and did not decide the point.[45]

15.62 The precise meaning of the phrase "abatement of a nuisance" thus remains uncertain. It is probably one of the most significant legal issues raised in this Chapter, particularly in the light of the number of protected trees growing on or close to property boundaries. We provisionally considered that it would be helpful to resolve that uncertainty.

15.63 We suggested that the best solution would be to abolish the "nuisance" exemption, so that landowners would still have a common law right (as per *Lemmon v Webb*[46]) to remove an encroaching root or branch, but would have to apply to the planning authority for consent under any TPO protecting the tree. Such an application could presumably be dealt with on the same basis as where a tree is causing similar problems on the land on which it is growing. No doubt the authority (or, on appeal, the Welsh Ministers) would give those problems appropriate weight, and balance them against any effect on amenity that would arise as a result of the proposed remedial works.

15.64 We noted that this proposal could potentially lead to more applications for consent. However, because of the uncertainty as to the current law, we suspect that few people proposing to carry out works to protected boundary trees rely on the exemption at present.

15.65 Of the 41 responses to this question, 37 were in agreement. Mark Mackworth-Praed described it as "brilliant and long overdue, as the Courts have steadfastly refused over the years to cut this Gordian knot. As the paper quite rightly says, very few people are so rash as to rely on the exemption, in view of the uncertainties surrounding it." Several planning authorities suggested that any new regulations should make it clear that TPO approval will be required for works proposed to prevent or abate a nuisance; this would remove any confusion. However, we consider that merely removing the exemption would be sufficient.

15.66 Two consultees drew attention to the problems caused by boundary trees, and the desirability of being able to carry out necessary remedial works – removing overhanging branches or, where appropriate, felling the tree in question. We do not doubt the desirability of such works, seen from the point of view of the person suffering from the falling leaves, or worrying about a possible falling branch. Equally, the planning authority may consider that the branch should be retained, in the interests of amenity – so long as it is not dangerous. But the key point is that this is precisely the type of disagreement that occurs all the time in relation to protected

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44 [2006] EWHC 2331 (TCC), [2007] 1 All ER 929, at [34] and [35].

45 [2007] EWCA Civ 1353, [2008] 1 WLR 1307, CA at [27], [29], [66] and [67]. Wall LJ agreed with both judgments.

46 [1894] 3 Ch 1, CA, upheld at [1895] AC 1, HL.

trees, and the need for consent should not be determined on the basis of who owns the tree.

Recommendation 15-7.

We recommend that the exemption from the need for consent under a tree preservation order relating to works that are "necessary to prevent or abate a nuisance" (currently in section 198(6)(b) of the TCPA 1990) should not be restated either in the Act or in new trees regulations.

Works to saplings

We provisionally proposed that a new exemption from consent under tree preservation regulations should be introduced, to allow the carrying out without consent of works to trees having a diameter not exceeding a specified size, save in the case of trees that were planted as a result of a requirement under section 206 or a condition of planning permission (Consultation Question 15-8).

15.67 Tree preservation orders are generally made to protect trees of reasonable size. But they may in some situations protect saplings from the moment they are planted – notably when they are introduced to replace a mature tree whose felling has been permitted, or are required by a landscaping condition attached to a planning permission for new development, or (under section 206 of the TCPA 1990[47]) following the removal of a tree because it was dead or dangerous or removed unlawfully. In such a case it would be illogical for the owner of the sapling to be able to remove it without consent.

15.68 However, we noted in the Consultation Paper that an order will also apply to self-seeded saplings within a protected woodland – since a woodland order protects all trees, even those appearing many years after it was made.[48] We suggested that it would therefore be unhelpful to require consent to be obtained for the removal of undergrowth and scrub (which is likely to contain such saplings). As Lord Denning put it, "in woodland like this, it is often, from the agricultural point of view (especially in a derelict area such as this) very important to get out the bushes, scrub and saplings and to replant".[49]

15.69 There is an exemption from the need to notify the planning authority of works to a tree in a conservation area where the tree in question is smaller than a specified size.[50] But there is no equivalent exemption from the need to obtain consent where the tree is protected by a TPO. However, the most recent model order in Scotland contains a provision whereby consent is not required for the cutting down, uprooting, topping or lopping of a tree having a diameter not exceeding 75mm (or 100mm in a

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47 See **para 15.86**.

48 See **para 15.30**.

49 *Kent CC v Batchelor* (1976) 33 P&CR 185, CA, at p 189.

50 TCP (Trees) Regulations 1999, reg 10(1)(e) and (f).

woodland where the work is to improve the growth of other trees).[51] This allows for the thinning of woodlands.

15.70 We provisionally considered that there should be a limited exemption from the need for consent in relation to small saplings, but not where they were planted as a result of a requirement under section 206 or a condition of a planning permission or a consent to fell another tree. That would protect saplings that had been deliberately planted and merited preservation, but would enable undergrowth and scrub to be removed in woodlands on a regular basis without fear of prosecution.

15.71 This proposal generated a large number of responses. Of those who responded, 16 were in agreement, whilst 23 disagreed.

15.72 Those who disagreed did so on the basis that the purpose of a woodland order is quite distinct from that of an order protecting individual trees. We have already drawn attention to the difference.[52] In particular, a tree preservation order (other than one relating to a woodland) protects specific plants, for as long as they are in existence. By contrast, a woodland preservation order protects a continuously evolving ecosystem. The introduction of an exemption for works to "trees" of less than a specified size would accordingly seem to allow saplings to be freely removed without any control.

15.73 We have considered this issue carefully. It is almost inevitable that the routine management of woodlands at present includes in many cases the pruning of some saplings, and the removal of others, probably without specific consent being obtained. Where a woodland preservation order applies, the carrying out of such works currently constitutes a criminal offence. That seems unsatisfactory in principle, and relying on the discretion of planning authorities not to prosecute is not a sufficient solution. On the other hand, the existence of the criminal sanction presumably does not prevent the necessary work being carried out.

15.74 We accept that a specific exemption of the kind proposed might send out the wrong message, encouraging inappropriate woodland management. But we note that none of those who disagreed with the proposed exemption put forward any suggestion as to how to avoid landowners being liable to prosecution when carrying out beneficial management works.

15.75 We observe that the corresponding exemption from the need to notify the planning authority of works to a tree in a conservation area is framed by reference to

> the cutting down or uprooting
>
> (i) of a tree whose diameter does not exceed 75 mm; or
>
> (ii) where carried out for the sole purpose of improving the growth of other trees, of a tree whose diameter does not exceed 100mm.

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51 Art 4(c) and (d) of the model order at Scottish Government Circular 1 of 2011, *Tree Preservation Orders*, Annex A.

52 See **paras 15.30** and **15.31**.

15.76 On that basis. it would be possible to introduce a similarly phrased exemption to allow the carrying out without consent of works to a tree protected by a woodland preservation order whose diameter does not exceed a specified size, but only where carried out for the sole purpose of improving the growth of other trees. That would allow saplings to be removed without consent as part of a responsible management programme, but not the removal of all understorey.

15.77 We consider that this point should be considered when the regulations are next updated, so that a possible exemption can be the subject of a further consultation exercise.

Recommendation 15-8.

We recommend that, when the regulations are next updated, consideration should be given to introducing a new exemption to allow the carrying out without consent of works to a tree protected by a woodland preservation order smaller than a specified size, but only where carried out for the sole purpose of improving the growth of other trees.

Certificate as to need for consent

We recommend that a provision be introduced in the trees regulations (along with an appropriate enabling provision in the Bill) to enable a certificate of lawfulness to be issued in relation to proposed works to a tree or woodland (Consultation Question 15-9).

15.78 As with the display of advertisements, there can be considerable uncertainty as to whether consent is required for proposed works to a tree or woodland, and particularly as to whether it falls within one or more of the exemptions in the Act or the order (or, under the new system, in the regulations).[53] And here too, this is particularly unfortunate given that carrying out works to protected trees and woodlands without consent is a criminal offence.

15.79 Again, therefore, we provisionally proposed that it would be more straightforward for there to be a mechanism, similar to that governing applications for certificates of lawfulness of proposed development (CLOPUDs), whereby anyone could seek a binding decision as to the lawfulness of proposed works to protected trees or woodlands. Such a certificate would then prevent the authority from instituting a prosecution.

15.80 Of the 40 consultees who responded to this question, 21 supported the proposal. The Central Association of Agricultural Valuers, for example, agreed that it would be useful for an applicant to have the option to gain a decision on the lawfulness of proposed works to protected trees that could be relied upon in any enforcement

[53] See **paras 14.47.**

action. Newport City Council made the sensible point that the resulting certificate would need to be subject to a time limit, to reflect the fact that trees grow.

15.81 But 5 responses were equivocal – questioning the need for a formal certificate procedure – and 14 disagreed.

15.82 The issues raised by this proposal are identical to those raised by the equivalent proposal relating to the need for advertisements consent, considered in the previous Chapter.[54] We consider that, as a matter of principle, anyone should be able to find out whether consent is required for a proposed operation – whether, for example, the authority consider that an exception applies.[55] The procedure as to such applications would probably best be included in the new Regulations when the new system is brought into effect. The enabling provisions in the Bill would need to be adjusted accordingly.

Recommendation 15-9.

We recommend that a provision should be introduced in the trees regulations (along with an appropriate enabling provision in the Act) to enable a certificate of lawfulness to be issued in relation to proposed works to a tree or woodland.

Applications for consent

We provisionally propose that planning authorities be required to acknowledge applications for consent under the trees regulations (Consultation Question 15-10).

15.83 We noted in the Consultation Paper that there is at present no requirement for a planning authority to acknowledge receipt of an application for consent under a tree preservation order, unlike other types of application under the TCPA 1990. Government guidance in England suggested that to do so would be good practice.[56] We suggested that this omission could be rectified when new regulations are made.

15.84 Of the 42 consultees who responded to this question, 40 agreed. The other two considered that it should be left as a matter of good practice.

15.85 We see no reason why tree applications should be treated differently from other applications under the TCPA 1990.

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54 See **paras 14.48 to 14.53**.

55 "Land-owners should have a reasonably accessible means of establishing what can be done lawfully with their property" – Robert Carnwath QC, *Enforcing Planning Control*, HMSO, 1989, para 7.2.

56 Department of the Environment, *Tree Preservation Orders: A Guide to the Law and Good Practice* (2000) at para 6.42.

Recommendation 15-10.

We recommend that planning authorities should be required to acknowledge applications for consent under the trees regulations.

REQUIREMENT TO PLANT REPLACEMENT TREES

Location of the replacement tree

We provisionally proposed that the requirement to plant a replacement tree following the felling of a dangerous tree or following unauthorised works should be limited to the planting of a tree of appropriate species at or near the location of the previous tree (rather than, as at present, in precisely the same place) (Consultation Question 15-11).

15.86 Section 206 of the TCPA 1990 imposes a duty to plant a replacement tree where

1) a tree protected by a tree preservation order or a woodland preservation order is removed, uprooted or destroyed unlawfully, or

2) a tree protected by a tree preservation order is removed without consent because it is dead, dying or dangerous.

15.87 The replacement tree is to be planted "at the same place", unless the planning authority agree to vary the requirement. In practice, planting at precisely the same place is often not practical – or it is unnecessarily expensive due to the need to remove the remains of the previous tree. We suggested that it would be sensible to relax the requirement slightly, to allow the replacement tree to be planted "at or near" the location of the original tree.[57]

15.88 Of the 46 consultees who responded to this question, all agreed. A few stated that the planning authority should decide the location of the replacement tree.

15.89 Mark Mackworth-Praed raised a further point relating to replanting requirements under section 206. He drew attention to section 206(3) of the TCPA 1990, which provides that, "in respect of trees in a woodland, it shall be sufficient to replace the trees removed, uprooted or destroyed by planting the same number of trees". This provision was considered by the Court of Appeal in *Distinctive Properties (Ascot) v Secretary of State*,[58] which concerned a decision by an inspector to uphold a tree replacement notice that had been drafted by reference to the area of woodland felled, and standard planting densities. The Court accepted that it was difficult if not impossible to calculate the number of trees that had been lost where a woodland had been completely felled, and accepted the inspector's approach as being correct.

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57 And see Department of the Environment, *Tree Preservation Orders: Review* (1994) at paras 2.44 and 2.45.

58 [2015] EWCA Civ 1250.

15.90 Mr Mackworth-Praed points out that it would be much clearer if the requirements of section 206(3) were framed by reference to the same number of trees or the same area of woodland. We agree, and consider that would indeed be useful.

Recommendation 15-11.

We recommend that:

(1) the requirement to plant a replacement tree following the felling of a dangerous tree or following unauthorised works should be limited to the planting of a tree of appropriate species at or near the location of the previous tree (rather than, as at present, in precisely the same place); and

(2) the requirement to plant trees to replace trees in a woodland that have been lost should be specified by reference to either the same number of trees or the same area of woodland.

Variation of tree replacement notice

We provisionally propose that there be introduced an explicit power enabling a planning authority to waive or relax a replacement notice (Consultation Question 15-12)

15.91 If a landowner fails to comply with a requirement to plant a tree either under section 206 of the TCPA 1990 or under a condition of a consent to fell a protected tree, the authority may enforce the requirement by the service of a replacement notice under section 207. There is a right to appeal against such a notice under section 208.

15.92 We noted in the Consultation Paper that there is at present no power for a planning authority to waive or relax a replacement notice.[59] However, the Courts have held that an authority may enforce only some of the requirements of a planning enforcement notice.[60] There is no reason why it should not be able to vary a tree replacement notice, albeit not in such a way as to extend its scope. We provisionally suggested that this omission should be rectified.

15.93 Of the 36 consultees who responded to this question, all agreed.

Recommendation 15-12.

We recommend that there should be introduced an explicit power enabling a planning authority to waive or relax a tree replacement notice.

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59 Consultation Paper, paras 15.95 to 15.97.

60 *Arcam Demolition & Construction Co. Ltd. v Worcestershire CC* [1964] 1 WLR 661.

Costs incurred by the planning authority

We asked whether it would be helpful to introduce powers enabling a planning authority to recover any expenses it has incurred in making and enforcing a tree replacement notice, under Section 209 of the TCPA 1990 (Consultation Question 15-13).

15.94 Section 209 of the TCPA 1990 provides that, where a replacement notice is not complied with, a planning authority may take action to carry out the required work, and recover the cost from the owner of the land. Section 209(5) provides that regulations may provide for any expenses incurred by an authority to be registered as a charge on the land, to enable recovery from subsequent purchasers. However, no such regulations have been made.[61]

15.95 We suggested in the Consultation Paper that such a recovery exercise might not be worthwhile in some cases. We asked consultees whether it would be helpful for the authority at least to have the power.[62]

15.96 Of the 40 consultees who responded, 35 agreed that the existence of such powers might be helpful; three felt that they would not be necessary. On balance, we consider that it would be do no harm to include such powers when the regulations are next updated, even if they are not often used.

Recommendation 15-13.

We recommend that powers to enable a planning authority to recover any expenses it has incurred in making and enforcing a tree replacement notice should be introduced when the regulations are next updated.

UNAUTHORISED WORKS TO TREES

15.97 Section 210(1) of the TCPA 1990 makes it an offence to cut down, uproot, or wilfully destroy a protected tree; wilfully to damage, top or lop the tree in such a manner as to be likely to destroy it; or to cause or permit any of those activities. A person guilty of an offence under section 210(1) is liable on summary conviction, or on conviction on indictment, to a fine (of any amount).[63]

15.98 Section 210(4) provides that any other breach of a tree preservation order is an offence, attracting a maximum penalty of a Level 4 fine on the standard scale (currently £2,500).

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61 Compare TCP General Regulations 1992 (SI No 1492), reg 14(2) (enforcement notices) and reg 14(3) (waste land notices).

62 Consultation Paper, paras 15.98 and 15.99.

63 TCPA 1990, s 210(2), amended by 2015 SI 664, Sched 4, para 18.

Reckless or indirect damage

We provisionally proposed that the scope of the matters prohibited by a tree preservation order be extended to include causing harm to a tree: (1) intentionally; or (2) recklessly (for example, by raising or lowering soil levels around the base of a tree, or grazing animals in woodlands) (Consultation Question 15-14).

15.99 The wording of section 210(1) indicates that the offence under that subsection is only committed where destruction or damage is "wilful". In the Consultation Paper, we provided examples of various activities that might or might not come within that categorisation.[64]

15.100 We noted that the courts have held that "wilful" in a criminal statute includes recklessness.[65] We suggested that the phrase "intentional or reckless" would be clearer than "wilful" – and arguably has the same meaning.[66]

15.101 All of the 40 consultees who responded to this question were in agreement.

15.102 The Central Association of Agricultural Valuers, the Woodland Trust and the Ancient Tree Forum all pointed out that grazing animals in woodlands may in some cases be desirable to maintain the habitat, and should not always be categorised as detrimental. We consider that this point could be highlighted in guidance.

Recommendation 15-14.

We recommend that the scope of the matters prohibited by a tree preservation order should be extended to include causing harm to a tree:

(1) intentionally; or

(2) recklessly.

One offence or two

We provisionally proposed that the two offences currently in section 210 of the TCPA 1990, relating to works liable to lead to the loss of the tree (subsection (1)) and other works (subsection (4)) be replaced with a single offence, triable either summarily or on indictment, of contravening tree preservation regulations (Consultation Question 15-15).

15.103 In the Consultation Paper, we explored the history of what is now section 210 of the TCPA 1990, noting that there was originally just one offence, referring to any breach of a tree preservation order. This was split into two offences – one relating to breaches likely to lead to the loss of the tree, and one relating to other, lesser works.

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64 Consultation Paper, paras 15.102 to 15.103.

65 *R v Sheppard* [1981] AC 394, per Lord Diplock at p 398.

66 Blackstone, *Criminal Practice* (2018) para A2.13.

We observed that this could cause practical problems, and open up potential abuses.[67] We also noted that the corresponding statutory code relating to listed buildings was framed by reference to a single offence, covering all works from the major to the trivial.

15.104 We therefore suggested that it would be preferable to replace the two offences with a single offence, consisting of any breach of tree preservation regulations.

15.105 Of the 43 consultees who responded to this question, all but one were in agreement.

15.106 One observed that there is a difference between poor pruning and felling a tree. We agree, but note that the penalty imposed in any particular case would be at the discretion of the sentencing court. We also note that it is possible to carry out a series of minor operations to a tree, which together result in it not being worth saving, and thus unlocking a development site yielding a substantial financial gain. It is accordingly worth the court having the full range of possible fines available to it in every case.

Recommendation 15-15.

We recommend that the two offences currently in section 210 of the TCPA 1990, relating to works liable to lead to the loss of the tree (subsection (1)) and other works (subsection (4)) should be replaced with a single offence, triable either summarily or on indictment, of contravening tree preservation regulations, punishable on conviction with a fine of any amount.

The need to prove an order is available for inspection

We provisionally proposed that the offence under section 210 (of contravening tree preservation regulations) and the regulations made under section 202A prohibiting works to a tree subject to a tree preservation order should be framed so as to require the prosecution to prove that: (1) a copy of the order had been served on the person carrying out the works before the start of those works; or (2) a copy of the order was available for public inspection at the time of the works; and that a defence should be available to a person charged with such an offence if able to show that he or she had not been served with a copy of the order and did not know, and could not reasonably have been expected to know, of its existence (Consultation Question 15-16).

15.107 We noted in the Consultation Paper that problems can arise in instituting a prosecution for unauthorised works to protected tree or woodland – or in mounting a defence to such a prosecution – if a copy of the order has not been served on those who need to know about it, or if one has not been made available for inspection.[68]

15.108 We suggested that it would be preferable for the prosecution to have to prove that the order was available for inspection at the time of the offence – or that a copy of it

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67 Consultation Paper, paras 15.105 to 15.113.

68 Consultation Paper, paras 15.114 to 15.119.

had been served on the person carrying out the works – rather than for those who are accused to have to show that the order has neither been served on them nor made available for inspection.

15.109 The offence in section 210 (as it will be following amendment by the Planning Act 2008) relates to the carrying out of various categories of works to a protected tree in contravention of tree preservation regulations; and the regulations (in England) prohibit works to "a tree to which an order relates".[69] We provisionally considered that the equivalent regulations in Wales should refer to the carrying out of works to a tree that is the subject of an order of which a copy had been served on the person carrying out the works, or of which a copy had been made available for inspection at the time of the works.

15.110 We also suggested that it would be appropriate for there to be a defence if the accused shows he or she had not been served with a copy of the order, and did not know, and could not reasonably have been expected to know, of its existence. That would enable the authority to prosecute contractors who had been personally served with a copy of the order, but would avoid liability attaching to, for example, an absentee owner to whom a copy of the order had not yet been sent.

15.111 Of the 46 consultees who responded to this question, 19 agreed, and a further 21 provided equivocal responses – making a number of useful points. In particular, a number of planning authorities pointed out that the suggested defence might open up the possibility of a contractor escaping liability by claiming to have asked the landowner and been told that there was no TPO. Equally, an owner could escape liability by claiming to have been persuaded by contractors to let them carry out the works, unaware of the TPO.

15.112 On reflection, we consider that the defence is not required. However, the first limb of what needs to be proved could usefully be widened to refer to a copy of the order having been served in accordance with the relevant statutory provisions as to service. Those provisions would then require a copy of the order to be served on persons interested in the land – which includes "every owner and occupier … and every other person whom the authority know to be entitled to fell any of the trees".[70]

15.113 Other consultees observed that a requirement to prove that an order was available "at the time of the works" could be problematic where works were carried out, possibly at a weekend, some while after the order was made. We consider that this evidential problem would be alleviated if there were to be introduced a further requirement to record on the order the date on which it was first made available.

15.114 We have already discussed the similar issues that arise in relation to offences under section 179 (resuming activity prohibited by an enforcement notice).[71]

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69 TCP (Tree Preservation) (England) Regulations 2012 SI No 605.

70 1999 Regulations, regs 3(1) and 1(2).

71 See **paras 12.140 to 12.144**.

Recommendation 15-16.

We recommend that the offence under what is now section 210 of the TCPA 1990 (contravening tree preservation regulations) and under regulations made pursuant to the provision restating section 202A (prohibiting works to a tree subject to a tree preservation order) should be framed so as to require the prosecution to prove that:

(1) a copy of the order had been served in accordance with the relevant statutory requirements before the start of those works; or

(2) a copy of the order was available for public inspection at the time of the works.

We also recommend that the regulations should include, alongside the requirement to make the order available for inspection, a further requirement to record on the order the date on which it was first thus made available.

TREES IN CONSERVATION AREAS

We provisionally proposed that it would be more straightforward if an authority, on being notified under section 211 of the TCPA 1990 of proposed works to a tree in a conservation area, were to have four possible responses open to it: (1) to allow the works; (2) to allow the tree to be felled; (3) to impose a tree preservation order, and to allow works to the tree; or (4) to impose a tree preservation order, and to refuse consent for the works (Consultation Question 15-17).

15.115 We outline in the Consultation Paper the unsatisfactory statutory regime relating to the control of works to trees in conservation areas, involving a two-stage approval process whereby notice has to be given of proposed works, under section 211 of the TCPA 1990, and the planning authority can then decide whether it wishes to make a tree preservation order to protect the tree in question.

15.116 We suggested that it would be more straightforward if an authority, on being notified of proposed works to a tree in a conservation area, were to have four possible responses open to it:

1) to allow the works (either felling of the tree or other works to it) to proceed, with no conditions (other than as to the two-year time limit);

2) to allow the tree to be felled, subject to a condition as to a replacement tree being planted;

3) to impose a tree preservation order, and to allow works to the tree other than felling, possibly subject to conditions; or

4) to impose a tree preservation order, and to refuse consent for the works.

15.117 This would not introduce a new procedure, so much as condense the convoluted procedure that already exists. That would save time and effort for the planning authority in cases where it wishes to do anything other than simply allow the works to proceed.

15.118 Some 43 consultees responded to this question, of whom 32 were in agreement (in a few cases on a hesitant basis). In relation to option (2), Mark Mackworth-Praed considered that it would be unreasonable for an authority to allow felling and then require a replacement. The Arboricultural Association, by contrast, considered this to be a positive step, as the loss of trees in a conservation area can have significant cumulative effect. We understand the concern, but note that frequently authorities grant consent for the removal of a protected tree, subject to a replacement condition. But we agree that such a condition should not be included in every case.

Recommendation 15-17.

We recommend that the provision restating section 211 of the TCPA 1990 should empower an authority notified of proposed works to a tree in a conservation area, to:

(1) allow the works to proceed, with no conditions other than a two-year time limit;

(2) allow the tree to be felled, subject to planting a replacement tree;

(3) impose a tree preservation order, and to allow works to the tree other than felling, possibly subject to conditions; or

(4) impose a tree preservation order, and to refuse consent for the works.

Chapter 16: Improvement, regeneration and renewal

INTRODUCTION

16.1 In the Consultation Paper, we noted that there are in the TCPA 1990 and associated legislation a number of provisions that relate to the powers of public authorities to intervene positively to bring about change to the physical environment.[1] Many of these powers were introduced over the last seventy years as a result of various policy-driven initiatives by governments of various political complexions, aiming to bring about regeneration and renewal – largely but not exclusively in urban areas. It has thus been recognised that it is not enough to rely on schemes being promoted by private landowners; in some cases, the public sector, in one form or another, must intervene to bring about improvement.

16.2 The initiatives under this heading are broadly in three categories:

1) powers for public authorities to encourage or enable improvement works to be carried out by private landowners;

2) powers for authorities to carry out such works on land remaining in private ownership; and

3) powers for authorities to acquire private land, with a view to carrying out works themselves or passing it to others for them to do so.

16.3 The statutory powers are to be found scattered throughout the TCPA 1990 itself, and in a number of other statutes – notably the National Parks and Access to the Countryside Act 1949, the Local Authorities (Land) Act 1963, the Welsh Development Agency Act 1975, the Local Government, Planning and Land Act 1980, the Derelict Land Act 1982, the Housing Grants, Construction and Regeneration Act 1996, the Anti-social Behaviour Act 2003, and the Localism Act 2011. It may be noted in particular that the 1975 Act has for some years not related to the Agency itself, as that body was wound up in 2006; but it now provides the authority for action by the Welsh Ministers.

16.4 Under the first of the three headings above, local authorities have powers to make financial advances to promote development;[2] to require owners to maintain their land and buildings;[3] to require them to remove or obliterate graffiti;[4] and to remove high hedges.[5] If owners do not comply with such requirements, the authority may enter

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1 Consultation Paper, paras 3.64 to 3.75.

2 Local Authorities (Land) Act 1963, ss 3, 4.

3 TCPA 1990, Part 8, Ch 2.

4 TCPA 1990, ss 225F to 225K.

5 Anti-Social Behaviour Act 2003, Part 8.

the land and carry out the necessary action itself. The Welsh Ministers too may give financial assistance, advice, and take other action to promote development.[6]

16.5 Under the second heading, planning authorities have a general power to carry out development on private land;[7] and a slightly oddly assorted collection of specific powers to reclaim or improve derelict land, to plant trees, and to provide garages and hard standings for vehicles.[8] The Welsh Ministers may carry out reclamation and improvement works.[9]

16.6 Under the third heading, planning authorities may acquire land for planning purposes;[10] and the Welsh Ministers have similar powers.[11]

Obsolete provisions

16.7 Alongside the powers noted above, which at least can be used and are still used – albeit in some cases not frequently – there are a number of statutory provisions that have been used rarely or not at all since they were first introduced; or which were used initially but not in recent years.

16.8 There have been a number of procedures introduced to enable public authorities to bring about new development on a large scale, usually by the creation of special bodies in place of the conventional planning authorities – perhaps in recognition of the fact that democratically controlled local authorities seem to be less effective than new executive agencies specifically created as agents of change. And in most cases planning control could be exercised either by the special body thus created, or by the Secretary of State (now the Welsh Ministers).[12]

Our recommendations

16.9 In Chapter 16 of the Consultation Paper, we outlined the powers that enable authorities to intervene in respect of individual buildings and plots of land in private ownership, and made some minor recommendations as to the way in which they should operate.[13] We also described the powers that used to exist to enable them to deal with graffiti and fly-posting, and proposed their reintroduction.[14] And we also explored briefly the scope of various area-based initiatives aimed at bringing about regeneration, and suggested that they were no longer required. These proposals were generally welcomed by those who responded.

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6 TCPA 1990, ss 304, 304A; Welsh Development Agency Act 1975; Derelict Land Act 1982, s 2.

7 Local Authorities (Land) Act 1963, s 2.

8 National Parks and Access to the Countryside Act 1949, s 89; Local Authorities (Land) Act 1962, s 5; Derelict Land Act 1982, s 3.

9 Welsh Development Agency Act 1975, s 16; Derelict Land Act 1982, a 2.

10 TCPA 1990, Pt 9.

11 TCPA 1990, s 228; Welsh Development Agency Act 1975, ss 16, 21A.

12 TCPA 1990, ss 7, 8; New Towns Act 1981 s 7.

13 Consultation Paper, paras 16.7 – 16.43.

14 Consultation Paper, paras 16.44 – 16.55.

16.10 In this Chapter, we outline our recommendations as to those matters, as well as note our recommendation for the inclusion in the Bill of the provisions relating to the compulsory acquisition of land for planning purposes, currently in Parts 9 to 11 of the TCPA 1990.

16.11 Finally, we touch upon the other statutory provisions relating to regeneration, improvement and renewal.

IMPROVEMENT OF UNSIGHTLY LAND AND BUILDINGS

16.12 Where land is in a condition which causes harm to the amenity of the local area, planning authorities may rely on two provisions to ensure that the land is improved. These include powers:

1) to require the owner or occupier of land that is "adversely affecting the amenity of the authority's area" to take steps to remedy its condition, and in default to carry out such works itself (under sections 215 to 219 of the TCPA 1990);[15] and

2) to undertake works on any land which is "derelict, neglected or unsightly" (or likely to become so) to reclaim or improve the land, and in default to acquire it (under section 89 of the National Parks and Access to the Countryside Act 1949).

Section 215 notices

We provisionally proposed that the Bill be drafted to make clear that a notice under section 215 of the TCPA 1990, requiring land to be properly maintained, can be served where the condition of the land: (1) is adversely affecting the amenity of part of the authority's area or the area of an adjoining authority; and (2) does not result in the ordinary course of events from, the lawful carrying on of continuing operations on that land or a continuing use of that land that is lawful (Consultation Question 16-1).

16.13 A notice under section 215 of the TCPA 1990 can be served by a planning authority on the owner and occupier of land the condition of which appears to affect the amenity of the authority's area (or that of a neighbouring authority). Such a notice will set out the steps that should be taken to remedy the condition of the land and the period within which they should take place.[16] A recipient of such a notice can either comply with its requirements, appeal against it (on any of four grounds specified in the Act),[17] or be prosecuted for failure to comply.[18] Authorities may also carry out the specified

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15 TCPA 1990, s 215.

16 TCPA 1990, s 215(1). Note that "land" includes "building" (TCPA 1990, s 336).

17 TCPA 1990, s 217.

18 TCPA 1990, s 216.

works, and recover the expenses of doing so from the owners (or from future owners).[19]

16.14 In the Consultation Paper, we noted that the grounds of appeal, set out in section 217, include:

1) that the condition of the land to which the notice relates does not adversely affect the amenity of the planning authority's area; or

2) that the condition of the land results "in the ordinary course of events" from lawful uses or operations carried out on the land.

16.15 The second ground reflects the fact that many perfectly lawful uses of land – for example, scrap dealers' premises, and many industrial sites – are such that the land is inevitably somewhat unsightly. Section 215 is not aimed at those, but rather at land that is in poor condition otherwise than as the inevitable result of its lawful use – such as overgrown gardens and other open land, semi-derelict factories, and vacant houses.[20]

16.16 Where the second ground of appeal can be substantiated, the appeal is bound to succeed, and the notice be quashed. An authority should therefore never serve a notice in such a case in the first place. We therefore suggested that section 215 should be amended to reflect this.[21]

16.17 Of 31 consultees who responded to this proposal, 26 agreed with it, largely without comment. Two consultees disagreed.

16.18 Blaenau Gwent CBC argued that it would place undue pressure on planning authorities considering the service of such notices, as it would require them to examine the "planning history of every site" and render section 215 "very difficult to use". However, we are not proposing any substantive change to the law, as the authority would have to consider the history of the site if called upon to respond to an appeal under ground (b). The only result of the change we are proposing would be to ensure that the authority considers the history of the site at the outset, rather than awaiting a ground (b) appeal.

16.19 In response to this proposal, Jordan Whittaker raised a slightly different point, relating to the problem that may arise where the unsightly condition of land is said to be the result of action by a third party. He pointed out that the section 215 procedure penalises the owner or occupier of land that has become unsightly due to the action of a third party and suggested that sections 215 and 217 be amended to allow for an owner to appeal against a notice on the grounds that the condition of the land was due to the act of a third party – and to prevent an authority serving a notice in such a case in the first place. He considered that this would be of assistance to landowners whose land has become unsightly as the result of illegal fly-tipping, and would prevent

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19 TCPA 1990, s 217.

20 Consultation Paper, para 16.17.

21 Consultation Paper, para 16.18.

authorities serving notice in such cases and then prosecuting landowners for non-compliance.

16.20 He drew attention, in particular, to section 59 of the Environmental Protection Act 1990, which allows a waste regulation authority to require the occupier of land on which controlled waste has been deposited to remove it within 21 days, but also requires the magistrates' court to quash the notice where it is satisfied that the occupier had neither deposited nor knowingly caused nor knowingly permitted the deposit of the waste on the land.

16.21 We understand the concern expressed by Mr Whittaker. Where the untidy state of land is said to be due to the action of a third party, the authority may or may not be aware of this. And it does seem unsatisfactory for a landowner to end up having to pay for the cost of remedying environmental degradation caused by a third party. On the other hand, it is desirable for owners to have an incentive to take steps to prevent their land from becoming in poor condition in the first place.

16.22 Section 219 already provides that any expenses paid by the landowner in complying with the notice, or paid by the owner to the authority to reimbursing it for carrying out the required works, are deemed to have been paid at the request of the person responsible for the state of the land. It is therefore, theoretically, possible for the owner to recover the money from the third party; but, pending such recovery, the owner is out of pocket. It might be helpful, therefore, for the authority to have a power (but not a duty) to recover the amount directly from the third party – where the third party can be identified. However, we suspect that the number of cases where that would apply would be very small.

16.23 However, that does not deal with the alternative position – likely to be more common in practice – where it can be shown that the state is the land is the responsibility of a third party, but that third party either cannot be identified or is unable to pay. It might seem sensible to introduce a further provision preventing the authority from recovering the cost of remedial works from the owner in such a case. However, that would mean that in many such cases the authority would end up not being able to recover the cost of the works from anyone, which might deter it from taking action. It would also discourage owners from protecting their land against such degradation in the first place.

16.24 A further problem may arise where the untidy state of land arises as a result of waste unlawfully deposited by a third party. If the authority takes action under section 59 of the 1990 Act, the occupier of the land may be able to escape liability, as noted above. But if the authority takes action under section 215 of the TCPA 1990, the owner or occupier will be liable to take remedial action, or to pay the authority to take such action. That seems unfair.

16.25 The more satisfactory remedy would therefore be to introduce a further restriction on the use by an authority of its power under section 215, whereby it may not do so where the conditions of the land results from the unlawful deposit of controlled waste or extractive waste in contravention of section 33 of the 1990 Act. That would ensure that an authority in such a case would have to take action under the 1990 Act, with all the consequences that flow from such action. The use of Section 215 would therefore be reserved for cases of land that has become "untidy" or "injurious to

amenity"; more serious cases involving fly-tipping would be dealt with under the 1990 Act.

Recommendation 16-1.

We recommend that section 215 of the TCPA 1990 should be restated so as to make clear that a notice requiring land to be properly maintained can be served where the condition of the land:

(1) is adversely affecting the amenity of part of the authority's area or the area of an adjoining authority;

(2) does not result in the ordinary course of events from, the lawful carrying on of continuing operations on that land or a continuing use of that land that is lawful; and

(3) is not the result of the unlawful deposit of controlled waste or extractive waste in contravention of section 33 of the Environmental Protection Act 1990.

We provisionally proposed that it should be possible to issue a notice (under what is now section 215 of the TCPA 1990) where the condition of the land in question results from the carrying on of operations or a use of the land that was lawful at the time it was done but is no longer lawful (Consultation Question 16-2).

16.26 In relation to the second limb of the test set out above, which refers to the carrying on of operations or a use of land which is lawful, we suggested that it should be possible to issue a section 215 notice in relation to land that was damaged by virtue of operations or activities which were lawful at the time, but which are no longer so.[22]

16.27 We received 26 responses to this proposal, of which 25 supported it, largely without any further comment.

16.28 Three consultees expressed concern about the potential consequences of such a proposal. The Institution of Civil Engineers noted that it can be unclear at what point something that was once lawful ceases to be so, and suggested that reliance on such an imprecise concept might result in more problems for the planning authority than it would solve.

16.29 We agree that the question of whether a particular permission remains "live" may add an additional layer of complexity to the process of issuing a section 215 notice. However, this suggestion does not impact on the ability of an owner or occupier to appeal against a notice on the ground that the condition of the land results from a use of the land that is still lawful, albeit no longer being made. If an authority wishes to use a notice to remedy damage to land caused by a use that was lawful at the time, and may or may not still be lawful, it will have to form a judgment. If the matter is

[22] Consultation Paper, para 16.19.

unclear, the authority will likely desist. However, the proposed amendment does give an authority a chance to remedy such damage in some cases at least.

Recommendation 16-2.

We recommend that it should be possible to issue a notice (under what is now section 215 of the TCPA 1990) where the condition of the land in question results from the carrying on of operations or a use of the land that were lawful at the time, but are no longer lawful.

We provisionally proposed that a notice under the provision in the new Code replacing section 215: (1) should come into force on a particular date specified in it (rather than at the end of a specified period from the date of service); (2) should be "issued" (rather than "served" as at present), with a copy served on all those responsible for the maintenance of the land in question; and (3) should contain a notice as to the rights of any recipient to appeal against it (Consultation Question 16-3).

16.30 Sections 215(3) and (4) of the TCPA 1990 require planning authorities to specify the period before which the notice takes effect, and that this period should not be less than 28 days after the service of the notice.

16.31 We noted in the Consultation Paper that these requirements are likely to cause some confusion in circumstances where notices are served on multiple recipients. We also observed that planning authorities were not explicitly required to point out to recipients of the notice that they had a right to appeal against it. We suggested that both omissions created uncertainty for recipients and could unfairly hinder them from appealing a notice. This echoes similar proposals we made in relation to various enforcement notices.[23]

16.32 All 28 consultees who responded to this proposal agreed with it. The Royal Town Planning Institute (RTPI) observed that the proposal would "expedite the process" and "make it explicit about the rights of all recipients to appeal". Huw Williams (Geldards LLP) also suggested that it ensured "consistency across the whole range of enforcement and cognate notices".

[23] See **Recommendations 12-8, 12-17,** .

Recommendation 16-3.

We recommend that a notice under the provision in the new Bill replacing section 215:

(1) should come into force on a particular date specified in it (rather than at the end of a specified period from the date of service);

(2) should be "issued" (rather than "served" as at present), with a copy served on all those responsible for the maintenance of the land in question; and

(3) should contain a notice of the rights of any recipient to appeal against it.

Appeals against section 215 notices

We provisionally proposed that the Code should make it clear that all appeals against section 217 notices are normally to be determined by inspectors (Consultation Question 16-4).

16.33 Appeals against a section 215 notice used to be made to the magistrates' court, on the grounds of appeal set out in subsection 217(1) of the TCPA 1990. They are now made to the Welsh Ministers, as a result of changes made by the Planning (Wales) Act 2015, which also provided them with powers to make regulations for the procedure at such appeals.[24]

16.34 We noted in the Consultation Paper that the power in paragraph 1 of Schedule 6 to the TCPA 1990, to determine the classes of appeals that are to be determined by an inspector, had not been extended to appeals under section 217.[25] This prevents such appeals from being determined by inspectors, which we considered to be unfortunate, as these appeals are particularly suitable for determination by inspectors. We proposed that this omission be rectified.

16.35 All 25 of the consultees who responded to this proposal agreed. The RTPI noted that "inspectors are appropriately trained to assess impact on the amenity of land" and that "recourse to inspectors would appear to be appropriate". Carmarthenshire CC also suggested that directing appeals towards inspectors would "provide an independent viewpoint" for the determination of such appeals.

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[24] TCP (Referred Applications and Appeals Procedure) (Wales) Regulations 2017, which allow the Welsh Ministers to determine the procedure to be followed with regards to such appeals, identify the information which is required to be submitted, and determine the classes of persons capable of making representations in the course of the appeal.

[25] Consultation Paper, paras 16.23 – 16.26. See also **Recommendation 11-2**.

Recommendation 16-4.

We recommend that the Bill should make it clear that all appeals against section 217 notices are normally to be determined by inspectors, in line with Recommendation 11-2.

Overlap between section 215 of the TCPA 1990 and section 89 of the 1949 Act

We provisionally proposed that the new Planning Code include powers, replacing those currently available under section 89(2) of the National Parks and Access to the Countryside Act 1949, to enable a planning authority, in relation to any land whose condition is affecting the amenity of its area or of any adjacent area (or is likely to affect it due to mining subsidence): (1) to issue a notice, and serve a copy of it on the owner and occupier of the land and to display an appropriate notice on the land, stating the authority's intention to carry out remedial works; (2) to carry out the works specified in the notice itself, either on terms agreed between it and the owner and occupier of the land or where no response is received to the notice; (3) to recover the cost of such works from the owner, or to make the cost a charge on the land; and (4) to acquire the land for the purpose of carrying out such works, using compulsory powers or by agreement (Consultation Question 16-5).

16.36 In our Consultation Paper, we noted that the powers available to planning authorities under section 89(2) of the National Parks and Access to the Countryside Act 1949 ("the 1949 Act") are similar to those available under section 215 of the TCPA 1990. In particular, under the 1949 Act they are able to carry out works to land that is "derelict, neglected or unsightly", or is likely to become derelict, neglected or unsightly as a result of former mining operations. This is similar to land whose condition is adversely affecting the amenity of the neighbourhood, which can be the subject of action under section 215.

16.37 It is to be noted that, despite the title of the 1949 Act, the powers under section 89 are not only available in relation to land within a national park, or even in the countryside, but can also be exercised in urban areas.

16.38 We observed that there are some differences between the two procedures. In particular, the powers that are available to a planning authority under section 89(2) of the 1949 Act but are not available to it under section 215 are as follows:

1) provided that it has obtained the consent of the owner, the authority may itself carry out remedial works on any land that is derelict, neglected or unsightly, regardless of whether or not the condition of the land arises as a result of its lawful use;

2) provided that it has obtained consent, the authority may also carry out remedial works on any land that is likely to become derelict, neglected or unsightly by reason of the collapse of the surface due to former underground mining; and

3) the authority may acquire any land that is derelict, neglected or unsightly (or is likely to become derelict etc due to mining-related collapse) using compulsory powers or by agreement, for the purpose of carrying out remedial works.

16.39 On the other hand, there is no explicit provision enabling an authority to use its powers under section 89 in relation to a building. There is no right of appeal in relation to any action under section 89. And the powers under section 89 may only be exercised in relation to Crown land with the consent of the relevant authority.[26]

16.40 Because of its wider scope, we suggested that the power under section 89(2) was still of some value. However, we suggested that it would be more satisfactory for the existing powers of an authority under section 89(2) of the 1949 Act to be included in the Planning Code alongside those currently available to it under section 215 of the TCPA 1990. Other than in relation to the matters noted above (buildings and Crown land), that would not of itself give authorities any more powers than they currently possess, but would bring those powers together into a coherent scheme.

16.41 We suggested that one useful additional power would be power to deal with land whose owner cannot be found – not least because such land is often in the greatest need of remediation. In such cases the authority cannot require the owner to take action under section 215 of the TCPA 1990; nor can it obtain the consent of the owner before carrying out the necessary work itself under section 89(2). We provisionally considered that this omission should be rectified.

16.42 Under a new procedure replacing section 89(2) an authority could issue a notice stating its intention to carry out works on land whose condition is adversely affecting the amenity of the neighbourhood,[27] serving copies on owners and occupiers (where known) and displaying a site notice as appropriate. The authority could then carry out those works, either on terms agreed between it and the owner and occupier of the land or where it had received no response to the notices within a specified period.

16.43 As with the current procedure under section 215, the cost of the works carried out could be recovered from the owner, where practicable, or made a charge on the land. And, as with the existing procedure under section 89, where the authority does not receive a satisfactory response to such a notice, it would then be able to acquire the land in question.

16.44 Of the 27 consultees who responded to this proposal, 23 agreed, largely without comment. Allan Archer noted that "the two powers are closely related" and suggested that they should "both be included, side by side if possible, in the Planning Code". Pembrey and Burry Port Town Council also described the proposal as "beneficial".

16.45 Three consultees disagreed with the proposal. The Central Association of Agricultural Valuers suggested that extending the scope of section 89(2) to allow planning authorities to charge owners for works undertaken on their behalf, where

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[26] National Parks etc Act 1949, s 101(7).

[27] Or on land that is likely to become derelict, neglected or unsightly due to the collapse of the surface as the result of former underground mining operations (as with the current section 89).

damage is caused by the owner or occupier's lawful use of the land, might result on unfair burdens being imposed upon them.

16.46 However, the power to carry out works under section 89(2) applies only where the owner has consented – and such consent will presumably only be granted subject to negotiation as to who pays the costs of them. Further, as the works in question are being undertaken to "repair or improve" land which would otherwise be "derelict, neglected or unsightly", and are therefore likely to increase its value, it seems fair in principle to require owners to bear such costs. In addition, as with the current procedure under section 215, the cost of the works carried out need not be immediately recovered. Instead, it could be registered as a charge on the land in the Local Land Charges Register, to be met when the land changes hands. There would thus be no immediate burden on landowners who are unable to meet the costs of the works (or those whose identity is unknown), but the land would still be improved.

16.47 The Law Society pointed out, correctly, that section 89(2) of the 1949 Act was originally introduced in its present form by the Derelict Land Act 1982, which conferred powers to deal with derelict land on the Welsh Development Agency (WDA) and local authorities. The powers of the WDA in due course passed to the Welsh Ministers. It therefore suggested that any reconsideration of section 89(2) should be postponed until a future phase of the codification exercise dealing with regeneration.

16.48 We share the hope that in due course the Part of the Act containing the provisions discussed in this Chapter will include all powers relating to regeneration and renewal.[28] However, in the meantime, we observe that the powers available under section 89 are very similar to those available under section 215. We therefore remain of the view that it would be helpful for users of the system, and in particular, planning authorities, if all the powers under section 89(2) of the 1949 Act are brought into the Bill, alongside those currently in section 215 of the TCPA 1990.

[28] See **paras 16.98 to 16.111**.

Recommendation 16-5.

We recommend that the Bill should include powers, replacing those currently available under section 89(2) of the National Parks and Access to the Countryside Act 1949, to enable a planning authority, in relation to any land whose condition is affecting the amenity of its area or of any adjacent area (or is likely to affect it due to the collapse of the surface as the result of underground mining operations):

(1) to issue a notice, and serve a copy of it on the owner and occupier of the land and to display an appropriate notice on the land, stating the authority's intention to carry out remedial works;

(2) to carry out itself the works specified in the notice, either

- **on terms agreed between it and the owner and occupier of the land (both as to the carrying out of the works themselves and as to the subsequent maintenance of the land); or**
- **where no response is received to the notice;**

(3) to recover the cost of such works from the owner, or to make them a charge on the land; and

(4) to acquire the land for the purpose of carrying out such works, using compulsory powers or by agreement.

Landscaping

We provisionally proposed that the new Planning Code include powers, equivalent to those currently available under section 89(1) of the 1949 Act, to enable a planning authority: (1) to issue a notice, and serve a copy of it on the owner and occupier of the land, stating the authority's intention to carry out landscaping works for the purpose of improving the land; (2) to carry out itself the works specified in the notice, either on terms agreed between it and the owner and occupier of the land; or where no response is received to the notice; and (3) to acquire the land for the purpose of carrying out such works, using compulsory powers or by agreement (Consultation Question 16-6).

16.49 Section 89(1) of the 1949 Act enables planning authorities to "plant trees on land in their area for the purpose of preserving or enhancing the natural beauty thereof". This provision allows authorities to plant trees (defined as including planting bushes, planting or sowing flowers, sowing grass and laying turf[29]) and to undertake acts which "preserve the natural beauty of land…and its flora, fauna and geological and

[29] 1949 Act, s 114(3), and (2).

physiographical features.[30] As with section 89(2), the authority may acquire the land in question for such purposes.

16.50 We suggested that this procedure could usefully be included in the Planning Code, alongside the provisions currently in section 215 of the TCPA 1990 and s 89(1) of the 1949 Act. However, as with the previous Consultation Question, we suggested that they be amended to allow planning authorities to exercise the power where there is no identifiable owner. We also suggested replacing the reference to "tree planting" (even with its expanded definition, noted above) with a broader definition of the works that may be carried out – perhaps along the lines of those specified in section 5(2) of the Inner Urban Areas Act 1978.[31]

16.51 Of the 26 consultees who responded to this question, 21 agreed with it. The RTPI described the power as being capable of "being used positively to promote economic regeneration and serve the aims of wider sustainable development".

16.52 Five consultees disagreed. The Central Association of Agricultural Valuers and Sirius Planning suggested that the provision in the 1949 Act which allows planning authorities to acquire land compulsorily for this purpose was an illegitimate use of public power and should be excluded from the scope of the provision. The Country Land and Business Association (CLA) expressed concern about the validity of works undertaken without the landowner's consent or agreement. Carmarthenshire CC questioned whether it should be possible for an authority to recoup from the landowner the cost of exercising its powers under this provision.

16.53 On reflection, we consider that there is a distinction to be made between the use of powers under section 89(2) of the 1949 Act and those under section 89(1). The powers under section 89(2) – and indeed powers under section 215 of the TCPA 1990 – relate to land that has become unsightly or derelict, and whose appearance is harming the appearance of the surrounding area, and enable the authority to take remedial action to remove the problem. By contrast, powers under section 89(1) relate to land that may be already in an adequately satisfactory state, which the authority wishes to improve.

16.54 It makes sense for there to be a power to acquire land in the first category, if necessary under compulsory powers, as that may realistically be the only way to ensure that it is improved and, just as important, that it does not become derelict again. Such problems not infrequently arise as a result of the owner of land being unwilling to co-operate, or unable to do so due to limited resources, or being absent, or simply unknown. In such cases, acquiring the land may be necessary.

16.55 However, in the second category, although the authority may perfectly properly wish to improve the land, perhaps as part of a wider regeneration or improvement scheme, there seems no basis on which to justify compulsory acquisition, except where the owner is unknown after reasonable enquiry having been made. We therefore consider that, in relation to an authority exercising it improvement powers under what is currently section 89(1), it should have power to acquire the land involved by

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30 1949 Act, s 114(3).

31 Consultation paper, paras 16.42 to 16-43.

agreement, and using compulsory powers where the owner is unknown, but not otherwise. There is in any event a power of compulsory purchase available where the planning authority wishes to acquire land for the proper planning of the area.[32]

16.56 The Law Society disagreed with this proposal, on the same basis as it disagreed with the previous proposal.[33] We understand the concern, but consider that it would be a worthwhile to include this power in the Planning Code, pending any more far-reaching reform of the law relating to regeneration and renewal.

Recommendation 16-6.

We recommend that the new Planning Code should include powers, equivalent to those currently available under section 89(1) of the 1949 Act, to enable a planning authority:

(1) to issue a notice, and serve a copy of it on the owner and occupier of the land, stating the authority's intention to carry out landscaping works for the purpose of improving the land;

(2) to carry out itself the works specified in the notice, either

- **on terms agreed between it and the owner and occupier of the land (both as to the carrying out of the works themselves and as to the subsequent maintenance of the land); or**
- **where no response is received to the notice; and**

(3) to acquire the land for the purpose of carrying out such works by agreement, or using compulsory powers where the owner cannot be found after reasonable enquiries have been made.

GRAFFITI AND FLY-POSTING

We provisionally proposed that the Code should contain powers for the Welsh Ministers to make regulations to facilitate the removal of graffiti and fly-posting, by enabling planning authorities: (1) to deal with graffiti or fly-posting that is detrimental to amenity or offensive, by requiring the users or occupiers of the land affected to remove it; (2) to deal with persistent unauthorised advertising, by serving a notice on those responsible for surfaces persistently covered with fly-posting, requiring them to take preventive measures to minimise recurrence; and (3) in either case, to take direct action where necessary, and recharge those responsible where appropriate (Consultation Question 16-7).

16.57 One specific form of environmental degradation that has received particular attention in recent years is the defacing of buildings and other structures with graffiti and

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32 See **para 16.103**.

33 See **para 16.47**.

flyposting. In the Consultation Paper, we summarised what we described as the slightly curious history of the legislation in this area. In short, there were in force in Wales provisions enabling authorities to deal specifically with graffiti (from 2004 to 2014) and flyposting (from 2007 to 2014). There are no such provisions in force at present.

16.58 We provisionally suggested that it would be appropriate to reintroduce some form of control, broadly similar to the provisions introduced into the TCPA 1990 by the Localism Act 2011 in England, enabling authorities:

1) to deal with graffiti or fly-posting that is detrimental to amenity or offensive, by requiring the owners or occupiers of the land affected to remove it; and

2) to deal with persistent unauthorised advertising, by serving a notice on those responsible for surfaces persistently covered with fly-posting, requiring them to take preventive measures (such as applying stippled paint, which makes fly-posting more difficult) to minimise recurrence.

16.59 We considered that it would be appropriate to include such provisions in a freestanding set of regulations, not least because it is likely that they would need to be amended from time to time in the light of experience. And we recognised that the details of the provisions to be included in such regulations would need to be the subject of further detailed consideration, and in due course a separate consultation.

16.60 We therefore suggested that the most appropriate way forward at this stage would be to introduce in the new Bill a power enabling Ministers to introduce regulations to facilitate the removal of graffiti and flyposting. If the Welsh Ministers were to take advantage of such a power, that would enable the production of regulations forming a separate self-contained code governing the removal of graffiti and fly-posting – analogous to the regulations relating to the display of advertisements and the carrying out of works to protected trees. [34]

16.61 Of the 29 consultees who responded to this question, 22 were in agreement. The Law Society commented:

> We agree that powers to address graffiti and fly-posting should be introduced and that a self-contained code made contained in regulations offer a more flexible way of addressing a persistent but also constantly evolving problem.

16.62 Five consultees raised objections to the principle of the system that has evolved in England and Wales over the years and used to operate in Wales until recently – notably in relation to the principle of making the owner or occupier of land to some extent responsible for sorting out the problems of flyposting and graffiti by third parties. We consider that such objections, although entirely understandable, can best be considered when regulations are made in due course, along with possible procedures to minimise any hardship for owners of vulnerable properties. At this stage we are only suggesting that the Welsh Ministers should have regulation-making

[34] Consultation Paper, paras 16.44 to 16.55.

powers; there will no doubt be considerable discussion as to how those powers should be exercised.

16.63 The North and Mid Wales Association of Local Councils suggested that any enforcement system should also include the possibility of fixed penalty notices being served by town and community councils, who have taken over the street scene from principal authorities. That seems to be a sensible suggestion. Here too, appropriate regulation-making powers could be introduced to enable that to occur. The practicalities and details can then be considered when regulations are made in due course.

Recommendation 16-7.

We recommend that the Bill should contain powers for the Welsh Ministers to make regulations to facilitate the removal of graffiti and fly-posting,

(1) by enabling planning authorities:

- **to deal with graffiti or fly-posting that is detrimental to amenity or offensive, by requiring the users or occupiers of the land affected to remove it;**
- **to deal with persistent unauthorised advertising, by serving a notice on those responsible for surfaces persistently covered with fly-posting, requiring them to take preventive measures to minimise recurrence; and**
- **in either case, to take direct action where necessary, and recharge those responsible where appropriate; and**

(2) by enabling town and community councils to serve fixed penalty notices in appropriate cases.

AREA-BASED INITIATIVES GENERALLY

16.64 In the second half of Chapter 16 of the Consultation Paper, we mentioned briefly a variety of legislative regimes that have created powers for central Government (now the Welsh Ministers) to set up various types of special authorities and other arrangements with the aim of promoting generation or improvement.

16.65 We explained that each of the various initiatives has been used only to a very limited extent, or not at all, in Wales. Further, experience in recent decades suggests that new initiatives to facilitate urban regeneration are implemented either by the use of normal planning legislation – in particular, through the development plan process – or are accompanied by the introduction of completely new legislation, designed to reflect the particular features of the policy initiative that is to be introduced. We therefore found it unlikely that the various pieces of legislation highlighted in the remainder of the Chapter would be utilised in the future.

16.66 We noted that the main body of planning legislation, and in particular the TCPA 1990, contains relatively few references to these various area-based regimes. The main link is in the definition of a local planning authority within an area that is subject to one of them. So, for example, an enterprise zone authority or an urban development corporation can, at least in theory, be designated as the planning authority within its area – although it is noticeable that no enterprise zone authority ever has been so designated, and nor has any urban development corporation in Wales.

16.67 We also noted that the legislation governing each of these special types of area is clearly linked to mainstream planning legislation, if only by the nature of the subject matter; and that this codification exercise is an ideal time to review or abolish it. It is easy to put off such a review indefinitely, but to do so now would result in the Welsh statute book continuing to contain legislation that is extremely unlikely ever to be used; this is not helpful for those devising future legislation or, more important, for users.[35]

16.68 Carmarthenshire CC disagreed with this approach, observing in each case that, although such designations have not been much used in the past, retaining them keeps all options open to local authorities going forward. However, it suggested that the detailed wording of each set of provisions should be considered, to ensure they are fit for purpose.

16.69 The Law Society, on the other hand, observed:

> We agree that these are all powers that can be removed. Future proposals for special purpose authorities are unlikely to be so closely aligned to the structures of these bodies that any of them could be revived without significant amendment. It is also desirable that future legislation starts with a clean slate, and meanwhile the Code will be shorter and simpler if the existing models are not retained.

16.70 These opposing views encapsulate the two competing approaches to this issue. It is indeed probable that the detailed wording of each set of statutory provisions is not fit for purpose; but that begs the question of what will be the purpose for which they will be required. We therefore remain of the view that it would be a significant improvement to the legislation in this area if all of these redundant provisions are amended so that they no longer apply in Wales.

Enterprise zones

We provisionally proposed the amendment of Part 18 of and Schedules 32 to the Local Government, Planning and Land Act 1980 (enterprise zones) and the provisions relating to enterprise zones in the TCPA 1990 and related legislation so that no longer apply in relation to Wales (Consultation Question 16-8)

16.71 In the Consultation Paper, we noted that there are two distinct categories of "enterprise zones", arising under quite distinct legal regimes:

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35 Consultation Paper, paras 16.56 to 16.60.

1) those designated by the Secretary of State under powers in the Local Government, Planning and Land Act 1980 ("the 1980 Act"); and

2) those recognised by the Treasury under the Capital Allowances Act 2001, as amended by the Finance Act 2012.[36]

16.72 As to the first, powers were introduced, in Schedule 32 to the 1980 Act, to enable the Secretary of State (now the Welsh Ministers) to invite a local authority to adopt an enterprise zone scheme.[37] The scheme could appoint the "enterprise zone authority" to be the local planning authority, if it was not already; and could grant planning permission for the development specified in it. Section 6 of the TCPA 1990 provided that an order designating a zone could specify that the "enterprise zone authority" was to be the planning authority in relation to specified categories of development.

16.73 The scheme also exempted occupiers of non-domestic premises from liability to pay rates and introduced 100 per cent capital allowances for industrial and commercial buildings. It also conferred benefits in relation to development land tax, industrial development certificates, and industrial training levies.

16.74 In the following decades, some 35 orders were made under Schedule 32 to the 1980 Act, between them designating just over 100 zones. Of those, four orders designated 15 zones in Wales.[38] No order designated as a planning authority any body that was not already the planning authority. Each order lasted for ten years. No order has been made since 1996, and none in Wales since 1985. It follows that no enterprise zone has existed under the 1980 Act in Wales for over 20 years.

16.75 As to the second type of "enterprise zone", a new scheme was introduced by the Finance Act 2012, enabling expenditure on certain plant or machinery to attract tax advantages in respect of capital allowances, if it is in an assisted area designated in an order by the Treasury within an enterprise zone.[39] There are currently eight zones in Wales that have been designated under these provisions – in the Capital Allowances Act 2001, as amended by the 2012 Act.[40] Their extent is shown on maps that can be accessed via the Treasury website and the Welsh Government's "Business Wales" website.[41]

16.76 The recognition of an enterprise zone under the provisions of the 2001 Act has no direct implications for the planning system, although it is likely that the planning

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36 There is a third type of enterprise zone, under the Enterprise Zones (Northern Ireland) Order 1981 – presumably as an offshoot of the initiative that led to the designation of enterprise zones under the 1980 Act. This scheme is not relevant for present purposes.

37 Consultation Paper, paras 16.63 to 16.66.

38 Swansea (the first zone to be designated in Great Britain, under 1981 SI 757) and 13 on the shores of the Milford Haven Waterway (1984 SI 443/ 44) and Lower Swansea Valley (1985 SI 137).

39 Consultation Paper, paras 16.67 to 16.71.

40 Anglesey, Cardiff Airport and St Athan, Central Cardiff, Deeside, Ebbw Vale, Haven Waterway, Port Talbot Waterfront, and Snowdonia.

41 https://businesswales.gov.wales/enterprisezones/zones

authority will be more sympathetic to new development, and may use other tools such as local development orders to assist business start-ups.

16.77 We observed that no more enterprise zones were likely to be designated under the powers in the 1980 Act, and suggested that no purpose would be served by retaining the possibility of such designations. Further, the existence of two incentive regimes with the same title but set up under quite different legislation only goes to emphasise the need to remove redundant provisions from the statute book.

16.78 We therefore provisionally considered that the legislation relating to the existence of enterprise zones under the 1980 Act is redundant, and could be amended so that it no longer applies in Wales. And section 6 of the TCPA 1990, under which an enterprise zone authority may be designated as the local planning authority in its area, need not be restated in the Code.

16.79 This would have no effect whatsoever on the enterprise zones already designated in Wales under the Capital Allowances Act 2001, nor on the possibility of further zones (in England or Wales) being recognised by the Treasury under that legislation at some point in the future.

16.80 Of the 24 consultees who responded to this suggestion, all but one were in agreement. As before, Carmarthenshire CC argued that retaining these powers provide greater numbers of options open to local authorities going forward. Again, as before, we do not agree.

Recommendation 16-8.

We recommend the amendment of Part 18 of and Schedule 32 to the Local Government, Planning and Land Act 1980 (enterprise zones), and the provisions relating to enterprise zones in the TCPA 1990 and related legislation, so that they no longer apply in relation to Wales.

New town development corporations

We provisionally proposed the amendment of the New Towns Act 1981 and the provisions relating to new towns in the New Towns and Urban Corporations Act 1985, the TCPA 1990, the Housing and Regeneration Act 2008 and related legislation, so that they no longer apply in relation to Wales (Consultation Question 16-9).

16.81 In the Consultation Paper we summarised briefly the history of new towns, noting that ten new towns in England were created in 1946-50, a further five in 1961-64, and a final six in 1967-70. In Wales, Cwmbran New Town was designated in 1949, and the Development Corporation was subsequently wound up in 1988.[42] Newtown New Town (in Powys) was designated in 1967,[43] and the functions of the Development Corporation were subsequently transferred to the Development Board for Rural

[42] 1949 SI 2054; 1988 SI 265

[43] London Gazette, 28 December 1967; 1967 SI 1893.

Wales.[44] A third Welsh new town was proposed in 1969, at Llantrisant; but that proposal never came to fruition.[45]

16.82 The New Towns and Urban Development Corporations Act 1985 then provided for the completion of the new towns programme, and the eventual disengagement from it of the public sector. It also amended the functions of the Commission, and made provision for its eventual winding-up. This process was taken a step further by the Housing and Regeneration Act 2008, which provided for the final abolition of the Commission.[46]

16.83 We concluded that almost the whole of the New Towns Act 1981, as amended by the 1985 and 2008 Acts, is redundant. We therefore provisionally proposed that the Act should be amended so that it no longer applies in Wales. The provisions of the 1985 and 2008 Acts are largely now spent, and need not be retained either.[47]

16.84 Of the 25 consultees who responded to this suggestion, all but one were in agreement. No consultee identified any provision of the Act that needed to be retained.

Recommendation 16-9.

We recommend the amendment of the New Towns Act 1981, and the provisions relating to new towns in the New Towns and Urban Corporations Act 1985, the TCPA 1990, the Housing and Regeneration Act 2008, and related legislation, so that they no longer apply in relation to Wales.

Urban development corporations

We provisionally proposed the amendment of Part 16 of and Schedules 26 to 31 to the Local Government, Planning and Land Act 1980 (urban development areas and urban development corporations), and the provisions relating to urban development corporations in the New Towns and Urban Development Corporations Act 1985, the TCPA 1990, the Leasehold Reform, Housing and Urban Development Act 1993, and related legislation, so that no longer apply in relation to Wales (Consultation Question 16-10).

16.85 In the Consultation Paper, we outlined the origin and purpose of urban development areas, set up under Part 16 of the Local Government, Planning and Land Act 1980.[48]

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44 Development of Rural Wales Act 1976, s 1. The functions of the Board were subsequently transferred to the Welsh Development Agency (Government of Wales Act 1998).

45 HC debates, 13 May 1969.

46 Housing and Regeneration Act 2008, s 50, Sch 5.

47 Consultation Paper, paras 16.75 to 16.79.

48 Consultation Paper, paras 16.80 – 16.82.

16.86 Only one urban development corporation (UDC) was ever set up in Wales. Cardiff Bay Development Corporation was set up in 1987, but (unlike all the English corporations) was not given the powers relating to planning policy and development management available to a local planning authority.[49] It oversaw the construction of the Cardiff Bay Barrage, and undertook a number of other successful projects before being dissolved on 31 March 2000.[50] Its management responsibilities were largely taken over by Cardiff Harbour Authority, as provided for by the Cardiff Bay Barrage Act 1993.

16.87 We found it unlikely that the urban development corporation procedure will be used again in Wales. It followed that Part 16 of the 1980 Act, and the associated Schedules to that Act, were redundant, at least in relation to Wales, along with the other legislation that has amended those provisions over the subsequent years. And section 7 of the TCPA 1990, relating to the role of an urban development corporation as a local planning authority, need not be restated in the Code.[51]

16.88 Of the 25 consultees who responded to this suggestion, 22 were in agreement. The Institution of Civil Engineers Wales objected, observing:

> Urban Development Corporations (UDC) should remain available for use in Wales. When large scale development is proposed, to be undertaken by a variety of developers, a UDC facilitates the stage management of the development and can avoid the situation of developers refusing to cooperate with each other to a useful end result. The Cardiff Bay development provided an excellent demonstration of this situation, in the way that all of the development was overseen; but current development in Cardiff under its LDP could so easily degenerate into the situation described."

16.89 We recognise that the Cardiff Bay project has indeed been successful. However, it was very much a one-off situation and it is noticeable that the project was achieved despite the Cardiff Bay Corporation not being the planning authority. We remain of the view that it is unlikely that the existing legislation will be used in future. It is more likely that general regeneration powers will be created as a result of the possible review mentioned earlier, or else that specific projects will be the subject of private Bills.

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49 1987 SI 646.

50 See https://www.cardiffharbour.com/achievements-of-the-regeneration-project/

51 Consultation Paper, paras 16.80 – 16.84.

Recommendation 16-10.

We recommend the amendment of

(1) Part 16 of and Schedules 26 to 31 to the Local Government, Planning and Land Act 1980 (urban development areas and urban development corporations), and

(2) the provisions relating to urban development corporations in the New Towns and Urban Development Corporations Act 1985, the TCPA 1990, the Leasehold Reform, Housing and Urban Development Act 1993, and related legislation

so that they no longer apply in relation to Wales.

Housing action trusts

We provisionally proposed the amendment of Part 3 of the Housing Act 1988 (housing action trust areas), and the provisions relating to housing action trusts in the TCPA 1990 and related legislation, so that they no longer apply in relation to Wales (Consultation Question 16-11).

16.90 We noted in the Consultation Paper that housing action trust areas could be designated by the Welsh Ministers, as areas in which the living conditions of local residents and the social conditions and general environment could be improved by a specially constituted "housing action trust". Once established, such a trust could be designated as the local planning authority in its area.[52] The relevant legislation, Part 3 of the Housing Act 1988, applied to both England and Wales, and such areas could therefore have been designated in Wales.

16.91 In the event, only six areas were ever designated, between 1991 and 1994; all were in England (three in London, three elsewhere). None of the trusts were designated a local planning authority and they were wound up at various dates between 1999 and 2005.

16.92 Once again, therefore, we concluded that there seemed to be no prospect of such areas being designated in Wales in the future. Section 60(1) of the 1988 Act could therefore be amended to make it plain that Part 3 applies only to land in England; and section 9 of the TCPA 1990, relating to the role of a housing action trust as a local planning authority, need not be restated in the Code.[53]

16.93 Of the 24 consultees who responded to this suggestion, all but one were in agreement. The RTPI and the National Trust both supported the proposed change, in the following terms:

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52 TCPA 1990, s 9.

53 Consultation Paper, paras 16.87 to 16.89.

Housing is now a devolved power, and the Housing (Wales) Act 2014 aims to improve the quality and standards of housing in Wales. No Housing Action Trust Areas have been designated in Wales; and regeneration policy funded via the Viable and Viable Places programme and the recently launched targeted regeneration investment policy are the appropriate mechanisms for tackling areas with serious housing and other social problems. Stock transfer of local authority housing and the release of subsidy to bring homes up to the Welsh Housing Quality Standard have been largely successful across Wales.

16.94 We are therefore minded to maintain the proposal.

Recommendation 16-11.

We recommend the amendment of

(1) Part 3 of the Housing Act 1988 (housing action trust areas), and

(2) the provisions relating to housing action trusts in the TCPA 1990 and related legislation

so that they no longer apply in relation to Wales.

Rural development boards

We provisionally proposed the amendment of Part 3 of and Schedule 5 to the Agriculture Act 1967 (rural development boards) and related legislation so that they no longer apply in relation to Wales (Consultation Question 16-12).

16.95 Finally, we described in the Consultation Paper the legislation, in Part 3 of and Schedule 5 to the Agriculture Act 1967, designed to deal with the problems and needs of rural areas of hills and uplands – in particular, the use of land in such areas for agriculture and forestry, improving public services, and the preservation of amenity and scenery there. The provision provided a power to set up rural development boards in such areas, to draw up a programme to deal with the problems and needs outlined above.

16.96 Only one board was ever set up, in the north of England in 1969, which was dissolved two years later. A second proposed board, in mid-Wales, was the subject of campaigns by the National Farmers' Union, which resisted it as a foreign implant from London. It never came into existence. We saw no likelihood of this statutory scheme ever being used in the future and proposed its repeal in relation to Wales.[54]

16.97 Of the 23 consultees who responded to this suggestion, all but one were in agreement.

[54] Consultation Paper, paras 16.90 – 16.92.

Recommendation 16-12.

We recommend the amendment of Part 3 of and Schedule 5 to the Agriculture Act 1967 (rural development boards) and related legislation so that they no longer apply in relation to Wales.

ACQUISITION OF LAND FOR PLANNING PURPOSES

16.98 In the Consultation Paper, we noted that the general law of compulsory purchase is clearly linked to planning law, by virtue of its subject-matter. But it remains a substantial topic in its own right, considered by the Law Commission in a separate Consultation Paper some ten years ago.[55] We considered that it should not be included within the scope of the present exercise.[56] No-one suggested otherwise; and we continue to consider that this project should not extend to the general law of compulsory purchase and compensation..

16.99 However, we also noted that, in addition to that general law, a number of statutes relating to devolved matters contain provisions enabling the acquisition of land, either using compulsory powers or by agreement, for specific purposes related to the subject matter of the Act in question.[57] The TCPA 1990 is no exception, and section 226 empowers a local authority to acquire compulsorily any land for planning purposes. The remainder of Part 9 of the TCPA 1990 then elaborates that principle in more detail.

16.100 We observed that it would be possible to restate the provisions of Part 9 (and related provisions in Parts 10 and 11) in the new Bill. We considered, however, that this would add significantly to the complexity of the exercise and delay the production of the Bill. We accordingly concluded that it should not be included at this stage, but might later be included, possibly along with other provisions currently in the Welsh Development Agency Act 1975 and related legislation.[58]

16.101 We have now revisited that conclusion, in the light of our other work on this project.

16.102 In the Consultation Paper, we suggested that, if all of our proposals were to be adopted, and the TCPA 1990 and related legislation consolidated as envisaged, it would be possible to repeal (in relation to Wales) the whole of the TCPA 1990 except for Part 9 and sections 251, 258, and 271 to 282.[59]

16.103 The key provision of Part 9 is section 226, which enables a local authority to acquire land by compulsory purchase where it considers that to do so would facilitate the

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55 *Towards a Compulsory Purchase Code: (2) Procedure*, 2004, Law Com 291.

56 Consultation Paper, para 3.118.

57 For example, Public Health Act 1875, s 164; Forestry Act 1967, s 39; Highways Act 1980, s 239(3).

58 Consultation Paper, para 3.120.

59 Consultation Paper, paras 3.134, 11.71, and Appendix B, Table B-4.

carrying out of development, redevelopment or improvement of the land or where the land is required for a purpose that is necessary to achieve the proper planning of the area.[60] Land may be acquired by an authority by agreement, under section 227; and by the Welsh Ministers under section 228. And special rules apply where the land to be acquired forms part of a common.[61]

16.104 A local authority is defined to include a national park authority; and land may be held by a joint body.[62] In other words, the "local authority" for the purposes of Part 9 of the TCPA 1990 is identical to the "planning authority" in the remainder of the Act.

16.105 Sections 232 to 235 deal with the appropriation, disposal and development of land acquired under Part 9.[63]

16.106 Section 236 deals with the extinguishment of private rights of way, and other private rights over the land; sections 251 and 258 with the extinguishment of public rights of way. Sections 238 to 240 deal with the acquisition of consecrated land and burial grounds; section 241 with open spaces; and section 242 with overriding rights of tenants in possession of houses acquired under Part 9. Sections 271 to 282 provides for the extinguishment of the rights of statutory undertakers, with compensation payable in certain circumstances.

16.107 We consider that it would be relatively straightforward to incorporate the provisions of Part 9, and sections 251, 258, and 271 to 282 without any amendment other than purely as to drafting style.

16.108 This would have the advantage that the whole of the TCPA 1990, not merely most of it, would apply only in England. That would make it simpler to draft the amendments to that Act, to ensure that it continues to operate correctly – with no need to retain the interpretation sections of the Act applying to Wales. More importantly, it would enable users of the TCPA 1990 to know that the whole of it applies only in England. Users of the Planning Code would also know that it contains the whole of the primary legislation relating to planning in Wales, and not just most of it.

16.109 The only provision in Part 9 which does require restatement is section 231, which enables the Welsh Ministers to require an authority to acquire or develop land, as to which the *Encyclopaedia of Planning Law* comments as follows:

> This is a reserve power, and likely to be rarely, if ever, used. A more direct method of ensuring that land is acquired for planning purposes might nowadays be the use of the [Welsh Ministers'] powers under section 228, provided there is some public purpose involved. Section 231 is cumbersome, in that it requires an inquiry to be held into the local authority's alleged default, in which inevitably questions as to the suitability of the land to be acquired and the necessity of acquiring it would be in issue; followed, if an order is

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60 TCPA 1990, s 226, amended by Housing and Planning Act 2016, s 99.

61 TCPA 1990, ss 229, 230(1)(a).

62 TCPA 1990, ss 243, 244, 244A.

63 Note that the Growth and Infrastructure Act 2013 replaced section 233 with a new version in England, but not in Wales.

made against the authority, by a further inquiry in the event of objection being made to the compulsory purchase order, at which those issues would be considered again.

16.110 We agree, and do not consider that section 231 needs to be restated in the Bill.

16.111 It may also be noted that the relevant provisions are also directly applied to compulsory acquisition under the Listed Buildings Act 1990; the reference could readily be transferred to the Historic Environment (Wales) Bill

Recommendation 16-13.

We recommend that section 231 of the TCPA 1990 (power of the Welsh Ministers to require local authorities to acquire and develop land) should not be restated in the Code.

Recommendation 16-14.

We recommend the incorporation in the Bill of provisions equivalent to Part 9 (other than section 231) and sections 251, 258, and 271 to 282 of the TCPA 1990 (acquisition of land for planning purposes).

OTHER STATUTORY POWERS RELATING TO IMPROVEMENT, REGENERATION AND RENEWAL

16.112 In the light of the Law Society's comments in response to Consultation Questions 16-5 and 16-6, relating to section 89 of the 1949 Act,[64] and our **Recommendation 16-14** above as to the inclusion in the Bill of provisions relating to the acquisition of land for planning, we have concluded that we should briefly revisit the question of other statutory powers relating to improvement, regeneration and renewal.

16.113 In the Scoping Paper we provisionally proposed that the law relating to regeneration and renewal should be codified as the fourth of the five stages of codification that we envisaged at that time.[65] We also suggested the removal of some obsolete legislation. In the Consultation Paper, we suggested the inclusion within the Bill of provisions relating to those topics; and in this Chapter we have made recommendations accordingly. The provisions involved are as follows:

64 See **paras 16.47, 16.48 and 16.56** above.

65 See **para 2.19** above.

1) sections 215 to 219 of the TCPA 1990 (unsightly land notices) (which are within Part 8 of the Act along with the primary legislation relation to advertising and protected trees);[66]

2) section 89 of the 1949 Act (which deals with much the same topic area as section 215 to 219);[67]

3) new regulation-making powers to enable authorities to deal with fly-posting and graffiti (which links to the advertising code, and used to be in the TCPA 1990 in any event);[68]

4) the repeal in Wales of the provisions relating to enterprise zones, new town development corporations, urban development corporations, housing action trusts and rural development boards (which are effectively obsolete);[69] and

5) the provisions enabling the acquisition of land for planning purposes (in Part 9 and sections 251, 258, and 271 to 282 of the TCPA 1990 (which would otherwise be the only remaining provisions of the TCPA 1990 in force in Wales).[70]

16.114 This leaves untouched the other provisions mentioned at the beginning of this Chapter – including the Local Authorities (Land) Act 1963, the Welsh Development Agency Act 1975, the Derelict Land Act 1982, the Housing Grants, Construction and Regeneration Act 1996, the Anti-Social Behaviour Act 2003, and the Localism Act 2011.[71]

16.115 There would seem to be little point in simply consolidating these provisions, since, as we observed in the Consultation Paper, they form no remotely logical statutory scheme. If there is at some point in the future the political will on the part of the Welsh Government and the National Assembly to introduce a rational scheme of legislation enabling central Government and local authorities to deal with urban renewal, it would seem to be highly desirable that it should take the form of a new statutory scheme replacing all these existing powers.

16.116 In accordance with the principles of codification outlined in *The Form and Accessibility of the Law Applicable in Wales*, that statutory scheme should be inserted into the Part of the Planning Code dealing with the matters that are the subject of this present Chapter.[72] However, there would be numerous decisions to be taken as to the content of such a scheme – for example, as to what categories of land should be involved, what procedures should be used to acquire, improve and develop such land, and whether existing authorities should be empowered to take action or whether

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66 See **Recommendations 16-1 to 16-4**.

67 See **Recommendations 16-5, 16-6**.

68 See **Recommendation 16-7**.

69 See **Recommendations 16-8 to 16-12**.

70 See **Recommendations 16-13, 16-14**.

71 See **para 16.3**. There may be others.

72 See **para 4.52**.

new bodies should be created. The resolution of such questions would require policy input that would go beyond merely "technical reform" of the law; and is therefore beyond the scope of the present project.

16.117 We accordingly make no recommendations in that regard.

Chapter 17: High Court challenges

INTRODUCTION

17.1 Appeals against decisions of planning authorities may be made to the Welsh Ministers (as noted in Chapter 11). This is the most straightforward type of remedy, and the one most often encountered in practice. However, in addition, the making of decisions under the planning Acts – by authorities or by the Welsh Ministers (and the Inspectorate) – may generally be reviewed by the courts. This will generally consist of an application by the aggrieved party to the Planning Court, a specialist court within the Queen's Bench Division of the High Court.

17.2 Challenges to the validity of decisions may be brought:

1) by an application under Part 12 of the TCPA 1990, or

2) by an application for judicial review, under Part 54 of the Civil Procedure Rules (CPR).

17.3 In Chapter 17 of the Consultation Paper, we considered the features of both procedures, and whether there might be scope for their simplification. We also looked briefly at the procedure to enable the correction of minor errors in decisions.

CHALLENGES AS TO THE VALIDITY OF DECISIONS

17.4 Challenges as to the lawfulness of decisions by public authorities – including those under the planning Acts – will generally be challenged by way of an application for judicial review, unless there is a statutory right of appeal or application to the court. In our Consultation Paper, we provided a summary of the statutory appeals to the High Court may be brought.[1]

17.5 Other decisions can only be challenged by way of judicial review under Part 54 of the Civil Procedure Rules (CPR). In particular, this applies to decisions to grant planning permission or any other type of consent, decisions to call-in planning applications (or not to do so), and challenges to local authority policy and procedure generally.

17.6 Successful applications may result in the grant of mandatory, prohibiting or quashing orders.[2] Such orders can require that a public body do something, or desist from doing something, or can quash a decision. The High Court may also grant a

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1 Consultation Paper, paras 17.3 to 17.6

2 Civil Procedure Rules, Rule 54.2.

declaration or an injunction,[3] so as to declare certain acts invalid, pronounce on the rights that parties have or to prevent further acts from being undertaken.[4]

We provisionally proposed that Part 12 of the TCPA 1990 should be replaced in the Planning Code by new provisions to the effect that a court may entertain proceedings for questioning any decision of a public body under the Code (other than one against which there is a right of appeal to the Welsh Ministers) – and any failure to make any such decision – but only if: (1) the proceedings are brought by a claim for judicial review; and (2) the claim form is filed before the end of the period of four weeks in the case of a challenge to the decision of the Welsh Ministers on an appeal against an enforcement notice (other than a decision granting planning permission), a tree replacement notice, an unsightly land notice or a decision refusing a certificate of lawfulness of existing use or development; or before the end of the period of six weeks in any other case, beginning with the day after the day on which the relevant decision was made (Consultation Question 17-3).

17.7 In recent years there have been moves to standardise the two procedures. In particular, since 2013, applications for judicial review for planning decisions must be made within six weeks of the initial decision, in line with the time limit for statutory challenges under Part 12 of the TCPA 1990.[5] Additionally, since the enactment of section 91 of the Criminal Justice and Courts Act 2015, applicants must now seek permission to bring a statutory planning challenge, as they have long been required to do in relation to applications for judicial review.

17.8 However, the two types of application still require different documentation, which respondents to the Scoping Paper suggested created unnecessary complexity.[6] We accordingly suggested that there was no continuing justification for the existence of a separate system of statutory challenge.

17.9 Of the 31 consultees to the Consultation Paper who responded to this proposal, 30 agreed with (and many warmly welcomed) the proposal to merge the procedures. Planning Aid Wales argued that "uniform rules and procedure for challenge aid understanding, and that the existing complexity of the law needs reform". UK Environmental Law Association also described the process of statutory review as having "limited value and creates confusion around the processes of challenge and routes to access justice".

17.10 Friends of the Earth Cymru, which disagreed with the proposal in general, argued that the time in which applications must be made should be twelve weeks, rather than six weeks as at present (under either procedure).

17.11 The approach until 2013 in relation to judicial review applications under Part 54 of the CPR was to have a flexible time limit – an application was to be made "promptly", and

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3 Civil Procedure Rules, Rule 54.3.

4 *Administrative Law and the Administrative Court in Wales*, Gardner, Univ of Wales Press, 2016, p 5-47 ff.

5 Civil Procedure Rules, Rule 54.25(5) and the TCPA 1990 s 288, 287. The six-week limit only relates to challenges under "the planning Acts", which do not include the PCPA 2004 or other Acts such as the Ancient Monuments Act 1979.

6 Consultation Paper, para 17.22.

in any event within three months – but the three-month limit could be extended with permission. That led to considerable uncertainty, and the Rules were accordingly amended to provide a fixed time limit. That seems to us to be sensible in principle. As to what the fixed time limit should be, that will require balancing the desire of those mounting a challenge (especially third parties) to have sufficient time to do the job properly against the desire of those affected by the decision being challenged to be able to rely on it as soon as possible. The present position, whereby the time limit for a challenge under Part 54 to a planning decision is six weeks, accords with the limit under Part 12 of the TCPA 1990. We note that no-one else mentioned the point in their responses to our Consultation Paper, and consider that any move to alter the existing six-week limit would need to be the subject of a separate consultation exercise.

17.12 Subject to that point, we remain of the view that assimilating the process of judicially reviewing planning decisions to the wider judicial review system, would make the system more accessible for potential applicants. We are therefore minded to continue with the proposal in its original form, as follows.

Recommendation 17-1.

We recommend that Part 12 of the TCPA 1990 (challenges in the High Court to the validity of actions and decisions under the Act) should be replaced in the Planning Bill by new provisions to the effect that a court may entertain proceedings for questioning any decision of a public body under the Code (other than one against which there is a right of appeal to the Welsh Ministers) – and any failure to make any such decision – but only if:

(1) the proceedings are brought by a claim for judicial review; and

(2) the claim form is filed:

- **before the end of the period of four weeks in the case of a challenge to the decision of the Welsh Ministers on an appeal against an enforcement notice (other than a decision granting planning permission), a tree replacement notice, an unsightly land notice or a decision refusing a certificate of lawfulness of existing use or development; or**

- **before the end of the period of six weeks in any other case,**

beginning with the day after the day on which the relevant decision was made.

CORRECTION OF MINOR ERRORS

We provisionally proposed that Part 5 of the PCPA 2004 (relating to the correction of minor errors in decisions) should be included within the Bill, but amended so as to allow a 14-day period within which the Welsh Ministers or an inspector can respond to

a request to make a correction to their decision, and an applicant can respond to a notification by them that they propose to make such a correction (Consultation Question 17-2).

17.13 In circumstances where a decision document issued by Welsh Ministers or an inspector contain a "correctable error", Part 5 of the PCPA 2004 provides that they may correct it by issuing a notice to that effect. A correctable error is defined as an error or omission "contained in any part of the decision document … but which is not part of any reasons given for the decision".[7] The procedure is designed to be used for "obvious clerical errors…not material errors going to the substance of the decision."[8]

17.14 A correction notice can be issued on request or on notice to the applicant of the intention to issue one.[9] The procedure allows non-material errors to be corrected without expensive proceedings in the High Court.

17.15 We suggested in our Consultation Paper that the time within which the Welsh Minister or inspector in question can take such action (normally six weeks from the date of the decision in question) hampers the use of correction notices as a response to a High Court challenge.[10]

17.16 We proposed that a 14-day grace period should be provided for, in which the relevant decision-maker could respond to a request for a correction notice. Once the request or notification for a correction notice has been made, the six-week time limit would be put on hold until either a response had been made or the 14-day period for response had expired. We suggested that this would prevent unnecessary applications to the High Court from having to be made where all involved parties were in agreement.

17.17 All 24 consultees responding to this proposal were in support. Allan Archer suggested that it "hopefully could avoid having to go through lengthy challenge procedures when a correction would resolve an issue". The Law Society also described it as a "sensible proposal".

Recommendation 17-2.

We recommend that Part 5 of the PCPA 2004 (relating to the correction of minor errors in decisions) should be included within the Bill, but amended so as to allow a 14-day period within which the Welsh Ministers or an inspector can respond to a request to make a correction to their decision, and an applicant can respond to a notification by them that they propose to make such a correction.

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7 PCPA 2004, ss 59(5), 59(8).

8 Hansard, HL Debs, 5 February 2004, Vol 657, col 885.

9 PCPA 2004, s.56(2).

10 Consultation Paper, para 17.32.

Chapter 18: Miscellaneous and Supplementary Provisions

INTRODUCTION

18.1 In Chapter 18 of our Consultation Paper we dealt with a number of miscellaneous provisions relating to functions under the TCPA 1990. Broadly, these provisions can be considered under four headings:

1) the application of the planning system to certain categories of land, including statutory undertakers, the Crown, and the Church of England;

2) mining operations;

3) general provisions relating to fees and charges, inquiries and other proceedings, and the application of the Public Health Act; and

4) definitions.

18.2 We noted that even though many of these miscellaneous provisions are not encountered often, it is still worth considering whether they are fit for purpose.[1] Indeed, it is particularly important that rarely-used provisions are simple and easy to understand, given that the reader of such provisions may well be encountering them for the first time.

STATUTORY UNDERTAKERS

We provisionally proposed that the Bill should: (1) rationalise as far as possible the bodies or categories of bodies that are to be treated as statutory undertakers for the purpose of some or all of the Code; and (2) provide for each undertaker or category of undertaker what is to be regarded as its "operational land" and who is "the appropriate Minister" (Consultation Question 18-1).

18.3 In our Consultation Paper we noted that there are a number of special provisions in the TCPA 1990 and in the regulations under it, relating to the application of the planning system to certain land owned by statutory undertakers, and to development by them.[2]

18.4 "Statutory undertakers" are, in general terms, bodies that provide public services such as water, electricity, drainage, railways, canals, and postal services. We noted that

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1 Consultation Paper, para 18.6.

2 Consultation Paper, para 18.7 to 18.27.

the definition of "statutory undertaker" in the TCPA 1990 is very broad,[3] although certain bodies are only included for certain purposes. The TCP General Permitted Development Order 1995 (GDPO)[4] provides a further definition, very similar to that in the Act; unfortunately, however, the two definitions are not consistent in all respects.[5]

18.5 Many of the relevant provisions, in either the GPDO or the TCPA 1990 itself, relate to what statutory undertakers may do on their operational land. Section 263 of the CPA 1990 defines "operational land" as land which is used by a statutory undertaker for the purposes of carrying on their undertaking, and which an interest is held for that purpose, but it excludes land that is comparable to generally.[6]

18.6 We also noted the fact that, while planning applications for development by statutory undertakers are generally dealt with by planning authorities in the normal way, under section 266 of the TCPA 1990 the Secretary of State or the appropriate Minister may issue a direction to the effect that they will deal with certain matters jointly. Section 265 defines the term "appropriate minister" in respect of various categories of statutory undertaker. In general, it refers to the minister responsible for the field of activity to which the undertaking relates.[7]

18.7 We suspected that the law in this area is confusing, particularly as it will be unfamiliar to many. We therefore recommended that there should be – as far as possible – a single, rationalised definition of "statutory undertaker" in the Bill, which would also apply to regulations made under the Bill. We also recommended that for each undertaker or category of undertaker the Bill should provide what is regarded as "operational land" and who the "appropriate Minister" is.

18.8 Of the 33 consultees responded to this question, 24 were in agreement, including the Planning Inspectorate (PINS), the Planning and Environmental Bar Association (PEBA), a number of authorities and Natural Resources Wales (itself a statutory undertaker). Nine consultees were equivocal, but none disagreed.

18.9 Several consultees accepted the need for consolidation and clarification in this area. The Law Society agreed that "the code should use a single and consistent definition of a statutory undertaker". Rhondda Cynon Taf CBC noted that "the law relating to statutory undertakers can be confusing" and that "a lot of time can be spent gaining

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3 TCPA 1990, s 262, amended by Utilities Act 2000, Transport Act 2000, 2001 SI 1149, and 2013 SI 755.

4 TCP (General Permitted Development) Order, art 1(2), amended by Utilities Act 2000, s 76, Postal Services Act 2011 (Consequential Modifications and Amendments) Order 2011 (SI 2085), Sch 1, and Natural Resources Body for Wales (Functions) Order 2013 (SI No 755), Sch 4.

5 Consultation Paper, paras 18.12, 18.13.

6 TCPA 1990, s 264(3) – (6) provides a list of additional criteria for operational land, one or more of which must apply. The criteria include the following: the land was held by the undertaker before 6 December 1968, and used then as operational land; the land is the subject of a special development order or a local development order; the land was transferred to the undertaker from another undertaker under any of the reorganisation / privatisation legislation specified in section 264(4), and was held as operational land immediately before that transfer.

7 TCPA 1990, s 265(1)(a). The Secretary of State is the appropriate Minister in relation to development on operational land in Wales by suppliers of hydraulic power, universal postal service providers, gas transporters, Electricity Act licence holders and operators of reserved trust ports and cross-harbour ports.

an understanding of the provisions and how they apply." Pembrokeshire Coast National Park Authority, National Parks Wales, and Carmarthenshire CC all noted that there was currently confusion over whether National Parks was a statutory undertaker.

18.10 In particular, there was widespread support for clarifying the "appropriate Minister." SP Energy Networks, a statutory undertaker in north Wales, stated that "clarity on the appropriate minister is very welcomed". The Canal & River Trust, a statutory undertaker in respect of inland navigation, welcomed further provision regarding who the "appropriate minister" was; as did Arqiva, a statutory undertaker in respect of electronic communications.

18.11 Equivocal responses tended to reflect a concern that clarifying the law in this area may have unintended consequences, including the possible exclusion of existing statutory undertakers from the definition, and result in a too restricted the definition of operational land. National Grid thought our proposal "makes sense in principle" but said that that consultation on draft revisions will be important to avoid unintended consequences. The Canal & River Trust noted that:

> Whilst we are not against "rationalising" the list of bodies for the purposes of the Code, it is essential that the Trust and other statutory navigation authorities remain covered in any list or definition… Equally, whilst we are not against further clarity as to the definition of "operational land" (which should include any land directly or indirectly used for the purpose of carrying out a statutory undertaking), it is essential that this does not cut down extent of the definition of "operational land" in the TCPA.

18.12 It was not our intention to exclude any existing statutory undertakers from the definition, or to narrow the current definition of operational land. We accept National Grid's point that further consultation may be necessary to guard against unintended consequences.

18.13 The Law Society highlighted the fact that statutory undertakers, the appropriate Ministers and perhaps even the definition of operational land are susceptible to political change, and recommended to amend the relevant definitions by order. We agree that the mutability of public service delivery in the UK necessitates definitions that are easily amended. We therefore modify our proposal such that the legislation should be simplified as far as possible, and in addition that a single list of statutory undertakers should be provided in guidance (presumably the *Development Management Manual*), with in each case an identification of the appropriate Minister and its operational land. In appropriate cases, such a list would no doubt provide that a particular body is a statutory undertaker only for certain purposes.

18.14 Such a list would initially include all the bodies that are currently statutory undertakers under either primary or secondary legislation relating to planning (notably the TCPA 1990 and the GPDO).

Recommendation 18-1.

We recommend that

(1) the provisions of the Bill applying it to statutory undertakers should be simplified as far as possible, to clarify the identity of those bodies that are statutory undertakers for any or all of the purposes of the Bill and any regulations made under it;

(2) that a single list of such bodies should be included in Welsh Government guidance, including in relation to each such undertaker:

- **the purpose for which the body is to be a statutory undertaker;**
- **the appropriate Minister; and**
- **its operational land.**

We provisionally proposed that, when the GPDO is next updated, consideration should be given to separating provisions relating to development by statutory undertakers, the Crown, mineral operators, and other similar bodies from those relating to development generally (Consultation Question 18-2).

18.15 In our Consultation Paper, we noted that the provisions of the GDPO 1995 dealing with statutory undertakers take up a considerable amount of the overall document, but are rarely encountered by most users of it.[8] We suggested that it might be helpful if the provisions relating to development by statutory undertakers, the Crown, mineral operators, and other similar bodies were placed in a separate section of the document to those relating to development generally.[9]

18.16 Of 33 consultees who responded to this question, 15 agreed, two were equivocal and 16 disagreed.

18.17 Those who agreed included PEBA, the Royal Town Planning Institute ("RTPI"), the Institution of Civil Engineers Wales, PINS and a number of planning authorities – generally without further comment.

18.18 Most consultees who disagreed did so on the basis that they preferred a single document. Caerphilly and POSW South East Wales noted that "the existing system appears to work well and could be left alone without any disbenefit." National Grid argued that

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8 Consultation Paper, para 18.29.

9 See TCP (GPDO 1995, Sched 2, Parts 12, 13 (local authorities and highway authorities); Parts 14 to 18 (statutory undertakers); Part 20 (Coal Authority); Part 24 (electronic communications code operators); and Parts 34 to 38 (the Crown).

the document is largely a technical tool for professionals with significant experience of using multiple Parts of the Order. The current structure does not seem to present this user group with any significant challenges.

18.19 Arqiva said that they did not see any particular need for this proposal, as "someone only interested in householder development can simply look at that part".

18.20 Our provisional proposal was that "consideration should be given" to restructuring the GDPO in the way we indicated. We note the response to that suggestion; an alternative approach might be preferable, such as separating out permitted development rights relating to dwellings (currently in Part 1 of Schedule 2 to the GPDO) into a separate order – on the same basis that "householder applications" are now subject to different, and simpler, procedural requirements. But that is a matter that can be revisited when the GPDO is next revised.

Recommendation 18-2.

We recommend that, when the GPDO is next revised, consideration should be given to separating it into two orders, one dealing with permitted development rights relating to dwellings and one covering other cases.

We provisionally proposed that section 283 of the TCPA 1990 (relating to the display of advertisements on the operational land of statutory undertakers) should not be restated in the Code (Consultation Question 18-3).

18.21 Section 283 of the TCPA 1990 provides that sections 266 to 270 and 279(1), (5) and (6) – all of which apply to the grant of planning permission – do not apply to the display of advertisements on the operational land of statutory undertakers. We noted that such displays require consent under the Advertisements Regulations, and are then deemed to be granted planning permission automatically.[10] We therefore provisionally considered that section 283 is otiose, and need not be restated in the Code.

18.22 All 24 consultees who responded to this question agreed with our provisional proposal with no additional comments.

Recommendation 18-3.

We recommend that section 283 of the TCPA 1990 (relating to the display of advertisements on the operational land of statutory undertakers) should not be restated in the Code.

We provisionally proposed that section 316A of the TCPA 1990 (which enables regulations to be made relating to planning permission for development by local

[10] By virtue of section 222: Consultation Paper, para 18.33.

authorities that are statutory undertakers and the display of advertisements on their operational land) should not be restated in the Bill (Consultation Question 18-4).

18.23 We suggested in our Consultation Paper that section 316A of the TCPA 1990, relating to statutory undertakers that are planning authorities, was otiose as no regulations have ever been made under it.[11] We provisionally proposed that it should not be restated in the Code.

18.24 Of 22 consultees responded to this question, 21 agreed. The Law Society and Huw Williams (Geldards LLP) were "not aware of any local authority statutory undertakings in Wales" and agreed that "the provision not be restated". The RTPI and Rhondda Cynon Taf CBC expressed similar sentiments.

18.25 The Institution of Civil Engineers Wales disagreed on the basis that the provision could be useful in the future:

> There has been discussion in South Wales for some time on the subject of providing a metro for transportation purposes. This metro may include a street tramway or light railway system within Cardiff, which may be operated by or on behalf of either the local authority or the Welsh ministers. These regulations may become necessary in this eventuality and they should be retained therefore.

18.26 We suspect that if such a project were to come to fruition it would be against the background of a private Act or a development consent order under the Planning Act 2008, either of which could make provision equivalent to section 283 – no doubt subject to appropriate amendments. Alternatively, the regulations envisaged in Recommendation 18-1 above could be amended to include local authorities that are operators of enterprises similar to those run by existing statutory undertakers.

Recommendation 18-4.

We recommend that section 316A of the TCPA 1990 (which enables regulations to be made relating to planning permission for development by local authorities that are statutory undertakers and the display of advertisements on their operational land) should not be restated in the Bill.

MINERALS

18.27 The Mineral Products Association, the leading trade body in the sector representing all the major mineral operators, took exception to our proposed treatment of the place of mineral operations within the planning system. It drew particular attention to the features of mineral working that we describe in paragraph 18.58 of the Consultation Paper, and emphasised the importance of minerals to society. We accept that mineral development can indeed deliver many benefits, as can other kinds of

[11] Consultation Paper, para 18.34. We did note, however, that the power may be relevant if in future a local authority decides to operate a light railway or tramway.

development. In the Paper we were seeking to identify those features of mineral operations that were distinct from development in general.

18.28 We also note the Association's concern that the process of mineral planning has been somewhat marginalised by successive Governments, such that a more fundamental policy-driven review of the current system might well be called for. But, as is recognised by the Association, our terms of reference focus on technical reforms, and do not extend to wider policy issues.

We provisionally proposed that the new Bill should generally use – in place of the term "winning and working of minerals" – the term "mining operations", defined so as to include: (1) the winning and working of minerals in, on or under land, whether by surface or underground working; (2) the removal of material of any description from a mineral-working deposit, a deposit of pulverised fuel ash or other furnace ash or clinker or a deposit of iron, steel or metallic slag; and (3) the extraction of minerals from a disused railway embankment (Consultation Question 18-5).

18.29 In the Consultation Paper, we noted the definitions of "minerals" and "the winning and working of minerals" in section 336 of the TCPA 1990 and the definitions of "mining operations" in section 55 and in the GPDO. We observed that the definitions overlapped to a significant extent. We therefore suggested that they be rationalised, and that the term "winning and working of minerals" be replaced by "mining operations", defined to include both the winning and working of minerals in, on or under land, whether by surface or underground working, and also the various operations mentioned in section 55(4).[12]

18.30 Of the 30 consultees who responded to this question, 27 were in agreement with the suggested definitions.

18.31 Cardiff Council was concerned that this might mean that the requirements for periodic review of minerals permissions (in the Planning and Compensation Act 1991) would also apply to mineral working deposits and disused railway embankments. The current definition of "old mining permissions"[13] refers to permission for development consisting of the winning and working of minerals or involving the deposit of mineral waste, and would probably not include the permissions referred to by Cardiff Council. But the new definition of "mining operations" we are proposing would not apply to the interpretation of the 1991 Act, and therefore neither would the requirement for periodic review.

18.32 The Mineral Products Association, the main trade body for the minerals industry, suggested that the new definition should capture the full scope of a minerals development from start to finish, including beneficiation and other activities that may take place on a site. We note that each of the existing definitions in the Act, and our proposed definition to be included in the Bill, are inclusive ones – there is no exhaustive definition anywhere in the legislation of any of the terms relating to mineral

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12 Consultation Paper, paras 18.50 to 18.57.

13 Planning and Compensation Act 1991, s 22, which applies to the interpretation of Sch 2 to that Act and Sch 13 to the Environment Act (see Consultation Paper, paras 18.62 to 18.67).

extraction.[14] We consider that the entire process referred to by the Association is within the concept of "mining operations", just as a hotel includes all of the ancillary activities taking part within the hospitality industry, and not just the rooms in which guests sleep.[15]

18.33 The Association refers to case law clarifying the meaning of some of the existing definitions. That does not present a problem, since the definition proposed would incorporate all the same elements as the existing definition, so that the case law would still apply.

18.34 It also suggests that it might be helpful to include clarification of the terms "mineral resource" and "mineral reserve". We consider that might be helpful in guidance, but is not required in legislation, since neither term occurs either in the TCPA 1990 or in the GPDO.

Recommendation 18-5.

We recommend that the new Bill should generally use – in place of the term "winning and working of minerals" – the term "mining operations", defined so as to include:

(1) the winning and working of minerals in, on or under land, whether by surface or underground working;

(2) the removal of material of any description from:

- **a mineral-working deposit;**
- **a deposit of pulverised fuel ash or other furnace ash or clinker; or**
- **a deposit of iron, steel or metallic slag; and**

(3) the extraction of minerals from a disused railway embankment.

We provisionally considered that Schedule 2 to the Planning and Compensation Act 1991 (minerals permissions granted prior to 1 July 1948) and Schedule 13 to the Environment Act 1995 (minerals permissions granted from 1 July 1948 to 22 February 1982) no longer serve any useful purpose, and should not be restated in the Planning Code (Consultation Question 18-6).

18.35 Schedule 2 to the 1991 Act and Schedule 13 to the 1995 Act both imposed requirements in relation to the compiling of registers, to be carried out by dates that are now in the distant past. Those registers continue to be of relevance. Active sites included in the register are now subject to the requirement for periodic review, under

[14] Consultation Paper, para 18.50 to 18.57.

[15] *Emma Hotels v Secretary of State* (1981) 41 P&CR 255 (CA).

Schedule 14 to the 1995 Act (see below); and dormant sites could, at least in theory, be re-activated at some point in the future.[16]

18.36 We thus suggested that those two Schedules should not be restated in the new Planning Code, but should simply be updated by the making of appropriate consequential amendments to refer to the Code.

18.37 Of the 28 responses to this question, 15 were in agreement. The other 13 drew attention to the continuing relevance of the registers under the two Acts. We agree, but were not suggesting that Schedule 2 to the 1991 Act and Schedule 13 to the Environment Act 1995 should be repealed, merely that they should lie on the statute book as they are, rather than being incorporated in the Bill.

18.38 It would be possible to restate the two schedules, together with section 22 of the 1991 Act and section 96 of the 1995 Act that introduce them, in the new Bill. That was the approach adopted when the planning law in Scotland was consolidated in 1997, where the corresponding provisions emerged as Schedules 8 to 10 of the Town and Country Planning (Scotland) Act 1997.

18.39 Which approach is preferable is a matter of drafting; from the perspective of a user of the Bill it may be clearer if they are not included. We have adjusted the recommendation to make it clear that we are not suggesting the repeal of the two Schedules without restatement.

Recommendation 18-6.

We recommend that Schedule 2 to the Planning and Compensation Act 1991 (minerals permissions granted prior to 1 July 1948) and Schedule 13 to the Environment Act 1995 (minerals permissions granted from 1 July 1948 to 22 February 1982) need not be restated in the Bill, but should remain as they are.

We provisionally proposed that the Bill should include: (1) the provisions currently in Schedule 14 to the Environment Act 1995 (periodic review of minerals permissions); and (2) those currently in Schedule 9 to the TCPA 1990 (discontinuance of minerals permissions) (Consultation Question 18-7).

18.40 We noted in our Consultation Paper that Schedule 14 to the Environment Act 1995 introduced a new system requiring a review of minerals permissions in Wales every 15 years, to ensure that the conditions attached to them remain up-to-date and in line with current environmental standards. We provisionally proposed that the Schedule should be restated in the Bill, possibly placed with the provisions relating to the discontinuance of mineral working and the prohibition of its resumption found in Schedule 9 TCPA 1990.[17]

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16 Consultation Paper, paras 18.62 to 18.67.

17 Consultation Paper, paras 18.68 to 18.69.

18.41 Of 29 consultees who responded to this question, 28 agreed and one disagreed. Those agreeing made few further comments.

18.42 The Mineral Products Association disagreed with the proposal on the basis that the 15-year review period should not be mandatory, and that a review should only be carried out "'where necessary', that is, where it is clearly established that the conditions pertaining to a development are outdated and therefore need to be the subject of a formal mineral review". The Association noted that the legislation in England was changed to reflect this approach, by the Growth and Infrastructure Act 2013.

18.43 This is a reasonable suggestion, but we think it lies outside the scope of technical reform. Furthermore, any substantive change to a planning authority's environmental obligations must be considered in the context of the Well-being of Future Generations (Wales) Act 2015, which several consultees identified as being relevant to this Consultation Question.

18.44 Cardiff Council agreed in principle but suggested that in relation to orders requiring discontinuance of mineral working:

> It would be helpful to provide a clearer definition of what is meant by the term "substantial extent" in paragraph 3(2) of Schedule 9 of the TCPA 1990 [which provides that an authority may assume that mineral working has permanently ceased only when no operations have occurred, to any substantial extent, for at least two years]. A clearer definition of this term would enable planning authorities to bring forward more orders forward for approval by Welsh Ministers.

18.45 We agree that the meaning of this term should be made clearer, but consider that this would be more appropriately included in guidance. There appears to be no guidance currently in force in Wales (or in England for that matter) on the meaning of "substantial extent", but we note that *Minerals Planning Guidance*[18] provided some assistance on this point, in relation to dormant sites under the Environment Act 1995:

> "Substantial extent" is not defined in the statute and, in the absence of case law, the words have their common or everyday meaning. It will therefore be a matter of fact and degree in each case as to whether development has taken place to a substantial extent in the relevant period… "Substantial" clearly means more than token or cosmetic working to keep a permission active and there will need to be evidence of production (or depositing of mineral waste) over a reasonable period of time within the relevant period. Where part of the reserves of the quarry is physically detached from the main operation, if the detached part has planning permission and the main quarry is active, it should not be necessary for there to have been substantial extraction from

[18] Department for Communities and Local Government, *No 14, Environment Act 1995: review of mineral planning permissions* (repealed in 2014).

the detached part for it to be included within the whole operation as an active site.[19]

18.46 We recommend that the Welsh Government should consider providing guidance on the meaning of "substantial extent" in paragraphs 3(2), 5(3), 10(4) and 10(8) of Schedule 9 to the TCPA 1990.

Recommendation 18-7.

We recommend that the Bill should include:

(4) the provisions currently in Schedule 14 to the Environment Act 1995 (periodic review of minerals permissions); and

(5) those currently in Schedule 9 to the TCPA 1990 (discontinuance of minerals permissions).

In relation to the discontinuance of minerals permissions, the Welsh Government should consider providing guidance on the meaning of "substantial extent" in Schedule 9 to the TCPA 1990.

We provisionally proposed that the provisions of the TCPA 1990 in the form in which they apply as modified by the TCP (Minerals) Regulations 1995 (so as to apply to minerals development) should be included in the Bill itself rather than in secondary legislation (Consultation Question 18-8).

18.47 In our Consultation Paper we noted that section 315 of the TCPA 1990 empowers the Welsh Ministers to prescribe adaptations and modifications of the sections of the Act listed in Schedule 16 in the context of minerals development.[20]

18.48 We noted that the regulations currently in force are the TCP (Minerals) Regulations 1995,[21] which are not easy to understand, and have not been substantively amended since their first appearance.[22] We therefore provisionally proposed that the modifications prescribed in the TCP (Minerals) Regulations should be included in the Bill itself.

18.49 30 consultees responded to this question; 29 agreed, including PEBA, the Law Society, PINS and the RTPI. One consultee was equivocal.

18.50 The Mineral Products Association stated that "a more open review of the approach to minerals consents may be warranted" but nevertheless agreed that the special compensation provisions relating to the revocation of minerals permissions (under

19 UK Government, *Minerals Planning Guidance 14: Environment Act 1995 - review of mineral planning permissions* (1995), para 24.

20 Consultation Paper, para 18.70.

21 SI No 2863.

22 Consultation Paper, para 18.73.

section 107 of the TCPA 1990, as modified by the Minerals Regulations) should be included in the Bill itself.

Recommendation 18-8.

We recommend that the provisions of the TCPA 1990 in the form in which they apply as modified by the TCP (Minerals) Regulations 1995 (in relation to minerals development) should be included in the Bill itself rather than in secondary legislation.

FINANCIAL PROVISIONS

We provisionally proposed that the Bill should include a power for the Welsh Ministers to provide for a scale of fees for the performance by them or by planning authorities of any of their functions under the Code, by publication rather than prescription, provided that it also includes a restriction equivalent to section 303(10) of the TCPA 1990, ensuring that the income from the fees so charged does not exceed the cost of performing the relevant function (Consultation Question 18-9).

18.51 In our Consultation Paper, we noted the Welsh Ministers now have powers to make regulations to enable planning authorities to charge fees for the performance of any of their functions under the TCPA 1990.[23] The suggestion had been made to us that it would be more convenient if the levels of fees could be amended simply by being published on a website, rather than by being prescribed in a statutory instrument.

18.52 We noted that the existing power to prescribe fees is subject to section 303(10), which requires that the income accruing to planning authorities and to the Welsh Ministers from the fees so charged must not exceed the cost of performing the function in question. Provided that such a limitation were to be retained, we provisionally considered that it would be reasonable for new fees to be published rather than prescribed.

18.53 Of the 36 responses to this proposal, 27 were in agreement, with a further four broadly in agreement but subject to a strong emphasis on the need for any proposed new scale of fees to be the subject of consultation. As Huw Williams pointed out, such consultation would probably occur anyway, but a provision in the Bill to that effect would be beneficial. He also suggested that all fees received by an authority should be ring-fenced, and used for the benefit of the service concerned. We see the attraction of this proposal, but question its practicality.

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[23] TCPA 1990, s 303, as substituted by Planning Act 2008, s 199. See Consultation Paper, paras 18.74 – 18.79.

Recommendation 18-9.

We recommend that the Bill should include

(1) **a power for the Welsh Ministers to provide for a scale of fees for the performance by them or by planning authorities of any of their functions under the Code, by publication rather than prescription;**

(2) **a provision equivalent to section 303(10) of the TCPA 1990 (income from the fees so charged not to exceed the cost of performing the relevant function) and**

(3) **a provision requiring any proposed scale of fees to be appropriately publicised before being formally published.**

INQUIRIES, HEARINGS AND OTHER PROCEEDINGS

We provisionally proposed that there should be a single provision in the Bill providing for the determination by the Upper Tribunal of disputes as to compensation under provisions in the Bill relating to revocation, modification and discontinuance of planning permission, temporary stop notices, stop notices, damage caused by entry for enforcement purposes, tree preservation, highways, and statutory undertakers, under the provisions in the Land Compensation Act 1961 (Consultation Question 18-10).

18.54 In our Consultation Paper we noted that several provisions of the TCPA 1990 related to compensation, including sections 117 and 118 (revocation, modification and discontinuance); section 171H (temporary stop notices); section 186 (stop notices); section 191 (damage caused by entry for enforcement purposes); section 203 (tree preservation); section 250 (highways); and section 282 (statutory undertakers).[24] We noted that each of those provisions directly or indirectly applies section 4 of the Land Compensation Act 1961, and suggested that it would be more straightforward for the Bill to include a single provision to the effect that any question as to disputed compensation under any of these provisions is to be determined by the Upper Tribunal under section 4 of the 1961 Act.

18.55 None of the 29 consultees who responded to this proposal disagreed. The Law Society said "we agree that a single provision providing recourse to the Lands Chamber is appropriate, provides consistency and simplifies the Code". The Canal & River Trust thought that "this would make the issue of who has responsibility for determining compensation disputes clear to all".

[24] Consultation Paper, para 18.80.

Recommendation 18-10.

We recommend that there should be a single provision in the Bill providing for the determination by the Upper Tribunal of disputes as to compensation under provisions in the Bill relating to revocation, modification and discontinuance of planning permission, temporary stop notices, stop notices, damage caused by entry for enforcement purposes, tree preservation, highways, and statutory undertakers, under the Land Compensation Act 1961.

We provisionally proposed that the Code should include a power to require expert evidence at inquiries and other proceedings (including appeals decided on the basis of written representations) to be accompanied by a statement of truth in accordance with the requirements of the Civil Procedure Rules in force for the time being (Consultation Question 18-11).

18.56 Practice Direction 35 of the Civil Procedure Rules sets out that expert reports "must be verified by a statement of truth in the following form –

> I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.[25]

18.57 In our Consultation Paper, we referred to the directions in professional guidance manuals, which suggested that a similar statement be used to endorse expert evidence used for planning inquiries, hearings and other planning proceedings.[26] We also proposed that the requirement be made a statutory requirement, rather than remaining a rule of good practice.[27]

18.58 33 consultees responded to this proposal; 23 agreed. The Law Society noted that this "is frequently done already on an informal basis and in accordance with advice from professional bodies". The RTPI also suggested that the proposal would "increase confidence in professional evidence".

18.59 Nine consultees expressed mixed views. PINS – which has particular experience of conduct at inquiries – highlighted three main concerns with the proposal, namely

1) the difficulties in defining an "expert";

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25 CPR, Practice Direction, para 3.3.

26 Consultation Paper, paras 18.86 to 18.87.

27 Consultation Paper, para 18.88.

2) the consequences of failing to include a statement of truth, in the light of PINS' inability to turn away evidence;[28] and

3) the difficulties in ensuring that expert evidence is considered to carry more weight than evidence submitted without the attached statement of truth.

18.60 We agree with the concerns being expressed. The inclusion of a statement of truth by a professional person giving evidence at a planning inquiry is a relatively recent development, and should undoubtedly be encouraged. Indeed, arguably, it is the confidence of witnesses in their own expertise, sufficient to justify the inclusion of a statement along the lines indicated above, that makes them stand out as experts, rather than vice versa. Experience suggests that there are a number of witnesses at planning inquiries whose expertise is uncertain, and whose evidence may as a result be of limited value; but that must be a matter of judgment for the inspector.

18.61 Further, particular problems may arise in relation to appeals determined on the basis of written representations, where there is no opportunity for the supposed expertise of a witness to be challenged.

18.62 We therefore agree that the production of a statement of truth by all witnesses (with the omission of the word "professional" where appropriate) should be encouraged, but not made a statutory requirement.

Recommendation 18-11.

We recommend that guidance relating to planning inquiries and appeals should strongly encourage the inclusion of a suitably worded statement of truth in any witness statement (including in relation to appeals decided on the basis of written representations).

We provisionally proposed that the power to make orders as to the costs of parties to proceedings, currently in section 322C(6) of the TCPA 1990, should be amplified to make explicit that such an order is only to be made where a party to an appeal has behaved unreasonably and the unreasonable behaviour has led other parties to incur unnecessary or wasted expense (Consultation Question 18-12).

18.63 In our Consultation Paper, we noted that in respect of inquiries and other proceedings, section 322C(6) gives the Welsh Ministers the power to make orders as to the costs of the parties, and as to the party by whom they are to be paid. We noted that despite the general terms in which this provision is expressed, longstanding practice has made it clear that an award of costs is only made where one party has behaved unreasonably, leading to another party incurring unnecessary or wasted expense.[29]

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28 Note that any interested party may make representations.

29 Consultation Paper, para 18.90. See also Welsh Government, *Development Management Manual* (May 2017), Section 12 Annex: *Awards of Costs* (replacing Welsh Office Circular 23/93 *Awards of Costs incurred in Planning and Other (Including Compulsory Purchase Order) Proceedings*).

18.64 We provisionally proposed that this principle should be enshrined in the Bill.

18.65 Twenty-nine consultees responded to this question, including the RTPI, PINS, and PEBA. All agreed with our proposal.

18.66 The Mineral Products Association suggested that:

> It would be beneficial to identify which circumstances could be considered "unreasonable" and this should include decisions made against officer recommendation. This would ensure spurious or political decisions are eliminated. Whilst we recognise the planning process is democratic, applicants for controversial development will routinely avoid periods leading up to local elections.

18.67 The refusal of permission and the imposition of conditions – including where the officers have recommended otherwise – will always be accompanied by a statement of reasons. And we have noted that the Supreme Court has recently confirmed that an authority granting permission against officers' recommendation should also include such a statement.[30] Those requirements should concentrate the minds of authorities, and mitigate the problems feared by the Association.

18.68 Friends of the Earth Cymru argued that it should be made clear in the legislation that rule 6 parties – that is parties (such as amenity groups) other than the appellant and the planning authority, sometimes granted special status by the Inspectorate – will not be exposed to costs. We note that, in practice, rule 6 parties are only very rarely required to pay the costs of other parties. However, in certain circumstances it may be appropriate for them to be exposed to a potential liability to pay such costs, and a blanket immunity from costs awards might allow some rule 6 parties to abuse their status. We therefore do not agree that such an immunity should be included in the Bill.

Recommendation 18-12.

We recommend that the power to make orders as to the costs of parties to proceedings, currently in section 322C(6) of the TCPA 1990, should be restated in an amended form so as to make it explicit that such an order is only to be made where:

(1) a party to an appeal has behaved unreasonably; and

(2) that unreasonable behaviour has led other parties to incur unnecessary or wasted expense.

[30] *R (CPRE Kent) v Dover DC* [2018] 1 WLR 108, SC, per Lord Carnwath; see **paras 8.225, 8.226**.

APPLICATION OF PROVISIONS IN THE PUBLIC HEALTH ACT 1936

We provisionally proposed that the Planning Code should incorporate provisions equivalent to those currently in section 276, 289 and 294 of the Public Health Act 1936, to be applicable to the carrying out by the authority of works required by discontinuance notices, enforcement notices, tree replacement notices, and unsightly land notices (Consultation Question 18-13).

18.69 In our Consultation Paper we noted that various provisions of the TCPA 1990 referred to the Public Health Act 1936.[31] Most of the 1936 Act has been repealed, but some provisions are still in force. Section 276 contains the powers of a local authority to sell materials removed in executing works, section 289 contains the power to require the occupier of any premises not to prevent the works being carried out, and section 294 limits the liability of landlords and agents in respect of expenses recoverable. We suggested that these provisions – between them amounting to no more than five subsections – should be incorporated into the Planning Bill, to avoid the need for reference to the 1936 Act.

18.70 Of the 28 consultees who responded to this question, 27 agreed and one was equivocal. POSW and several planning authorities described the incorporation of these provisions as "long overdue". Rhondda Cynon Taf CBC expressed strong support, noting that "by placing these provisions in the Bill it makes it clear and saves the time and expense reviewing other legislation to establish what the powers are applied by reference".

18.71 The Mineral Products Association argued that the powers of a planning authority to sell materials removed in executing works should be subject to the same level of environmental controls as non-public bodies. We see no reason why this should not be the case in any event.

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31 Consultation Paper, para 18.93; E.g. TCPA 1990 s 178(3) (execution and costs of works required by enforcement notice), s 209(3) (works required by a tree replacement notice) and s 219 (works required by an unsightly land notice under section 215).

Recommendation 18-13.

We recommend that the Planning Bill should incorporate provisions equivalent to those currently in:

(1) section 276 of the Public Health Act 1936 (power of a planning authority to sell materials removed in executing works);

(2) section 289 of that Act (power to require the occupier of any premises not to prevent works being carried out); and

(3) section 294 of that Act (limit on the liability of landlords and agents in respect of expenses recoverable),

to be applicable to the carrying out by the authority of works required by discontinuance notices, enforcement notices, tree replacement notices, and unsightly land notices.

INTERPRETATION

Are there any terms used in the TCPA 1990 that need to be defined (or defined more clearly), other than those explicitly referred to in other consultation questions? (Consultation Question 18-14)

18.72 In addition to the proposed definitions set out above, we invited suggestions from consultees as to other words or phrases that they considered might usefully be defined within the Bill.[32] Of the 25 consultees responded, 13 declined to make any suggestions; the other 12 between them suggested 15 items.

18.73 Arup highlighted the need for "clear and concise definitions of terms in order to restrict ambiguity and promote consistent interpretation and (by extension) decision making between authorities". They also warned against processes which "introduce too many variables and…lead to conflicting interpretation and applications of legislative terms". And they made a number of suggestions as to terms that could perhaps usefully be defined. We agree with this sentiment, but it is not always possible or appropriate to define terms in statutes, as we have shown in relation to Consultation Question 18-16 (definition of "curtilage").

18.74 While we are grateful for the submissions we received from consultees, we do not consider it appropriate vehicle to provide definitions of the terms suggested. We therefore make no recommendation in response to this question. But for completeness we set out below our response to each of the suggestions made.

Buildings, plant and machinery

18.75 Several consultees suggested that "building" should be defined – particularly to exclude structures, such as lamp posts and certain categories of plant and

[32] Consultation Paper, paras 18.98 to 18.105.

machinery. The TCPA 1990 currently provides that "building" includes a structure or erection.[33] That seems to us to be sensible, as any attempt to include some structures but to exclude others would be fraught with complications.

18.76 "Plant" is defined in the GPDO as anything in the nature of plant; and "machinery" is defined similarly.[34] Neither term is defined in the TCPA 1990. Arup seek a more precise definition, but we consider that the nature of plant and machinery is such that it would be impossible to provide a definition which is capable of providing sufficient certainty and encompass future changes in technology.

18.77 Arup also suggest clarifications of various terms in the GPDO – notably "ground level", in relation to underground structures, "renewing of services", and "enclosures". We consider that these may be appropriate points to consider when the GPDO itself is next replaced.

Highways

18.78 Three consultees suggested including a definition of "highway". Arup suggested that for the purposes of the GPDO, it may be appropriate to exclude certain types of highway, so as to enable statutory undertakers to construct fences higher than 1m next to footways. And the Institute of Civil Engineers suggested that it would be helpful to clarify the extent of a highway, and in particular whether it includes the grass verge.

18.79 The TCPA 1990 states that it has the same meaning as in the Highways Act 1980; but that Act in turn merely provides that "highway" means the whole or part of a highway, other than a ferry or waterway.[35] However there is an extensive and complex body of case law, going back to the nineteenth century, as to what actually is a highway – and whether, for example, it includes open land to either side.[36] By virtue of the existing statutory definition, all that case law is automatically incorporated. We consider that it would not be helpful to attempt to provide any more precision.

Other terms with technical meaning

18.80 The Health and Safety Executive observes that there are several references in planning legislation to a person having "control of land". Section 72(1)(a) of the TCPA 1990 refers to "land under the control of the applicant…", section 179(4) refers to "a person who has control of or an interest in the land …"; and section187A(2)(b) refers to "any person having control of the land". Paragraph (w) of Sch.4 to the DMPWO 2012 refers to "the person who is in control of the land on which any existing establishment in question is located". And the Planning (Hazardous Substances) Regulations 2015 contains several references to "the person in control of the land to which the (application/direction/consent/claim form/notice) relates".

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33 TCPA 1990, s 336.

34 GPDO 1995, art 1(2).

35 Highways Act 1980, s 328.

36 The relevant law on the characteristics of a highway is summarised in the first 21 pages of *Highway Law*, by Stephen Sauvain, QC, fourth edn, 2009.

18.81 "Control" of land clearly means something less than ownership; and the Courts have stressed in a number of cases that the ascertainment of who has "control" of land sufficient to come within any of these statutory provisions must be a matter of fact and degree.[37] Once again, we consider that it would be difficult to make more precise a statutory term that has acquired a settled, if not entirely precise, meaning over many years.

18.82 The same applies to terms such as "implementation of permission" and "commencement of development". Each has been the subject of case law, laying down general principles, and we do not consider that it would be possible to provide a statutory formula that would, inevitably, fall to be applied in a wide variety of factual situations.

Words in normal use

18.83 Two planning authorities requested definitions of "adjacent" and "abutting". We consider that these are ordinary English words, and do need a formal definition. We freely accept that it may be difficult to determine their precise meaning in certain situations – such as where a number of property boundaries are in close proximity. But we do not consider that a statutory definition would help – it might indeed make the interpretation of those words more difficult in more straightforward situations.

18.84 Andrew Ferguson observes that the term "ancillary" is often used in planning jargon (and is used in the Consultation Paper), and incorrectly used interchangeably with the term "incidental". He suggests that it might be worthwhile considering carefully which term is appropriate in each case, or defining what both mean.

18.85 We agree that the two words are used on many occasions in both the primary and secondary legislation. Each is an ordinary English word; "ancillary" means "subservient, subordinate (to)"; and "incidental" means "occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part; casual." We suspect that in some cases the legislation may use one where it should use the other, and care will be taken in drafting the Code to ensure correct usage.

18.86 We do not consider that definitions would help for any of the terms suggested above, and therefore do not recommend that a definition be provided for them within the Code.

Recommendation 18-14.

We do not recommend that the Bill should provide any further definitions of terms, other than those recommended below.

We provisionally proposed that: (1) the provisions of the English language version of the Bill equivalent to sections 55, 171, 183, 196A and 214B and Schedule 3 of the TCPA 1990 should be framed by reference to a "dwelling", rather than a "dwellinghouse"; and

[37] See for example *George Wimpey Ltd v New Forest DC* (1979) 250 EG 249.

(2) the interpretation section of the Bill should include a definition of the term "dwelling", to the effect that it includes a house and a flat (Consultation Question 18-15).

18.87 In our Consultation Paper we noted that the term "dwellinghouse" is used in a number of places in planning legislation, despite a lack of clarity over its meaning.[38] In particular, in some pieces of secondary legislation it is defined to include a flat; in others it is defined to exclude a flat; and in the TCPA 1990 itself (at least in relation to Wales) it is not defined at all.

18.88 We provisionally proposed that the term "dwellinghouse" should be replaced with the more widely understood term "dwelling." We suggested that it would not be appropriate to define the term "dwelling" other than to clarify that it includes a house and a flat.[39]

18.89 Of the 33 consultees responding to this question, 32 agreed with our proposal and one was equivocal. The RTPI and Alan Archer said that our proposal "put forward a very persuasive case for the rationalisation of the differing definitions." PEBA thought that "the proposed definition of "dwelling" is a sensible standardisation of the meaning of these terms". Rhondda Cynon Taf CBC told us that "the clarification that a dwelling includes both a house and a flat is welcomed".

18.90 Cardiff Council questioned whether there might be an unintended consequence whereby a flat may gain some permitted development rights.[40] We agree that this is a possible consequence; but consider that it would be possible, when amending or consolidating the relevant provisions relating to permitted development, to introduce specific exclusions in relation to flats where appropriate.

Recommendation 18-15.

We recommend that:

(1) the provisions of the English language version of the Bill equivalent to sections 55, 171, 183, 196A and 214B and Schedule 3 of the TCPA 1990 should be framed by reference to a "dwelling", rather than a "dwellinghouse"; and

(2) the interpretation section of the Bill should include a definition of the term "dwelling", to the effect that it includes a house and a flat.

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38 Consultation Paper, paras 18.106 to 18.127.

39 See Building Regulations 2010, reg 2.

40 Permitted development rights under the General Permitted Development Order 1995, Sched 2, Part 1 and Part 24 currently only apply to "dwellinghouses".

DEFINITION OF "CURTILAGE"

We provisionally considered that the Bill should include a provision to the effect that the curtilage of a building is the land closely associated with it, and that the question of whether a structure is within the "curtilage" of a building is to be determined with regard to: (1) the physical 'layout' of the building, the structure, and the surrounding buildings and land; (2) the ownership, past and present, of the building and the structure; and (3) their use and function, past and present (Consultation Question 18-16).

18.91 The term "curtilage" refers to the land associated with a building. It is referred to over 1,500 times in a wide variety pieces of primary and secondary legislation, and in the planning context it appears in the context of the definition of a listed building, and the extent of certain permitted development rights.

18.92 We noted in our Consultation Paper that the term is not defined in the statute, resulting in a lack of transparency and confusion for practitioners and users of the planning system.[41] We discussed the complexity of defining a term that is used in so many contexts, but suggested that it might be helpful to incorporate into a non-exclusive definition the factors identified by the Court of Appeal in *Attorney-General v Calderdale*[42] as those to be taken into account when determining whether or not one structure or object is within the curtilage of another.[43]

18.93 Amongst the 31 consultees responding to this proposal, there was a wide range of views. PINS agreed with the approach proposed, and drew attention to the recent decision in *Burford v Secretary of State and Test Valley BC*, which affirmed the criteria laid down in *Calderdale* in a non-listed building case.[44] PEBA found our suggested approach to be a sensible clarification of an elusive concept. The Central Association of Agricultural Valuers agreed, noting that it was important that the definition "look at principles only and that each case continue to be determined individually". Rhondda Cynon Taf CBC also suggested that "prescribing the factors that should be considered when making a determination as to the curtilage of a building will assist both the layperson and planning practitioner".

18.94 Four consultees agreed in principle that it would be desirable to clarify the meaning of "curtilage" if possible, but expressed doubts about whether the suggested definition would in fact achieve that result. The RTPI questioned whether the *Calderdale* factors were "capable of being applied to the many different instances where the definition of the curtilage comes into play", arguing that reference to physical layout, ownership, use and function "appears rather narrow". Neath Port Talbot CBC suggested that the three criteria are helpful, but other issues should not be precluded. We agree.

18.95 Several consultees focussed solely on the relevance of the word "curtilage" to the definition of a listed building. We accept that this is one aspect of the matter, but the

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41 Consultation Paper, paras 18.134 to 18.138.

42 (1983) 46 P. & C.R. 399, at p. 407. The three deciding factors are set out in Consultation Question 18-16.

43 Consultation Paper, paras 18.139 to 18.142.

44 [2017] EWHC 1493 (Admin).

definition of "listed building", currently in section 1(5) of the Listed Buildings Act and referring to the curtilage of the building in the list, would remain in place whether or not the term "curtilage" was itself defined. We also note that a number of consultees suggested that, in that context, it would be helpful if the original listing of a building were to define the curtilage at that date. We agree that that would be helpful, and could be done on a non-statutory basis.[45] But it does not answer the need for a wider definition of "curtilage".

18.96 The CLA disagreed strongly with our proposed definition, suggesting that the criteria laid down in *Calderdale* are "black or white", and not "factors" to be weighed in the balance. Unfortunately, that is not always the case. In relation to questions of ownership, for example, patterns of ownership may vary over the years, with different parts of a plot of land owned by different family members. Thus, precision is sometimes impossible.

18.97 Allan Archer suggested that the key question is not whether one structure is within the curtilage of another, but rather the extent of the curtilage of a building – for example, for the purposes of determining permitted development rights (for example, to erect a greenhouse within the curtilage of a country house). Even in that context, however, it is necessary to focus on the question of whether the location of the proposed structure is within the curtilage of the house – to determine in abstract terms the overall extent of the boundary of the curtilage may be difficult if not impossible.

18.98 It is of course easy to say that such a definition should be in guidance, or should be left to users to discover for themselves. And we freely admit that the suggested definition of "curtilage" cannot be determinative. However, as we have noted, the word "curtilage" appears in various places in planning legislation. Unlike most technical terms used in the legislation, it is likely to be not merely unfamiliar to most users, but completely incomprehensible. We therefore consider that it should have a definition in the Bill (which would also apply to secondary legislation made under it). Our suggestion aims to provide a broad indication of what the word means, followed by a summary of the most important principles derived from case law.

18.99 Finally, Andrew Ferguson suggested that it might be helpful to clarify that "domestic curtilage" is not a use of land, as is commonly suggested. We are aware of the misconception to which Mr Ferguson refers but we consider that case law is clear that the use of open land in the curtilage of a building is the same as the use of the building itself. We do not immediately see how a legal principle of this kind could be readily be incorporated as a statutory provision.

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[45] As is the practice with scheduled monuments: see *R v Bovis Construction Ltd* [1994] Crim LR 938, CA; also *R v Jackson*, 5 May 1994, Lawtel AC 0001096

Recommendation 18-16.

We recommend that the Bill should include a provision to the effect that the curtilage of a building is the land closely associated with it, and that in determining whether a structure is within the "curtilage" of a building, the factors to be considered include:

(1) the physical 'layout' of the building, the structure, and the surrounding buildings and land;

(2) the ownership, past and present, of the building and the structure; and

(3) their use and function, past and present.

DEFINITION OF "AGRICULTURE" AND RELATED TERMS

We provisionally proposed that the interpretation section of the Bill should contain definitions of the following terms: (1) "agriculture" and "agricultural", along the lines of the definition currently in section 336 of the TCPA 1990, with the addition of a reference to farming in line with those currently in section 147 and 171; and (2) "agricultural land" and "agricultural unit", broadly in line with the definition in Part 6 of Schedule 2 to the GPDO; and we provisionally proposed that no further definitions of those terms be provided in relation to purchase notices and blight notices (Consultation Question 18-17).

18.100 In our Consultation Paper we noted that the terms "agriculture"[46] and "agricultural"[47] are defined in section 336 of the TCPA 1990:

> "agriculture" includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and *"agricultural"* shall be construed accordingly.[48]

18.101 "Agricultural" is also defined in section 147 of the TCPA 1990 for the purposes of sections 145, 146 and 147 (purchase notices), and in section 171, for the purposes of Chapter 2 of Part 6 (blight notices). In both cases, the provision in the TCPA 1990 imports the definition of "agricultural" in section 109 of the Agriculture Act 1947, which is in precisely the same terms as the definition in section 336 of the TCPA 1990. Further definitions of "agricultural land" are provided in section 147, again by reference to the 1947 Act; and the terms "agricultural unit", "agricultural tenant" and

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46 Used in TCPA 1990, ss 55, 147 and 315, Schs 5 and 9.

47 Used (other than in terms such as "agricultural unit") in TCPA 1990, s 171.

48 Consultation Paper, paras 18.146 to 18.158.

"agricultural holding" are also defined in the Act, in some cases by reference to other statutes.

18.102 We suggested bringing together the various definitions of "agriculture" and related terms into the same place, and that the definitions used should be broadly the same as in existing legislation. Those definitions would also apply for the purpose of interpreting the GPDO.

18.103 Of the 27 consultees responding to this question, all but one agreed.

18.104 Three planning authorities questioned whether the definition should explicitly include or exclude the grazing of horses. The "use of land as grazing land" is already expressly included; if the suggestion is that such use should be excluded, so as to come within planning control, that would seem to be a policy change beyond the scope of the present exercise. The Central Association of Agricultural Valuers queried whether it should include the management of land for ecological benefit. The existing definition is inclusive, rather than exclusive; such activities might be included, depending on the facts of each case.

18.105 Keith Bush QC disagreed with our proposal on the basis that:

> "agriculture" is a common term which should be interpreted on the basis of common sense, and on the basis of the courts' previous decisions.

18.106 We consider that, given that "agriculture" is already (at least partially) defined in statute, it would not be helpful to depart from this and offer no definition at all. Our suggestion was merely to tidy up the plethora of existing interpretations.

Recommendation 18-17.

We recommend that the interpretation section of the Bill should contain definitions of the following terms:

(1) "agriculture" and "agricultural", along the lines of the definition currently in section 336 of the TCPA 1990, with the addition of a reference to farming in line with those currently in section 147 and 171; and

(2) "agricultural land" and "agricultural unit", broadly in line with the definition in Part 6 of Schedule 2 to the GPDO;

and we recommend that no further definitions of those terms should be provided in relation to purchase notices and blight notices.

MISCELLANEOUS PROVISIONS

We provisionally proposed that the following provisions, which appear to be obsolete or redundant, should not be included in the Planning Code: section 314 of the TCPA 1990 (apportionment of expenses by county councils); section 335 of the TCPA 1990

(relationship between planning legislation and other legislation in force in 1947); and Schedule 16 to the TCPA 1990 (provisions of the Act applied or modified by various other provisions in the Act) (Consultation Question 18-18).

18.107 In our Consultation Paper we highlighted three provisions that appeared to be obsolete:

8) Section 314 TCPA 1990, which enables a county council to direct that certain expenses incurred by it may be treated as having been incurred in respect of only part of its area, so that they can be appropriately reflected in council tax demands on different parts of the county;

9) Section 335 TCPA 1990, which relates to the relationship between the modern scheme of planning control and legislation in force at or about the time of the passing of the TCPA 1947; and

10) Parts 1 and 2 of Schedule 16 to the TCPA 1990, relating to sections 314 (county council expenses) and section 315 of the Act (minerals); Part 3 relating to section 315 and section 318 (ecclesiastical property); and Part 6 relating to section 318.

18.108 We suggested that these provisions need not be restated in the Bill.

18.109 All of the 24 consultees who responded to this question agreed in principle with our provisional proposal.

18.110 However, Allan Archer helpfully pointed out a potential issue regarding the suggested repeals in Schedule 16. In our Consultation Paper we proposed the restatement of the provisions relating to property of the Church of England in section 318 of the TCPA 1990, as they were applicable in some border parishes.[49] Section 318 has two references to Schedule 16. The first reference, to Part 6 of Schedule 16, applies only if the property in question is situated "elsewhere than in Wales",[50] and is therefore inapplicable. However, the second reference, to Part 3 of Schedule 16, has no such restriction.[51] It would seem, therefore, that Part 3 of Schedule would need to be retained in some form, and we recommend accordingly.

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49 Consultation Paper, paras 18.48 – 18.49.

50 TCPA 1990, s 318(2)(a).

51 TCPA 1990, s 318(4), relating to sums payable in relation to ecclesiastical property.

Recommendation 18-18.

We recommend that the following provisions, which appear to be obsolete or redundant, should not be included in the Bill:

(1) section 314 of the TCPA 1990 (apportionment of expenses by county councils);

(2) section 335 of the TCPA 1990 (relationship between planning legislation and other legislation in force in 1947); and

(3) Schedule 16 to the TCPA 1990 (provisions of the Act applied or modified by various other provisions in the Act), other than Part 3, which should retained in relation to the provision restating section 318 of the TCPA 1990.

Appendix A: Responses to Consultation Paper

[See Chapter 2. This list includes the stakeholders whom we met during the consultation period or who submitted written responses to the Consultation Paper . Entries within each group are in alphabetical order. All of those listed submitted written responses except those marked with an asterisk who met with the Commission, or hosted an event attended by it.]

CENTRAL GOVERNMENT

Department of Communities, Housing and Local Government *

Planning Inspectorate (PINS)

Welsh Government (including Cadw) *

LOCAL AUTHORITY REPRESENTATIVE BODIES (6)

Association of Local Government Ecologists

North Wales Development Managers Group

One Voice Wales *

Planning Officers' Society (POS) [England]

Planning Officers' Society Wales (POSW)

POSW North Wales *

POSW South-East Wales

POSW South-West Wales *

Welsh Local Government Association

LOCAL AUTHORITIES (18)

Blaenau Gwent CBC

Bridgend CBC

Caerphilly CBC

Cardiff Council

Carmarthenshire CC

Ceredigion CC

Denbighshire CC

Flintshire CC

Gwynedd CC

Merthyr Tydfil CBC

Monmouthshire CC
Neath Port Talbot CBC
Newport City Council
Pembrokeshire CC
Rhondda Cynon Taf CBC
Swansea Council
Torfaen CBC
Ynys Mon CC

NATIONAL PARK AUTHORITIES (2)

National Parks Wales
Pembrokeshire Coast National Park Authority

COMMUNITY AND TOWN COUNCILS (21)

Arddleen Community Council
Barry Town Council
Bay of Colwyn Town Council
Caersws Community Council
Carreghofa Community Council
Churchstoke Community Council
Cynwyl Elfed Community Council
Holywell Town Council
Lladydilio Community Council
Llandrinio Community Council
Llanfair Dyffryn Clwyd Community Council
Llantwit Major Town Council
Monmouth Town Council
Newtown and Llanllwchaiarn Town Council
Pembrey and Burry Port Town Council
Pestrowed Community Council
Pontarddulais Town Council
Pontypridd Town Council
Presteigne & Norton Town Council
Welsh St Donats Community Council
Welshpool Town Council

OTHER PUBLIC BODIES (6)

Health & Safety Executive
Natural Resources Wales
Public Service Ombudsman for Wales
South Wales Police
Welsh Assembly
Welsh Language Commissioner

PROFESSIONAL BODIES (15)

Bar Council
British Architectural Trust
Chartered Institute of Architectural Technologists
Chartered Institute of Building
Institute of Chartered Engineers (ICE) Wales Cymru
Institute of Historic Buildings Conservation (IHBC)
IHBC (Wales Branch)
Law Society Planning and Environment Committee
Lawyers in Local Government
National Association of Planning Enforcement (NAPE)
Planning and Environment Bar Association (PEBA)
Royal Institution of Chartered Surveyors (RICS)
Royal Society of Architects in Wales
Royal Town Planning Institute (RTPI Cymru)
UK Environmental Law Association (UKELA)

LAWYERS, PLANNING CONSULTANTS, ARCHITECTS ETC (7)

39 Essex Chambers *
Doug Hughes Associates
Francis Taylor Building *
Ove Arup
Planning Aid Wales
Sirius Planning
Welsh Planning Consultants' Forum *

HOUSING BODIES (4)

Barratt & David Wilson Homes South Wales
Community Housing Cymru
Home Builders Federation
Redrow Homes (South Wales)
Residential Landlords' Association *

RURAL LANDOWNERS (9)

Canal & River Trust
The Central Association of Agricultural Valuers
Community Land Advisory Service
Country Land & Business Association (CLA)
Farmers Union of Wales
Friends of the Earth Cymru
The National Trust
Open Spaces Society
Royal Society for the Protection of Birds (RSPB)

OTHER LANDOWNERS, DEVELOPERS ETC (7)

Accessible Retail
Arqiva
Innogy Renewables UK
Mineral Products Association
National Grid
Southern Power Energy Networks
Tidal Lagoon Power

HERITAGE BODIES (20)

Aberystwyth & District Civic Society
Ancient Monuments Society
Chartered Institute for Archaeologists
Council for British Archaeology
Design Commission for Wales
Dyfed Archaeological Trust

Glamorgan-Gwent Archaeological Trust
Gwynedd Archaeological Planning Service
Gwynedd Archaeological Trust
Historic Environment Group *
Historic Houses Association
Joint Committee of National Amenity Societies *
Llandaff Conservation Area Advisory Group
Manchester Civic Society
Mid and West Wales Conservation Officers' Group
Royal Commission on Ancient and Historical Monuments in Wales
Save Britain's Heritage
Society for the Protection of Ancient Buildings (SPAB)
Society of Antiquaries
South Wales Conservation Group
Theatres Trust
Wales Heritage Group

TREE-RELATED ORGANISATIONS (8)

Ancient Trees Forum
Arboricultural Association
Cedarwood Tree Care Ltd
Institute of Chartered Foresters
London Tree Officers Association
Simon Pryce Arboriculture
Woodland Trust
Wrexham County Council (arboricultural section)

FAITH GROUPS (5)

Churches Legislation Advisory Service
Church Buildings Council (Church of England)
Cytun (Churches Together in Wales)
Diocese of Llandaff
Monmouthshire Diocesan Advisory Committee for the Care of Churches

OTHER ORGANISATIONS (2)

Radio Society of Great Britain

CMet Residents Action Group

INDIVIDUALS (36)

Mr John Almond

Mr Allan Archer, independent planning adviser

Mr Chris Bell, of Donald Insall Associates

Mr Simon Bradley

Mr Andrew Bramwell

Mr Keith Bush, QC (Hon)

Sir Richard Buxton

Dr Martin Cherry

Ms Molly Edwards

Mr Huw Evans

Mr Eric Franklin

Mr Martin Goodall, of Keystone Law

Mr Andrew Goodyear, independent planning adviser

Mr Steven Hansberger

Mr Richard Harwood QC

Mr Nigel Hewitson, of Brook Street des Roches

Ms Jessica Holland, of Donald Insall Associates

Ms Lydia Inglis, architectural historian

Sir Donsall Insall [112], architect and planner

Ms Caroline James, of CJ Consulting

Mr Philip Jenkins

Mr Edward Lewis, of Donald Insall Associates

Mr Neil McKay

Mr Mark Mackworth-Praed, of David Archer Associates

Mr Julian Morris

Mr Andrew Muir, of Boyer Planning

Mr Matt Osmont, of Donald Insall Associates

Ms Pippa Richardson

Ms Ruth Richardson

Ms Sarah Richardson

Mr Gethin Roberts, of Donald Insall Associates

Mr Mark Teale

Mr Peter Thomas

Mr Michael Tree

Mr Jordan Whittaker (small business)

Mr Elfed Williams, of ERW Consulting

Mr Huw Williams, of Geldards

Mr Owain Wyn, town planner

Appendix B. Recommendations

CHAPTER 5. INTRODUCTORY PROVISIONS

Recommendation 5-1

We recommend that a provision should be included in the Bill, to the effect that, in the exercise of any of their function under the Code, the planning authority, a strategic planning panel or, as the case may be, the Welsh Ministers:

1) must have regard to the development plan, so far as relevant to the exercise of that function; and

2) must exercise that function in accordance with the plan unless any other relevant considerations indicate otherwise;

but that this duty should not apply to the exercise of functions relating to the formulation of the development plan, the determination of applications for certificates of lawfulness or claims for compensation, and the making of subordinate legislation.

Recommendation 5-2

We recommend that:

1) the Bill should not include a definition of the term “relevant [or material] considerations” or a list of examples; and

2) the word “relevant” should be used in place of “material” in the provisions of the Bill corresponding to sections 62(4A), 70(2), 70A(1), 70A(6), 91(2), 92(6), 97, 102, 172 and 177(2) of the TCPA 1990.

Recommendation 5-3

We recommend that a provision should be included in the Bill, to the effect that, in the exercise of any of their functions under the Code, a planning authority, a strategic planning panel or, as the case may be, the Welsh Ministers must also have regard to any other relevant considerations.

Recommendation 5-4

We recommend that

1) a provision or provisions should be included in the Historic Environment Bill to the effect that a public body exercising any function in relation to any historic asset or its setting must have regard to the desirability of preserving or enhancing the asset, its setting, and any features of special interest that it possesses; and

2) a provision should be included in the Planning Bill to the effect that planning authorities, strategic planning panels and the Welsh Ministers, when exercising any function under the Planning Code and the Historic Environment Code must

have special regard to the those matters so far as relevant to the exercise of that function;

3) "public body" should include:

   - the Welsh Ministers;
   - any Minister of the Crown;
   - any public body (including a local authority, a national park authority, a strategic planning panel, and a joint committee);
   - any statutory undertaker (as defined in Part 11 of the TCPA 1990),
   - any person holding public office (as defined in section 85 of the Countryside and Rights of Way Act 2000);

4) "heritage assets" should include world heritage sites, scheduled monuments, listed buildings, conservation areas, registered parks and gardens, and such other categories of land as the Welsh Ministers may prescribe.

Recommendation 5-5

We recommend that a provision should be included in the Bill to the effect that:

1) the relevant considerations, to which a planning authority, a strategic planning panel or, as the case may be, the Welsh Ministers must have regard (in accordance with Recommendation 5-3) when exercising any function under the Code – other than those relating to the determination of applications for certificates, or claims for compensation – should include the likely effect, if any, of the exercise of that function on the use of the Welsh language, so far as that is relevant to the exercise of that function; but

2) the duty to consider the effect of the exercise of a function on the use of the Welsh language is not to affect:

   - whether regard is to be had to any other consideration when exercising that function or
   - the weight to be given to any such consideration in the exercise of that function.

Such a provision would replace section 70(2)(aa) of the TCPA 1990 and sections 60B(2), 60I(8), 62(6A)of the PCPA 2004.

Recommendation 5-6

We recommend that a provision should be included in the Bill, to the effect that:

1) the relevant considerations, to which a planning authority, a strategic planning panel or the Welsh Ministers must have regard (in accordance with Recommendation 5-4) when exercising any function under the Code – other than those relating to the determination of applications for certificates, or claims for

compensation – should include the policies of the Welsh Government relating to the use and development of land, so far as they are relevant to the exercise of that function; but

2) the duty to consider Welsh Government policies is not to affect:

- whether regard is to be had to any other consideration when exercising that function, or
- the weight to be given to any such consideration in the exercise of that function.

Recommendation 5-7

We recommend that it is not necessary for the Bill to contain a provision, equivalent to section 2 of the P(W)A 2015, to the effect that any public body exercising some of the functions under the Code must do so as part of its duty under the Well-being of Future Generations (Wales) Act 2015 to carry out sustainable development.

Recommendation 5-8

We recommend that a comprehensive series of reference to duties in non-planning legislation that may be relevant to the exercise of functions under the Code should be included at appropriate points within Ministerial guidance, and be made available on the Welsh Government and Planning Portal websites.

Recommendation 5-9

We recommend that section 53 of the Coal Industry Act 1994 (environmental duties in connection with planning) should be repealed.

Recommendation 5-10

In the light of the previous proposals in this Chapter, we do not recommend that the Bill should contain a provision explaining the purpose of the planning system in Wales.

Recommendation 5-11

We recommend that persons appointed by the Welsh Ministers for the purpose of determining appeals, conducting inquiries and other similar functions should be referred to in the Planning Bill as “inspectors”.

Recommendation 5-12

We recommend that the Bill should not include the provisions currently in Part 1 of the TCPA 1990 enabling enterprise zone authorities, urban development corporations and housing action trusts to be designated as local planning authorities.

Recommendation 5-13

We recommend that the term “planning authority” should be used in the Planning Code in place of the term “local planning authority” and “minerals planning authority” in existing legislation.

CHAPTER 6. FORMULATION OF THE DEVELOPMENT PLAN

Recommendation 6-1

We recommend that Part 6 of the PCPA 2004 (development plans), as amended by the P(W)A 2015, should be restated in the Bill, subject to any necessary amendments relating to the Wales Spatial Plan and to the proposals in the remainder of the Chapter.

Recommendation 6-2

We recommend that:

1) the provisions currently in the Planning and Energy Act 2008 should be repealed; and

2) consideration should be given in due course to:

   - including equivalent provisions in guidance; and

   - making appropriate amendments to the Building Regulations.

Recommendation 6-3

We recommend that the requirement in the PCPA 2004 as to the sustainability appraisal of development plans should be carried forward into the Bill, but that:

1) the guidance on the implementation of that requirement be drafted so as to minimise the burden in practice; and

2) the position as to that requirement be reviewed in the light of any forthcoming review of the SEA Regulations.

Recommendation 6-4

We recommend that section 114 of the PCPA 2004 (responsibility for procedure at local plan inquiries) should not be restated in the Planning Bill.

Recommendation 6-5

We recommend that Chapter 2 of Part 6 of the TCPA 1990 (blight notices) and Schedule 13 to the Act should be restated in the Planning Bill in broadly their present form.

CHAPTER 7. THE NEED FOR A PLANNING APPLICATION

Recommendation 7-1

We recommend that the power of the Welsh Ministers to remove certain categories of demolition from the scope of development, currently in TCPA 1990, section 55(4)(g), should not be restated in the new Bill, but that the same result should be achieved by using the GPDO.

Recommendation 7-2

We recommend that the extent of minor building operations that are not excluded from the definition of development by TCPA 1990, s 55(2)(a), currently in the proviso to s 55(2)(a) and in s 55(2A) and (2B), should be clarified with a single provision to the effect that the carrying out of any works to increase the internal floor space of a building, whether underground or otherwise, is development.

Recommendation 7-3

We recommend that the Bill should not include a definition of “engineering operations”.

Recommendation 7-4

We recommend that the Planning Bill should provide for the approval of use classes regulations by the negative resolution procedure.

Recommendation 7-5

We recommend that section 55(3)(a) of the TCPA 1990 should be clarified by providing that the use as one or more dwellings of any building previously used as a different number of dwellings is a material change in the use of the building and of each part of it that is so used.

Recommendation 7-6

We recommend that section 55(2)(d) to (f) should be clarified by providing that the following changes of use should be taken for the purposes of this Act not to involve development of the land:

1) the change of use of land within the curtilage of a dwelling to use for any purpose incidental to the enjoyment of the dwelling as such;

2) the change of use of any land to use for the purposes of agriculture or forestry (including afforestation) and the change of use for any of those purposes of any building occupied together with land so used;

3) in the case of buildings or other land which are used for a use within any class specified in regulations made by the Welsh Ministers under this section, the change of use of the buildings or other land or, subject to the provisions of the regulations, of any part of the buildings or the other land, from that use to any other use within the same class.

Recommendation 7-7

We recommend that section 58 of the TCPA 1990 (ways in which planning permission may be granted) should not be restated in the new Planning Bill in its present form, but that a comprehensive list, regularly updated as required, should be included in guidance.

Recommendation 7-8

We recommend that section 61 of the TCPA 1990 (largely relating to the applicability of pre-1947 legislation) should not be restated in the new Planning Bill.

Recommendation 7-9

We recommend that sections 88 and 89 of the TCPA (planning permission granted by enterprise zone scheme) should not be restated in the new Planning Bill.

Recommendation 7-10

We recommend that sections 82 to 87 of and Schedule 7 to the TCPA (simplified planning zones) should not be restated in the new Planning Bill.

Recommendation 7-11

We recommend that the provisions relating to time limits and certificates of lawfulness, currently included in TCPA 1990, sections 171B and 191 to 196, should be included in the new Planning Bill alongside the other provisions relating to the need for planning permission. They should be drafted along the lines of TCPA 1990, section 64(1) (including a reference to the need for a planning application to be submitted, in the light of general and local development orders, but not to enterprise zone or simplified planning zone schemes).

Recommendation 7-12

We recommend that the Bill should not include a provision to the effect that an application for planning permission should be assumed to include an application for a CLOPUD or a CLEUD; but that Welsh Government guidance should remind planning authorities to consider, when validating applications, whether planning permission is actually required for the proposal in question and, if it is, whether it is granted by a development order.

CHAPTER 8. APPLICATIONS TO THE PLANNING AUTHORITY

Recommendation 8-1

We recommend that:

1) the provisions of the TCPA 1990 relating to outline planning permission should be retained in the Bill, but made clearer, and brought into the same part of the Act as those relating to detailed planning permission, currently in sections 62 and 70;

2) when the DMP(W)O is next updated, consideration should be given to whether additional categories of matters should be added to the list of those that are currently capable of being reserved for subsequent approval.

Recommendation 8-2

We recommend that section 327A of the TCPA 1990 – providing that planning authorities must not entertain applications that do not comply with procedural requirements – should not be restated in the Bill.

Recommendation 8-3

We recommend that section 65(5) of the TCPA 1990 (ownership certificates) should be restated in the Bill in its present form.

Recommendation 8-4

We recommend that the requirements of section 65(2) of the TCPA 1990 and secondary legislation made under that provision as to the notification of planning applications to agricultural tenants and the notification of minerals applications be redrafted to make clear the limited circumstances in which they apply.

Recommendation 8-5

We recommend that section 70A of the TCPA 1990 (power to decline similar applications) should be restated in the Bill in the form in which it applies in England following amendment by the PCPA 2004 and the Planning Act 2008, and as amended by the P(W)A 2015.

Recommendation 8-6

We recommend that section 78A of the TCPA 1990, enabling a period of dual jurisdiction between the planning authorities and the Planning Inspectorate, should be restated in the Bill, but not section 70B (which effectively prevents twin-tracking).

Recommendation 8-7

We recommend that the Bill should include a provision requiring each planning authority to prepare a statement specifying those categories of people and organisations within the community (including community and town councils) whom it will seek to involve in the determination of planning applications.

Recommendation 8-8

We recommend that no amendment should be made to the DMP(W)O in relation to representations relating to a planning application that are received after the end of the 21-day consultation period; any obligation to take into account later representations should remain, as at present, a matter of good practice.

Recommendation 8-9

We recommend that the term "condition" should be defined so as to include "limitation".

Recommendation 8-10

We recommend that:

1) the Bill should contain a general power for planning authorities to impose such conditions [or limitations] as they see fit, provided that they are:

   – necessary to make the development acceptable in planning terms,

   – relevant to the development and to planning considerations generally,

   – sufficiently precise to be capable of being complied with and enforced, and

   – reasonable in all other respects;

2) applicants should be afforded a right to see draft conditions proposed by a planning authority determining an application, with a limited period in which to respond, with a duty on the authority to have regard to any comments made.

Recommendation 8-11

We recommend that, in addition to the general power to impose conditions referred to in Recommendation 8-10, the Bill should only include an explicit power to impose conditions of a particular type where statutory authority is required – for example, in order to enable such a condition to be enforced against a person other than the applicant; otherwise, advice as to conditions should be contained in guidance.

Recommendation 8-12

We recommend that the Bill should not include a provision enabling the imposition of conditions to the effect that:

1) the approved works are not to start until some specified event has occurred (a *Grampian* condition); or

2) the approved works are not to be carried out until:

   – a contract for some other development has been made; and

   – planning permission has been granted for the development for which the contract provides,

but that Welsh Government guidance should include advice as to the circumstances in which such conditions would be appropriate.

Recommendation 8-13

We recommend that:

1) the Welsh Government should issue guidance discouraging the creation of any unnecessary burdens by the imposition of inappropriate conditions, and in particular by the drafting of conditions by reference to the commencement of development;

2) no legislative change should be made to enable pre-commencement conditions to be definitely categorised (as per *Hart Aggregates*);

3) where permission is granted subject to one or more conditions requiring that the development in question may not be commenced until certain matters have been resolved, an applicant should be able to apply for a certificate stating that all of those conditions have been complied with; and

4) where development has commenced in breach of a condition precedent, and is as a result deemed to be immune from enforcement action, the permission that would otherwise have authorised it is deemed to have been granted with the omission of the condition in question, such that the remaining conditions may subsist and be enforceable.

Recommendation 8-14

We recommend that a provision should be included in the Bill setting out that:

1) development authorised by permission granted in response to an application must be commenced by the date or dates specified in any relevant condition; and

2) in the absence of any such condition the development must be commenced within five years of the grant of permission.

Recommendation 8-15

We recommend that the Bill should include a provision to the effect that planning authorities may impose conditions providing that the development or use of land under the control of the applicant (whether or not it is land for which the application has been made) should be regulated to ensure that the approved development is and remains acceptable in planning terms.

Recommendation 8-16

We recommend that the Bill, or regulations under the Bill, should enable the imposition of conditions where permission has been granted for a limited period, to the effect that:

1) at the end of the period the buildings or works authorised by the permission be removed, or the authorised use be discontinued, and

2) works be carried out at that time for the reinstatement of land.

Recommendation 8-17

We recommend that a provision equivalent to section 72(3) of the TCPA 1990 (as to time-limited conditions) should be retained in the Code, but drafted so as to make clear that it applies only in the case of:

1) permissions issued between 29 August 1960 and 31 December 1968; and

2) time-limited permissions issued under what is now section 72(1)(b).

Recommendation 8-18

We recommend that the Bill should enable the imposition of conditions to the effect that:

1) particular features of the building or land to which the permission relates be preserved, either as part of it or after severance from it;

2) any damage caused to the building or land by the authorised works be made good after those works are completed; or

3) all or part of the building or land be restored following the execution of the authorised works, with the use of original materials so far as practicable and with such alterations as may be specified.

Recommendation 8-19

We recommend that the Bill should clarify the existing law and procedures as to the approval of details required by a condition of a planning permission, whether imposed at the request of an applicant (in relation to matters not sufficiently particularised in the application) or instigated by the authority itself.

Recommendation 8-20

We recommend that a provision should be included within the DMP(W)O enabling a planning authority to decline to determine an application for the approval of a reserved matter or an approval required by a condition unless further details are supplied, by a procedure analogous to that in article 3(2) of the DMP(W)O 2012.

Recommendation 8-21

We recommend that the Bill should clarify the existing law and procedures as to the approval of details required:

1) by a condition of a permission granted by a development order; or

2) by a planning authority following a notification of proposed works under a development order.

Recommendation 8-22

We recommend that no change should be made to the law regarding the time limits within which authorities should respond to notification of development permitted by certain Parts of the GPDO (for example, those relating to buildings for agriculture and forestry).

Recommendation 8-23

We recommend that section 73 of the TCPA 1990, governing the procedures for seeking amendments to conditions attached to a planning permission, should be restated in the Bill in an amended form so as to allow the making of an application for any amendment to a permission, including but not limited to a change of conditions, provided that:

1) in considering such an application, the planning authority should be under a duty to consider only the part of the planning permission to which the variation application relates;

2) if it decides that the proposed amendment is sufficiently minor that it could have been dealt with by an application under the provision restating section 96A (non-material minor amendments), the authority can treat the application as if it had been made under that provision; and

3) if it decides that the proposed amendment should be the subject of a new application, it should notify the applicant as soon as possible.

Recommendation 8-24

We recommend that the Bill should make it clear that the scope of the provision restating section 96A (approval of minor amendments) includes the making of non-material minor amendments to the details of a development approved in response to a condition of a permission.

Recommendation 8-25

We recommend that there be available an expedited procedure for the determination of an application to vary a permission – under the provisions restating either section 96A or section 73 – where the implementation of the permitted development is imminent or under way, limited to cases that have not attracted representations in relation to the part of the development now sought to be varied.

Recommendation 8-26

We recommend that the Bill should include a provision that empowers Welsh Ministers to:

1) make regulations requiring applications in a particular category to be notified to them, and

2) make a direction requiring a particular application to be so notified, so that they may decide whether to call it in for their decision.

Recommendation 8-27

We recommend that, where the Welsh Ministers decide to call in an application for planning permission, they (rather than the planning authority) should be under a duty to notify the applicant.

Recommendation 8-28

We recommend that the following provisions currently in the TCPA 1990 should not be restated in the Bill, but that equivalent provisions should be included in secondary legislation if considered necessary:

1) section 71(3) (consultation as to caravan sites); and

2) section 71ZB (notification of development before starting, and display of permission whist it is proceeding)

and that such secondary legislation takes account of the special features of development in particular categories, including in particular minerals.

Recommendation 8-29

We recommend that the following provisions currently in the TCPA 1990, which appear to be redundant (at least in relation to Wales), should not be restated in the Bill:

1) section 56(1) (the initiation of development);

2) in section 70(3), the reference to the Health Services Act 1976 (applications for private hospitals);

3) section 74(1)(b) (to make provision for the grant of permission for proposals not in accordance with the development plan);

4) section 74(1A) (planning applications being handled by different types of planning authority);

5) section 76 (duty to draw attention to certain provisions for the benefit of disabled people); and

6) section 332 (power of Welsh Ministers to direct that planning applications should also be treated as applications under other legislation).

Recommendation 8-30

We recommend that the power to determine an application for planning permission, currently in section 70(1) of the TCPA 1990, should be clarified to make explicit the power of an authority to grant permission for all or part of the development that is the subject of the application.

Recommendation 8-31

We recommend that there should be a duty on planning authorities to provide a reason for a decision to grant planning permission in the face of a recommendation by officers to refuse permission.

Recommendation 8-32

We recommend that the provisions in the TCPA 1990 relating to the service of completion notices be restated in the Bill, amended so as to refer to a notice being “issued” rather than “served”.

CHAPTER 9. APPLICATIONS TO THE WELSH MINISTERS

Recommendation 9-1

We recommend that sections 62M to 62O of the TCPA 1990, enabling a planning application to be made directly to the Welsh Ministers in the area of an underperforming planning authority should be restated in the new Bill, subject to appropriate adjustments to reflect our recommendations in Chapters 7 and 8.

Recommendation 9-2

We recommend that the law relating to pre-application consultation and pre-application services in connection with developments of national significance should be reviewed and, where appropriate, clarified.

Recommendation 9-3

We recommend that the power to appoint assessors to assist inspectors to determine DNS applications that are the subject of inquiries or hearings should be extended to allow their appointment in connection with applications determined on the basis of written representations.

Recommendation 9-4

We recommend that sections 62D to 62L of the TCPA 1990 should be restated in the new Planning Bill, subject to appropriate adjustments to reflect our proposals in Chapters 7 and 8.

Recommendation 9-5

We recommend that section 101 of and Schedule 8 to the TCPA 1990 (planning inquiry commissions) should not be restated in the new Planning Bill.

CHAPTER 10. THE PROVISION OF INFRASTRUCTURE AND OTHER IMPROVEMENTS

Recommendation 10-1

We recommend that the statutory provisions relating to CIL, currently in Part 11 of the Planning Act 2008 as amended by the Localism Act 2011, should be incorporated into the Planning Bill, pending any more thoroughgoing review that may take place in due course.

Recommendation 10-2

Subject to the following recommendations in this Chapter, we recommend that provisions relating to planning obligations, currently in sections 106 to 106B of the TCPA 1990, should be incorporated into the Planning Bill, pending any more thoroughgoing review that may take place in due course.

Recommendation 10-3

We recommend that the rules as to the use of planning obligations, currently in regulation 122 of the CIL Regulations, should be included within the Planning Bill.

Recommendation 10-4

We recommend that any future review of the law relating to planning obligations should consider introducing a provision whereby a planning agreement (under what is now section 106 of the TCPA 1990) could in certain circumstances include provision that could be included in an agreement under section 278 of the Highways Act 1980.

Recommendation 10-5

We recommend that any future review of the law relating to planning obligations should consider bringing the breach of a planning obligation under section 106 of the TCPA 1990 within the definition of a breach of planning control.

Recommendation 10-6

We recommend that section 106(12) of the TCPA 1990, which empowers the Welsh Ministers to provide regulations whereby the breach of an obligation to pay a sum of money would result in the imposition of a charge on the land to facilitate recovery from subsequent owners, should not be restated in the Planning Bill.

Recommendation 10-7

We recommend that the use of standard clauses in planning obligations should be promoted in Welsh Government guidance.

Recommendation 10-8

We recommend that any future review of the law relating to planning obligations should consider introducing a procedure to resolve disputes as to the terms of a section 106 agreement, possibly along the lines of Schedule 9A to the TCPA 1990.

Recommendation 10-9

We recommend that any future review of the law relating to planning obligations should consider the introduction of a procedure for the Welsh Ministers to impose restrictions or conditions on the enforceability of planning obligations as they relate to particular categories of benefits.

Recommendation 10-10

We recommend that a planning authority should be given power, when granting planning permission for the development of its own land, to pass at the same time a resolution setting out the terms of an obligation that will be deemed to have been entered into by any third party acquiring the land within a specified period.

Recommendation 10-11

We recommend that a person other than the owner of land (including but not limited to a person considering entering into a contract for the purchase of it) should be able to enter into a planning obligation relating to the land, which would take effect if and when a relevant interest is actually acquired by that person. Any permission linked to such a provisional obligation should be subject to a condition that, in the event that the land passes into the hands of a third party, the permitted development is not to be started until an agreement in the same or substantially the same terms has been concluded with the authority.

CHAPTER 11. APPEALS AND OTHER SUPPLEMENTARY PROVISIONS

Recommendation 11-1

We recommend that section 79(1) of the TCPA 1990 should be incorporated in the Planning Bill broadly without amendment.

Recommendation 11-2

We recommend that the Bill should clarify that all appeals (including those relating to development proposals by statutory undertakers) are to be determined by inspectors, except for:

1) those in categories that have been prescribed for determination by Welsh Ministers; and

2) those that have been recovered by Welsh Ministers (in case-specific directions) for their determination.

Recommendation 11-3

We recommend that the power to appoint assessors to assist inspectors to determine appeals and other proceedings that are the subject of inquiries or hearings:

1) should be widened so as to be exercisable by inspectors as well as by the Welsh Ministers; and

2) should be extended to allow the use of assessors in connection with such proceedings determined on the basis of written representations.

Recommendation 11-4

Subject to our recommendations in Chapter 13 relating to listed buildings and conservation areas, we recommend that the changes proposed in recommendations 11-1 to 11-3 should apply equally to:

1) appeals against enforcement notices;

2) appeals relating to decisions relating to applications for listed building consent or conservation area consent, express consent for the display of advertisements, and consent for the carrying out of works to protected trees; and

3) appeals against listed building and conservation area enforcement notices, advertisements discontinuance notices, tree replacement notices, and notices relating to unsightly land.

Recommendation 11-5

We recommend that the Bill should provide that, in a case where there has been an appeal to the Welsh Ministers, the period within which a purchase notice can be served runs from the date of the decision of the Welsh Ministers on the appeal.

Recommendation 11-6

We recommend that the Bill should clarify that a purchase notice may not be amended, but that a second or subsequent notice served in relation to a single decision should be deemed to supersede any earlier such notice.

Recommendation 11-7

We recommend that the powers currently in section 247, 248, 253 to 257 of the TCPA 1990 (relating to highways affected by development) should be restated in the Planning Bill, but those in section 116, 118 and 119 of the Highways Act 1980 should not.

Recommendation 11-8

We recommend that sections 249 and 250 of the TCPA 1990 (relating to orders extinguishing the right to use vehicles on a highway, in conjunction with a proposal for the improvement of the amenity of an area) should not be restated in the Bill, in view of the parallel provisions in section 1 of the Road Traffic Regulation Act 1984.

Recommendation 11-9

We recommend that decisions relating to orders under section 252 and Schedule 14 of the TCPA 1990 should generally be made by inspectors rather than by the Welsh Ministers, subject to a power for them to make a direction to recover a particular case for their decision.

CHAPTER 12. UNAUTHORISED DEVELOPMENT

Recommendation 12-1

We recommend that the provisions currently in sections 171C and 330 of the TCPA 1990 should be combined into a single power for the Welsh Ministers or a planning authority to serve a "planning information order" (or "planning information notice") on anyone who owns or occupies the land, anyone who has an interest in it, any person who is carrying out operations or other activities on the land or is using it for any purpose, and anyone who is authorised to manage it. The power should be exercisable where the Welsh Ministers or the authority believe that there may have been a breach of planning control, or where the information is needed to make any order, issue, or to serve a notice or any other document under the Act.

The order-making power should include the features mentioned in section 171C(3) (information required to be supplied) and 171C(4) (offer of a meeting to discuss); and where it is believed that there may have been a breach of control, the order must contain the information specified in section 171C(5) (as to possible enforcement action).

Recommendation 12-2

We recommend that the restriction on entering property for enforcement purposes only after giving 24 hours' notice, currently in section 196A(4) of the TCPA 1990, should be clarified to ensure that it applies in relation to any property in use as a dwelling.

Recommendation 12-3

We recommend that:

1) Welsh Government guidance should draw clear attention to the common law principle highlighted in *Welwyn Hatfield Council v Secretary of State* [2010] UKSC 15, [2011] 2 AC 304; and

2) the "planning enforcement order" procedure, introduced in England by the Localism Act 2011, should not be included in the Bill.

Recommendation 12-4

We recommend that section 173ZA of the TCPA 1990 should be restated in an amended form such that, where an enforcement warning notice has been issued, the period for taking other enforcement action starts on the date on which the notice was served, but that the time limit cannot be extended further by the issuing of additional enforcement warning notices in relation to the same matter.

Recommendation 12-5

We recommend that the restriction on issuing a temporary stop notice, currently in section 171F(1)(a) of the TCPA 1990, should be clarified to ensure that it applies in relation to any dwelling.

Recommendation 12-6

We recommend that:

1) a temporary stop notice (TSN) should come into effect at the time and date stated in it, which will normally be when a notice is displayed on the land in question;

2) it should then remain in effect for 28 full days (starting at the beginning of the day after the day on which it is displayed);

3) the notice to be displayed on the land, as near as possible to the place at which the activity to which it relates is occurring, should:

   - state that a TSN has been issued;
   - summarise the effect of the TSN; and
   - state the address (and, if applicable, the website) at which a full copy of the TSN can be inspected;

4) the authority should have a power (but not a duty) to serve copies of the TSN on the owner and occupier of the land and on others as may seem appropriate; and

5) Welsh Government guidance should emphasise that, following the display of the notice, copies of the TSN should be served within a reasonable time on the owner and occupier of the land, if either are known to the planning authority.

Recommendation 12-7

We recommend that:

1) it should be an offence to contravene a temporary stop notice that has come into effect (rather than, as at present, one that has been served on the accused or displayed on the site);

2) it should be a defence to a charge of such an offence to prove that the accused

   - had not been served with a copy of the notice; and
   - did not know, and could not reasonably have been expected to know, of the existence of the notice.

Recommendation 12-8

We recommend that the provisions relating to breach of condition notices, currently in section 187A of the TCPA 1990, should be restated in an amended form such that a notice is to be “issued”, to come into force on the date stated in it, with copies being served on those apparently responsible for the breach (rather than, as present, a separate notice being served on each such person, coming into force on a date specified by reference to the date of service).

Recommendation 12-9

We recommend that section 173(4) of the TCPA 1990 should be restated in an amended form to make it clear that a local authority can require steps to be taken in respect of both of the specified purposes, as set out in *Oxfordshire CC v Wyatt Bros (Oxford) Ltd* [2005] EWHC 2402 (QB).

Recommendation 12-10

We recommend that there should be an explicit provision in the Bill, incorporating the principle in *Murfitt v Secretary of State* (1980) 40 P&CR 254 and *Bowring v Secretary of State* [2013] JPL 1417 to the effect that, where an enforcement notice is served alleging the making of a material change of use of land, the notice may require that certain works be removed in addition to the cessation of the unauthorised use, provided that those works were carried out at or after the time of the making of the material change of use and were integral to the making of the change or the subsequent operation of the new use.

Recommendation 12-11

We recommend that Welsh Government guidance should include guidance as to the implications of the principle in *Mansi v Elstree RDC* (1964) 16 P&CR 153 to the effect that an enforcement notice does not restrict the rights of any person to carry out without a planning application any development that could have been carried out lawfully immediately prior to the issue of the notice.

Recommendation 12-12

We recommend that that the Bill:

1) should omit section 177(5) and (6) of the TCPA 1990, relating to the application for planning permission deemed to have been made by an appellant relying on ground (a) in section 174(2) (permission ought to be granted for any matter stated in the enforcement notice as constituting a breach of control); and

2) should provide instead that the Welsh Ministers, on determining an appeal under section 174, may do all or any of the following:

   - in relation to any of the matters that form the basis of an appeal under ground (a), grant planning permission or discharge any condition or limitation that is alleged to have been breached;

   - in relation to any of the matters that form the basis of an appeal under grounds (c) or (d), issue a certificate of lawfulness, insofar as they determine that those matters were in fact lawful.

Recommendation 12-13

We recommend that ground (e) on which an appeal can be made against an enforcement notice (under section 174 of the TCPA 1990) should refer to copies of the notice not having been served as required by the provision restating section 172(2) (which refers to service on owners and occupiers etc) rather than as required by the provision restating section 172 as a whole (which also refers to time limits for service).

Recommendation 12-14

We recommend that section 174(4) of the TCPA 1990 (requirements as to the statement to be submitted with appeal against an enforcement notice) should be amended so that it does not duplicate the requirements of the relevant secondary legislation.

Recommendation 12-15

We recommend that there should be included in the part of the Bill dealing with enforcement a provision equivalent to section 285(1) and (2) of the TCPA 1990, to the effect that an enforcement notice is not to be challenged, other than by way of an appeal to the Welsh Ministers, on any of the grounds on which such an appeal could have been brought.

Recommendation 12-16

We recommend that the restriction on issuing a stop notice, currently in section 183(4) of the TCPA 1990, should be clarified to ensure that it applies in relation to any building in use as a dwelling.

Recommendation 12-17

We recommend that the provisions relating to stop notices, currently in section 184 of the TCPA 1990, should be restated in an amended form such that a notice is to be "issued", to come into force on the date stated in it, with copies being served on those apparently responsible for the breach of control (rather than, as present, a separate notice being served on each such person, coming into force on a date specified by reference to the date of service); and where a notice is to be displayed on the land, it is to be as close as reasonably possible to the location at which the offending activity is occurring.

Recommendation 12-18

We recommend that:

1) it should be an offence to contravene a stop notice that has come into effect; and

2) it should be a defence to a charge of such an offence to prove that the accused

   – had not been served with a copy of the stop notice, and

   – did not know, and could not reasonably have been expected to know, of the existence of the notice.

Recommendation 12-19

We recommend that:

1) where a planning authority decides to withdraw a stop notice, the notice should cease to have effect immediately; and

2) such a decision should be publicised as soon as possible after it has been made:

   – by the notification of all those who were notified of the original notice, and

   – where the original notice was publicised by a site notice, by the display of another such notice, at the same location.

Recommendation 12-20

We recommend that where an enforcement notice is served by the Welsh Ministers under the provision restating section 182 of the TCPA 1990, and a stop notice is served by them under the provision restating section 185, and the stop notice is subsequently quashed, any liability to compensation arising under section 186 should be payable by them and not by the planning authority.

Recommendation 12-21

We recommend that:

1) the offences under section 179(2) (breach of an enforcement notice) and section 179(5) (subsequent resumption of prohibited activity) should each be reframed so as to provide that a person commits an offence if the person is in breach of an enforcement notice, and

   – the notice was at the time of the breach contained in the relevant register; or

   – the person was aware of the notice, through service of a copy or otherwise.

2) the relevant regulations should include, alongside the requirement to include an enforcement notice in the register, a further requirement to record the date on which it was first included.

3) Welsh Government guidance should advise users of the planning system to consult the enforcement register before undertaking activities on land that may be subject to planning control, and provide clear directions on how to do this.

Recommendation 12-22

We recommend that section 172A of the TCPA 1990 (assurances as to non-prosecution for breach of an enforcement notice) should be amended so as to enable an authority:

1) to give such an assurance simply by giving written notice, as defined in section 329 of the TCPA 1990, to the relevant person rather than necessarily doing so by a hardcopy letter; and

2) to give in response to a request from to a person (B), who acquires an interest in land following the issue of an enforcement notice relating to the land, an assurance explaining that, once the enforcement notice had been issued, the authority was required to serve a copy of it on a person (A) from whom B had acquired the interest in the land.

Recommendation 12-23

We recommend that section 180(1) of the TCPA 1990 (relating to the effect on an enforcement notice of a subsequent grant of planning permission) should be restated in an amended form so as to refer:

1) to the grant of planning permission following the issue of an enforcement notice or a breach of condition notice, rather than following the service of a copy of the notice; and

2) to the grant of planning permission generally for development already carried out; and

3) to the grant of planning permission for other development, once that permission has been implemented.

Recommendation 12-24

We recommend that offences of supplying false information in response to a request from a planning authority, currently under sections 65(6), 171D(5), 194(1) and 330(5) of the TCPA 1990, should – in the case offences committed on or after the date of the enactment of the Bill – all be triable either summarily (in the magistrates' court) or on indictment (in the Crown Court), and that the maximum penalty in each case should be in either case a fine of any amount.

Recommendation 12-25

We recommend that the offences of

1) reinstating or restoring buildings or works following compliance with an enforcement notice (under the provision restating section 181(5) of the TCPA 1990); and

2) failing to comply with a breach of condition notice (under the provision restating section 187A(9))

should, in the case offences committed on or after the date of the enactment of the Bill, both be triable either summarily or on indictment, and punishable in either case by a fine of any amount, to bring them into line with the penalties for other breaches of planning enforcement notices under the TCPA 1990.

Recommendation 12-26

We recommend that sections 57(7), 302 of and Schedules 4 and 15 to the TCPA 1990, relating to historic breaches of planning control, should not be restated in the Code.

CHAPTER 13. WORKS AFFECTING LISTED BUILDINGS AND CONSERVATION AREAS

Recommendation 13-1A

We recommend that the control of works to listed buildings should be simplified by:

1) amending the definition of "development", for which planning permission is required, to include the carrying out of works for the alteration or extension of a listed building in any manner likely to affect its character as a building of special architectural or historic interest;

2) providing that planning permission is not required for works to

   - the interior of an ecclesiastical building in ecclesiastical use by one of the exempt denominations; or

   - a scheduled monument.

3) ensuring that the carrying out without planning permission of works for the demolition of a listed building, or for its alteration or extension in any manner likely to affect its character as a building of special architectural or historic interest, remains a criminal offence;

4) removing the requirement for listed building consent to be obtained for works to a listed building; and

5) implementing the additional measures outlined in Recommendations 13-2, 13-3 and 13-5 to 13-8, to ensure that the existing level of protection for listed buildings is maintained.

Recommendation 13-1B

We recommend that the control of demolition in conservation areas should be simplified by:

1) removing the requirement for conservation area consent to be obtained for the demolition of an unlisted building in a conservation area;

2) ensuring that the carrying out without planning permission of works for the demolition of an unlisted building in a conservation area, remains a criminal offence; and

3) implementing the additional measures outlined in Recommendations 13-6 to 13-8, to ensure that the existing level of protection for unlisted buildings in a conservation area would be maintained.

Recommendation 13-2

We recommend that the power to make general and local development orders should be limited so that they may not grant permission for development consisting of

1) the demolition, alteration, or extension of a listed building;

2) the carrying out of any operational development in the curtilage of a listed building; or

3) the construction, rebuilding or alteration a gate, fence or wall bounding the curtilage of a listed building.

Recommendation 13-3

We recommend that heritage partnership agreements should be capable of granting planning permission for development in such categories as may be prescribed.

Recommendation 13-4

Regardless of whether planning permission is unified with listed building consent and conservation area consent, we recommend that the provisions (currently in sections 191 and 192 of the TCPA 1990) relating to certificates of lawfulness should be extended to include works that currently require only such consent.

Recommendation 13-5

We recommend that the Bill should include provisions to the effect that:

1) any appeal relating to works to a listed building may contain as a ground of appeal that the building in question is not of special architectural or historic interest, and ought to be removed from the list of such buildings maintained by the Welsh Ministers;

2) where a building is subject to a building preservation notice (provisional listing), the notice of appeal may contain a claim that the building should not be included in the list;

3) the Welsh Ministers, in determining an appeal relating to a listed building, may exercise their powers to remove the building from the list; and

4) in determining an appeal relating to a building subject to a building preservation order, they may state that they do not intend to include it in the list.

Recommendation 13-6

We recommend that the Bill should include provisions to the effect that:

1) it is an offence to carry out without planning permission works for

   - the demolition of a listed building;

   - for the alteration or extension of a listed building in any manner likely to affect its character as a building of special architectural or historic interest; or

   - the demolition of an unlisted building in a conservation area;

2) such an offence is punishable:

   – on summary conviction by imprisonment for a term not exceeding six months or a fine or both; or

   – on conviction on indictment by imprisonment for a term not exceeding two years or a fine or both; and

3) the defence to a charge of such an offence is the same as currently applies in relation to a charge of carrying out works without listed building consent.

Recommendation 13-7

We recommend that the Bill should include provisions to the effect that the categories of development that are subject to time limits as to the period within which enforcement action may be taken exclude works for:

1) the demolition of a listed building;

2) for the alteration or extension of a listed building in any manner likely to affect its character as a building of special architectural or historic interest; and

3) the demolition of an unlisted building in a conservation area.

Recommendation 13-8

We recommend that the Bill should include provisions to the effect that:

1) where an enforcement notice is issued in relation to the carrying out of works for

   – the demolition of a listed building; or

   – for the alteration or extension of a listed building in any manner likely to affect its character as a building of special architectural or historic interest;

   the grounds on which an appeal may be made against such a notice include grounds equivalent to grounds (a), (d), (i), (j) and (k) as set out in Section 39 of the Listed Buildings Act 1990;

2) where an enforcement notice is issued in relation to the carrying out of works for the demolition of an unlisted building in a conservation area, the grounds on which an appeal may be made against such a notice include grounds equivalent to grounds (a), (d), (j) and (k) as set out in Section 39 of that Act, as amended by SI 2012/793;

3) the Welsh Ministers, in determining an enforcement appeal relating to a listed building, may exercise their powers to remove the building from the list.

4) in determining an enforcement appeal relating to a building subject to a building preservation order, they may state that they do not intend to include it in the list.

Recommendation 13-9

We recommend that scheduled monument consent should not be replaced by planning permission.

Recommendation 13-10

We recommend that the definition of “listed building” should be clarified by making plain that it includes pre-1948 objects and structures if they were within the curtilage of the building in the list as it was

1) in the case of a building listed prior to 1 January 1969, at that date; or

2) in any other case, at the date on which it was first included in the list.

Recommendation 13-11

We recommend that the Ancient Monuments and Archaeological Areas Act 1979 should be amended so that Part 2 (areas of archaeological interest) does not apply in Wales.

CHAPTER 14. OUTDOOR ADVERTISING

Recommendation 14-1

We recommend that the definition of “advertisement” in the TCPA 1990 should be clarified, and included in the Bill alongside other provisions relating to advertising.

Recommendation 14-2

We recommend that the reference to the display of advertisements currently included in the statutory definition of “advertisement” in the TCPA 1990 should be omitted.

Recommendation 14-3

We recommend that the word “site” should be used in place of “land”:

1) in the provisions of the Bill relating to the control of advertisements; and

2) in the Regulations when they are next updated; and

that the Bill and the Regulations, where appropriate, should be drafted by reference to advertisements being displayed “on or at” land.

Recommendation 14-4

We recommend that a definition of “person displaying an advertisement” in the TCPA 1990 should be included in the Bill alongside other provisions relating to advertising, to include:

1) the owner and occupier of the land on or at which the advertisement is displayed;

2) any person to whose goods, trade, business or other concerns publicity is given by the advertisement; and

3) the person who undertakes or maintains the display of the advertisement.

Recommendation 14-5

We recommend that a discontinuance notice under the advertisements regulations:

1) should contain a notice as to the rights of any recipient to appeal against it;

2) should come into force on a particular date specified in it (rather than at the end of a specified period from the date of service); and

3) should be “issued” (rather than “served”, as at present), with a copy served on all those deemed to be displaying the advertisement in question.

Recommendation 14-6

We recommend that section 220(2), (2A) and (3) should be replaced with a provision enabling regulations to be made providing for:

1) the dimensions, appearance and position of advertisements that may be displayed, and the manner in which they are to be affixed to the land;

2) the prohibition of advertisements being displayed or land being used for the display of advertisements without either deemed or express consent;

3) the discontinuance of deemed consent;

4) the making and determination of applications for express consent, and the revocation or modification of consent;

5) appeals against discontinuance orders and decisions on applications for express consent;

6) areas of special control over advertising; and

7) consequential and supplementary provisions.

Recommendation 14-7

We recommend that deemed consent under the advertisements regulations should be granted for a display of advertisements that has the benefit of planning permission.

Recommendation 14-8

We recommend that the display of advertisements on stationary vehicles and trailers should be brought within control by the Regulations being amended so as to provide that:

1) no consent (express or deemed) is required for the display of an advertisement

   – inside a vehicle, or

   – on the outside of a vehicle on a public highway, other than one remaining stationary for more than 21 days;

2) deemed consent is granted for the display of an advertisement on the outside of a vehicle not on a highway, provided that the vehicle is normally employed as a moving vehicle and is not used principally for the display of advertisements.

Recommendation 14-9

We recommend that:

1) a provision should be introduced in the advertisements regulations to enable a certificate of lawfulness to be issued in relation to a display of advertisements; and

2) an appropriate enabling provision should be included in the Bill, in line with the approach indicated in Recommendation 14-6.

Recommendation 14-10

We recommend that Class 13 in Schedule 3 to the 1992 Regulations should be amended to provide that deemed consent is granted for the display of advertisements on or at land that has been used for that purpose for ten years.

Recommendation 14-11

We recommend that the power (currently in section 224(1) (2) of the TCPA 1990) for the Welsh Ministers to include in Regulations provisions similar to those governing enforcement notices should not be restated in the Bill.

Recommendation 14-12

We recommend that the powers currently in section 43 of the Dyfed Act 1987 (removal of other unauthorised advertisements) should be replaced with a new procedure, applying to all areas in Wales, allowing the removal of any unauthorised advertisement other than a poster or placard, subject to:

1) no advertisement being removed or obliterated without 21 days' notice having first been given to those responsible;

2) a right of appeal being available to recipients of such a notice and to owners and occupiers of the site of the offending advertisement – on grounds relating to the lawfulness of the advertisement, the service of the notice, and the time for its removal;

3) compensation being payable by the planning authority for damage caused to land or chattels by the removal of the advertisement (other than damage to the advertisement itself); and

4) protection for statutory undertakers to be afforded in similar terms to section 225K of the TCPA 1990).

Recommendation 14-13

We recommend that the maximum sentence on conviction for unauthorised advertising displayed on or after the date of the enactment of the Bill should be increased to an unlimited fine.

Recommendation 14-14

We recommend that it be made clear on the face of the Bill, rather than (as at present) in the Regulations, that all statutory powers relating to advertising should be exercised in the interests of amenity and public safety.

Recommendation 14-15

We recommend that the provisions in section 220 of the TCPA 1990 (relating to advisory committees and tribunals) should not be included in the Bill.

Recommendation 14-16

We recommend that the provisions in section 221(1)(b), (2) of the TCPA 1990 relating to experimental areas should not be included in the Bill.

Recommendation 14-17

We recommend that section 223 of the TCPA 1990, providing for the payment of compensation in respect of the costs of removing advertisements on sites that were in use for advertising in 1948, should not be included in the Bill.

CHAPTER 15. PROTECTED TREES AND WOODLANDS

Recommendation 15-1

We recommend that the Planning Bill should not attempt to define a “tree” or a “woodland”, in the context of tree preservation orders.

Recommendation 15-2

We recommend that the Bill should provide

1) that functions under the Code relating to the protection of trees must be exercised in the interests of amenity; and

2) that amenity for that purpose includes appearance, age, rarity, biodiversity and historic, scientific and recreational value; and

3) that tree preservation regulations may prescribe matters considered to be relevant to amenity.

Recommendation 15-3

We recommend that the Bill should provide that:

1) tree preservation orders can in future be made to protect individual trees, groups of trees, or areas of trees;

2) that a group or area order protects only those trees that were in existence at the time the order was made;

3) that a new area order provides protection only until it is confirmed, at which time it must be converted into an order specifying the trees to be protected either individually or as a group;

4) that woodland preservation orders can in future be made to protect woodlands; and

5) that a woodland preservation order can protect all trees, of whatever age and species, within the specified woodland, whether or not they were in existence at the date of the order;

and that the new regulations should be drafted accordingly.

Recommendation 15-4

We recommend that new trees regulations should require that a tree preservation order is to be notified to the owners and occupiers of any parcel of land on, in or above which any part of the protected trees is located.

Recommendation 15-5

We recommend that works to trees should not be brought within the scope of development requiring planning permission.

Recommendation 15-6

We recommend that the exemption from the need for consent under a tree preservation order relating to works to "trees that are dying or dead or have become dangerous" (currently in section 198(6)(a) of the TCPA 1990) should be tightened up when the trees regulations are next updated. We recommend it should extend only to the cutting down, topping, lopping or uprooting of a tree, to the extent that such works are urgently necessary to remove an immediate risk of serious harm (or to such other extent as agreed in writing by the authority prior to the works being undertaken).

Recommendation 15-7

We recommend that the exemption from the need for consent under a tree preservation order relating to works that are "necessary to prevent or abate a nuisance" (currently in section 198(6)(b) of the TCPA 1990) should not be restated either in the Bill or in new trees regulations.

Recommendation 15-8

We recommend that, when the regulations are next updated, consideration should be given to introducing a new exemption to allow the carrying out without consent of works to a tree protected by a woodland preservation order smaller than a specified size, but only where carried out for the sole purpose of improving the growth of other trees.

Recommendation 15-9

We recommend that a provision should be introduced in the trees regulations (along with an appropriate enabling provision in the Bill) to enable a certificate of lawfulness to be issued in relation to proposed works to a tree or woodland.

Recommendation 15-10

We recommend that planning authorities should be required to acknowledge applications for consent under the trees regulations.

Recommendation 15-11

We provisionally propose that:

1) the requirement to plant a replacement tree following the felling of a dangerous tree or following unauthorised works should be limited to the planting of a tree of appropriate species at or near the location of the previous tree (rather than, as at present, in precisely the same place); and

2) the requirement to plant trees to replace trees in a woodland that have been lost should be specified by reference to either the same number of trees or the same area of woodland.

Recommendation 15-12

We recommend that there should be introduced an explicit power enabling a planning authority to waive or relax a tree replacement notice.

Recommendation 15-13

We recommend that powers to enable a planning authority to recover any expenses it has incurred in making and enforcing a tree replacement notice should be introduced when the regulations are next updated.

Recommendation 15-14

We recommend that the scope of the matters prohibited by a tree preservation order should be extended to include causing harm to a tree:

1) intentionally; or

2) recklessly.

Recommendation 15-15

We recommend that the two offences currently in section 210 of the TCPA 1990, relating to works liable to lead to the loss of the tree (subsection (1)) and other works (subsection (4)) should be replaced with a single offence, triable either summarily or on indictment, of contravening tree preservation regulations, punishable on conviction with a fine of any amount.

Recommendation 15-16

We recommend that the offence under section 210 (contravening tree preservation regulations) and under regulations made pursuant to the provision restating section 202A (prohibiting works to a tree subject to a tree preservation order) should be framed so as to require the prosecution to prove that:

1) a copy of the order had been served in accordance with the relevant statutory requirements before the start of those works; or

2) a copy of the order was available for public inspection at the time of the works.

We also recommend that the regulations should include, alongside the requirement to make the order available for inspection, a further requirement to record on the order the date on which it was first thus made available.

Recommendation 15-17

We recommend that the provision restating section 211 of the TCPA 1990 should empower an authority notified of proposed works to a tree in a conservation area, to:

1) allow the works to proceed, with no conditions other than a two-year time limit;

2) allow the tree to be felled, subject to planting a replacement tree;

3) impose a tree preservation order, and to allow works to the tree other than felling, possibly subject to conditions; or

4) impose a tree preservation order, and to refuse consent for the works.

CHAPTER 16. IMPROVEMENT, REGENERATION AND RENEWAL.

Recommendation 16-1

We recommend that section 215 of the TCPA 1990 should be restated so as to make clear that a notice requiring land to be properly maintained can be served where the condition of the land:

1) is adversely affecting the amenity of part of the authority's area or the area of an adjoining authority;

2) does not result in the ordinary course of events from, the lawful carrying on of continuing operations on that land or a continuing use of that land that is lawful; and

3) is not the result of the unlawful deposit of controlled waste or extractive waste in contravention of section 33 of the Environmental Protection Act 1990.

Recommendation 16-2

We recommend that it should be possible to issue a notice (under what is now section 215 of the TCPA 1990) where the condition of the land in question results from the carrying on of operations or a use of the land that were lawful at the time, but are no longer lawful.

Recommendation 16-3

We recommend that a notice under the provision in the new Bill replacing section 215:

1) should come into force on a particular date specified in it (rather than at the end of a specified period from the date of service);

2) should be "issued" (rather than "served" as at present), with a copy served on all those responsible for the maintenance of the land in question; and

3) should contain a notice of the rights of any recipient to appeal against it.

Recommendation 16-4

We recommend that the Bill should make it clear that all appeals against section 217 notices are normally to be determined by inspectors, in line with Recommendation 11-2.

Recommendation 16-5

We recommend that the Bill should include powers, replacing those currently available under section 89(2) of the National Parks and Access to the Countryside Act 1949, to enable a planning authority, in relation to any land whose condition is affecting the amenity of its area or of any adjacent area (or is likely to affect it due to the collapse of the surface as the result of underground mining operations):

1) to issue a notice, and serve a copy of it on the owner and occupier of the land and to display an appropriate notice on the land, stating the authority's intention to carry out remedial works;

2) to carry out itself the works specified in the notice, either

- on terms agreed between it and the owner and occupier of the land (both as to the carrying out of the works themselves and as to the subsequent maintenance of the land); or

- where no response is received to the notice;

3) to recover the cost of such works from the owner, or to make them a charge on the land; and

4) to acquire the land for the purpose of carrying out such works, using compulsory powers or by agreement.

Recommendation 16-6

We recommend that the new Planning Code should include powers, equivalent to those currently available under section 89(1) of the 1949 Act, to enable a planning authority:

1) to issue a notice, and serve a copy of it on the owner and occupier of the land, stating the authority's intention to carry out landscaping works for the purpose of improving the land;

2) to carry out itself the works specified in the notice, either

   - on terms agreed between it and the owner and occupier of the land (both as to the carrying out of the works themselves and as to the subsequent maintenance of the land); or

   - where no response is received to the notice; and

3) to acquire the land for the purpose of carrying out such works by agreement, or using compulsory powers where the owner cannot be found after reasonable enquiries have been made.

Recommendation 16-7

We recommend that the Bill should contain powers for the Welsh Ministers to make regulations to facilitate the removal of graffiti and fly-posting,

1) by enabling planning authorities:

   - to deal with graffiti or fly-posting that is detrimental to amenity or offensive, by requiring the users or occupiers of the land affected to remove it;

   - to deal with persistent unauthorised advertising, by serving a notice on those responsible for surfaces persistently covered with fly-posting, requiring them to take preventive measures to minimise recurrence;

   - in either case, to take direct action where necessary, and recharge those responsible where appropriate; and

2) by enabling town and community councils to serve fixed penalty notices in appropriate cases.

Recommendation 16-8

We recommend the amendment of Part 18 of and Schedule 32 to the Local Government, Planning and Land Act 1980 (enterprise zones), and the provisions relating to enterprise zones in the TCPA 1990 and related legislation, so that they no longer apply in relation to Wales.

Recommendation 16-9

We recommend the amendment of the New Towns Act 1981, and the provisions relating to new towns in the New Towns and Urban Corporations Act 1985, the TCPA 1990, the Housing and Regeneration Act 2008, and related legislation, so that they no longer apply in relation to Wales.

Recommendation 16-10

We recommend the amendment of

1) Part 16 of and Schedules 26 to 31 to the Local Government, Planning and Land Act 1980 (urban development areas and urban development corporations), and

2) the provisions relating to urban development corporations in the New Towns and Urban Development Corporations Act 1985, the TCPA 1990, the Leasehold Reform, Housing and Urban Development Act 1993, and related legislation

so that they no longer apply in relation to Wales.

Recommendation 16-11

We recommend the amendment of

1) Part 3 of the Housing Act 1988 (housing action trust areas), and

2) the provisions relating to housing action trusts in the TCPA 1990 and related legislation

so that they no longer apply in relation to Wales.

Recommendation 16-12

We recommend the amendment of Part 3 of and Schedule 5 to the Agriculture Act 1967 (rural development boards) and related legislation so that they no longer apply in relation to Wales.

Recommendation 16-13

We recommend that section 231 of the TCPA 1990 (power of the Welsh Ministers to require local authorities to acquire and develop land) should not be restated in the Code.

Recommendation 16-14

We recommend the incorporation in the Bill of provisions equivalent to Part 9 (other than section 231) and sections 251, 258, and 271 to 282 of the TCPA 1990 (acquisition of land for planning purposes).

CHAPTER 17. HIGH COURT CHALLENGES

Recommendation 17-1.

We recommend that Part 12 of the TCPA 1990 (challenges in the High Court to the validity of actions and decisions under the Act) should be replaced in the Planning Bill by new provisions to the effect that a court may entertain proceedings for questioning any decision of a public body under the Code (other than one against which there is a right of appeal to the Welsh Ministers) – and any failure to make any such decision – but only if:

1) the proceedings are brought by a claim for judicial review; and

2) the claim form is filed:

   - before the end of the period of four weeks in the case of a challenge to the decision of the Welsh Ministers on an appeal against an enforcement notice (other than a decision granting planning permission), a tree replacement notice, an unsightly land notice or a decision refusing a certificate of lawfulness of existing use or development; or

   - before the end of the period of six weeks in any other case,

   beginning with the day after the day on which the relevant decision was made.

Recommendation 17-2.

We recommend that Part 5 of the PCPA 2004 (relating to the correction of minor errors in decisions) should be included within the Bill, but amended so as to allow a 14-day period within which the Welsh Ministers or an inspector can respond to a request to make a correction to their decision, and an applicant can respond to a notification by them that they propose to make such a correction.

CHAPTER 18. MISCELLANEOUS AND SUPPLEMENTARY PROVISIONS

Recommendation 18-1

We recommend that:

1) the provisions of the Bill applying it to statutory undertakers should be simplified as far as possible, to clarify the identity of those bodies that are statutory undertakers for any or all of the purposes of the Bill and any regulations made under it;

2) that a single list of such bodies should be included in Welsh Government guidance, including in relation to each such undertaker:

   - the purpose for which the body is to be a statutory undertaker;
   - the appropriate Minister; and
   - its operational land.

Recommendation 18-2

We recommend that, when the GPDO is next revised, consideration should be given to separating it into two orders, one dealing with permitted development rights relating to dwellings and one covering other cases.

Recommendation 18-3

We recommend that section 283 of the TCPA 1990 (relating to the display of advertisements on the operational land of statutory undertakers) should not be restated in the Code.

Recommendation 18-4

We recommend that section 316A of the TCPA 1990 (which enables regulations to be made relating to planning permission for development by local authorities that are statutory undertakers and the display of advertisements on their operational land) should not be restated in the Bill.

Recommendation 18-5

We recommend that the new Bill should generally use – in place of the term “winning and working of minerals” – the term “mining operations”, defined so as to include:

1) the winning and working of minerals in, on or under land, whether by surface or underground working;

2) the removal of material of any description from:

   - a mineral-working deposit;
   - a deposit of pulverised fuel ash or other furnace ash or clinker; or
   - a deposit of iron, steel or metallic slag; and

3) the extraction of minerals from a disused railway embankment.

Recommendation 18-6

We recommend that Schedule 2 to the Planning and Compensation Act 1991 (minerals permissions granted prior to 1 July 1948) and Schedule 13 to the Environment Act 1995 (minerals permissions granted from 1 July 1948 to 22 February 1982) need not be restated in the Bill, but should remain as they are.

Recommendation 18-7

We recommend that the Bill should include:

1) the provisions currently in Schedule 14 to the Environment Act 1995 (periodic review of minerals permissions); and

2) those currently in Schedule 9 to the TCPA 1990 (discontinuance of minerals permissions).

In relation to the discontinuance of minerals permissions, the Welsh Government should consider providing guidance on the meaning of "substantial extent" in Schedule 9 to the TCPA 1990.

Recommendation 18-8

We recommend that the provisions of the TCPA 1990 in the form in which they apply as modified by the TCP (Minerals) Regulations 1995 (in relation to minerals development) should be included in the Bill itself rather than in secondary legislation.

Recommendation 18-9

We recommend that the Bill should include

(1) a power for the Welsh Ministers to provide for a scale of fees for the performance by them or by planning authorities of any of their functions under the Code, by publication rather than prescription;

(2) a provision equivalent to section 303(10) of the TCPA 1990 (income from the fees so charged not to exceed the cost of performing the relevant function); and

(3) a provision requiring any proposed scale of fees to be appropriately publicised before being formally published.

Recommendation 18-10

We recommend that there should be a single provision in the Bill providing for the determination by the Upper Tribunal of disputes as to compensation under provisions in the Bill relating to revocation, modification and discontinuance of planning permission, temporary stop notices, stop notices, damage caused by entry for enforcement purposes, tree preservation, highways, and statutory undertakers, under the Land Compensation Act 1961.

Recommendation 18-11

We recommend that guidance relating to planning inquiries and appeals should strongly encourage the inclusion of a suitably worded statement of truth in any witness statement (including in relation to appeals decided on the basis of written representations).

Recommendation 18-12

We recommend that the power to make orders as to the costs of parties to proceedings, currently in section 322C(6) of the TCPA 1990, should be restated in an amended form so as to make it explicit that such an order is only to be made where:

1) a party to an appeal has behaved unreasonably; and

2) that unreasonable behaviour has led other parties to incur unnecessary or wasted expense.

Recommendation 18-13

We recommend that the Planning Bill should incorporate provisions equivalent to those currently in:

1) section 276 of the Public Health Act 1936 (power of a planning authority to sell materials removed in executing works);

2) section 289 of that Act (power to require the occupier of any premises not to prevent works being carried out); and

3) section 294 of that Act (limit on the liability of landlords and agents in respect of expenses recoverable),

to be applicable to the carrying out by the authority of works required by discontinuance notices, enforcement notices, tree replacement notices, and unsightly land notices.

Recommendation 18-14

We do not recommend that the Bill should provide any further definitions of terms, other than those recommended below.

Recommendation 18-15

We recommend that:

1) the provisions of the English language version of the Bill equivalent to sections 55, 171, 183, 196A and 214B and Schedule 3 of the TCPA 1990 should be framed by reference to a “dwelling”, rather than a “dwellinghouse”; and

2) the interpretation section of the Bill should include a definition of the term “dwelling”, to the effect that it includes a house and a flat.

Recommendation 18-16

We recommend that the Bill should include a provision to the effect that the curtilage of a building is the land closely associated with it, and that in determining whether a structure is within the “curtilage” of a building, the factors to be considered should include:

1) the physical ‘layout’ of the building, the structure, and the surrounding buildings and land;

2) the ownership, past and present, of the building and the structure; and

3) their use and function, past and present.

Recommendation 18-17

We recommend that the interpretation section of the Bill should contain definitions of the following terms:

1) “agriculture” and “agricultural”, along the lines of the definition currently in section 336 of the TCPA 1990, with the addition of a reference to farming in line with those currently in section 147 and 171; and

2) “agricultural land” and “agricultural unit”, broadly in line with the definition in Part 6 of Schedule 2 to the GPDO;

and we recommend that no further definitions of those terms should be provided in relation to purchase notices and blight notices.

Recommendation 18-18

We recommend that the following provisions, which appear to be obsolete or redundant, should not be included in the Bill:

1) section 314 of the TCPA 1990 (apportionment of expenses by county councils);

2) section 335 of the TCPA 1990 (relationship between planning legislation and other legislation in force in 1947); and

3) Schedule 16 to the TCPA 1990 (provisions of the Act applied or modified by various other provisions in the Act), other than Part 3, which should retained in relation to the provision restating section 318 of the TCPA 1990.

CCS1118073096

978-1-5286-0905-0