Law Commission
Reforming the law

Planning Law in Wales

Consultation Paper Summary

Law Com No 233 (Summary)
November 2017

Contents

Abbreviations

GPDO	Town and Country Planning (General Permitted Development) Order
Listed Buildings Act	Planning (Listed Buildings and Conservation Areas) Act
PCPA	Planning and Compulsory Purchase Act
P(W)A	Planning (Wales) Act
TCPA	Town and Country Planning Act

Introduction

THIS CONSULTATION EXERCISE

0.1 The Law Commission has been invited by the Welsh Government to review the possibility of simplifying and consolidating planning law as it applies in Wales, and in particular to make proposals for technical reforms. This follows the approach recommended in our report on the form and accessibility of the law in Wales,[1] and forms a key part of the Assembly's pilot project of codification.

0.2 The result of this exercise will contribute to the emergence in due course of a Planning Bill that will replace all or part of more than 25 Acts of Parliament and of the Assembly.[2] That in turn will form the principal element of a new Planning Code, which will also contain associated secondary legislation (regulations) and Government guidance.

0.3 This document summarises the substantial Consultation Paper that we have issued, setting out our proposals for reform, at the end of November 2017.

0.4 **Note that this Summary, along with the full Consultation Paper and individual chapters of it, are available online at www.lawcom.gov.uk/planning-law-in-wales or www.lawcom.gov.uk/cyfraith-cynllunio-yng-nghymru.**

0.5 Part One of the Paper deals with General Principles. It opens with a brief outline of how planning law in Wales has arrived at its present unsatisfactory state, and some of the problems that have arisen. It also sets out the progress of the project to date and explores the way forward. We issued a Scoping Paper in June 2016, setting out our initial views; we are grateful to all those who responded. In the light of the views expressed, and our further work, Part One of the Consultation Paper sets out our conclusions as to the scope of the exercise, and our general approach to technical reforms to the law.

0.6 Following on from those general conclusions, Part Two then deals in turn with each of the major topic areas in this field. It sets out a number of provisional proposals for technical changes to the substance of the law, and as to the way in which the law can best be presented for the benefit of those who use it. It also makes a number of suggestions as to obsolete provisions that are no longer required. We ask a number of questions in relation to issues where there are more likely to be differing views as to what is most appropriate.

0.7 We list our consultation questions at the end of Part Two of the full Consultation Paper.

0.8 We are grateful for the considerable assistance given to us by a number of officers of the Welsh Government throughout the preparation of this Consultation Paper, as well

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1 *Report on the Form and Accessibility of the Law Applicable in Wales*, Law Com No 366, June 2016

2 Listed in Table 1.1 at pages 14-15 of the Consultation Paper.

as by many others with whom we have shared ideas. We emphasise, however, that the Paper represents the provisional views of the Law Commission, and not necessarily those of any who have assisted in its production.

YOUR RESPONSE

0.9 **We invite responses from all those reading this Summary or the full Consultation Paper, in respect of all or any of the proposals and consultation questions. The deadline for such responses is Thursday 1st March 2018. They should preferably be sent by email to:**

planning_wales@lawcommission.gov.uk.

0.10 **Responses in Welsh should be sent to:**

cynllunio_cymru@lawcommission.gov.uk.

0.11 **Please feel free to comment either on all the proposals and questions, or on those in particular chapters, or just on one or two. We are very grateful for any response you may wish to give, and any further comments you may wish to make.**

0.12 We particularly welcome comments as to the financial or other resource implications – favourable or adverse – of any of our proposals. Would they save you time or money, or in some way make your life easier; or would they have the reverse effect? This will enable us to prepare an impact assessment to accompany our final report.

0.13 We also invite respondents to raise any particular points in the existing statutory code – similar in kind to those that have been included in the Consultation Paper – that they feel should also have been included.

0.14 We would be willing to meet any stakeholders – either groups or individuals – who wish to explore in more detail any of the contents of the Consultation Paper – although we are not able to discuss particular cases or to offer advice. Please send any requests for meetings to the above email address.

0.15 In the light of the responses we receive to this Consultation Paper, we will be issuing a Final Report in the summer of 2018. This will inform the production of a new Planning Bill, which will form the principal element in a new Planning Code for Wales.

Part One. General principles

CHAPTER 1: PLANNING LAW IN WALES

1.1 The planning system was created after the end of the Second World War. The legislation governing it has grown exponentially since then, so that the four main planning Acts of 1990 – including the Town and Country Planning Act ("TCPA") and the Listed Buildings Act – have been amended or supplemented by the Planning and Compensation Act 1991, the Planning and Compulsory Purchase Act ("PCPA") 2004, the Planning Act 2008, the Planning (Wales) Act ("P(W)A") 2015, the Historic Environment (Wales) Act 2016, and parts of about a dozen other Acts. A similar number of pre-1990 Acts also relate wholly or partly to planning.

1.2 The result of this process of gradual change is that there are now at least 30 pieces of interlocking primary legislation relating to land use and development. It is not at all straightforward for experienced practitioners to find the way round it, and almost impossible for non-professionals. There are particular problems in Wales, as it is becoming increasingly difficult to determine which legislation applies in both England and Wales, which in England only, and which in Wales only. And some cases a section of an Act applies quite differently in Wales from the way in which it applies in England – a notable example of this is section 1 of the TCPA 1990.[3] It is inevitable that these problems will increase in the coming years.

1.3 We consider that the planning system is, in principle, relatively simple. But we also consider, and those who have responded to our Scoping paper have universally agreed, that it appears to be extremely complex.

1.4 In the Consultation Paper we consider how the legislation can once again be made simple, at least in Wales. We set out our proposals as to the content of a planning Bill that would become the principal piece of primary legislation within a new Planning Code.[4] The Bill would include much of the law that exists at present, but in a clearer pattern, and in in a single piece of legislation rather than spread over numerous Acts; and it would clarify various points of detail. But it would omit a number of provisions that are of no continuing utility.

CHAPTER 2: TOWARDS A NEW PLANNING CODE

2.1 We published in July 2016 a Scoping Paper, setting out our provisional views as to the nature and scope of a possible codification and simplification exercise, and giving stakeholders an opportunity to comment. Copies were made available to a wide range of key stakeholders, including planning authorities and other public bodies, professional organisations, heritage and other third sector groups, and individual

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3 Set out at Table 1-2 (on **page 17** of the Consultation Paper) as it applies in England and as it applies in Wales.

4 The Code will also include relevant secondary legislation and guidance.

practitioners; and we met with officers of the Welsh Government, Planning Officers Society Wales (POSW), the Planning Inspectorate, and Cadw.

2.2 Over 60 organisations and individuals[5] met with us or submitted written responses to the Scoping Paper. Many highlighted problems with the existing legislation; the overwhelming majority (94%) agreed that there was a strong case for a new Planning Code for Wales, and pointed to the benefits that would flow from the exercise. As a result of those discussions and responses, we have reached a concluded view as to the scope of the present exercise, set out in Chapter 3 of the Consultation Paper.

2.3 In Chapter 4 we set out our general conclusions as to technical reforms to the legislation. And in the second part of the Consultation Paper we outline a number of provisional proposals as to specific reforms, grouped by subject matter, on which we seek the views of consultees.

CHAPTER 3: SCOPE OF THE CODIFICATION EXERCISE

3.1 In deciding what should be included in the codification exercise, we considered that it would be sensible to embark on a reasonably ambitious programme of codification, whilst having regard to the resources available to the Welsh Government to implement it.

3.2 We suggested in our Scoping Paper that the heart of the exercise should be the core planning provisions – that is, those relating to:

- the purpose of the planning system, and how it is administered;
- the formulation of the development plan (including the related topic of planning blight);
- the nature of development, and the need for planning applications;
- the process of seeking permission – either from the planning authority or from the Welsh Ministers; remedies (appeals, purchase notices etc); and
- unauthorised development.

3.3 We still consider that these provisions should be included. They are considered in more detail in Chapters 5 to 9, 11 and 12 of the Consultation Paper.

3.4 A further topic relating to mainstream planning control is the provision of infrastructure – either by planning obligations or through the community infrastructure levy (CIL). This was not touched on in the Scoping Paper, as CIL has until now been outside the legislative competence of the Assembly. That will no longer be the case, following the coming into effect next year of the Wales Act 2017, and we consider that infrastructure funding should be within the code. We deal with this in Chapter 10.

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5 Listed in Appendix A to the Consultation Paper.

3.5 We also referred in the Scoping Paper to the other consent regimes that exist alongside mainstream planning control – in particular, those relating to works to listed buildings and conservation areas, outdoor advertising and works to protected trees. We consider that the new Code should include those (although not the control of works to scheduled monuments); they are the subject of Chapters 13 to 15.

3.6 We consider that it would be appropriate for the present codification exercise also to include the provisions currently in the TCPA 1990 relating to initiatives by public authorities to achieve the improvement of unsightly land, and the removal of graffiti and flyposting. It would also be sensible, so far as possible, to abolish procedures (such as enterprise zones, simplified planning zones, urban development corporations) that have not been used for many years, or at all. These matters are the subject of Chapter 16.

3.7 Related to those core provisions – largely in Part 3 of the TCPA 1990 and Part 6 of the PCPA 2004 – will be those in Parts 9 to 15 of the TCPA 1990 relating to statutory undertakers, the Crown, minerals, court challenges, financial provisions, and interpretation. They are in most cases encountered only rarely in practice, but are essential to the operation of the planning system, and must also be included. They are generally considered in Chapter 17.

3.8 We thus consider that a new Planning Bill should include the various matters referred to above, set out in Table 3-1.[6]

3.9 Alongside such a Bill, we are aware that it is the intention of the Welsh Government to introduce in due course a Historic Environment Bill, incorporating all of the primary legislation relating to listed buildings, conservation areas, scheduled monuments and other heritage assets.

3.10 We consider that it would not be appropriate, at this stage, to include within the Planning Code the legislation relating to the countryside and rights of way, hazardous substances, compulsory purchase and compensation, Building Regulations, and a variety of other self-contained legislative codes.[7]

CHAPTER 4: TECHNICAL REFORMS TO THE LEGISLATION

4.1 In the Scoping Paper, we identified four categories of possible improvements to the legislation: clarification of words and phrases; improvements to streamline procedure or amend discrepancies; amendment where provisions do not reflect established practice; and rationalisation or removal of duplicative, obsolete or uncommenced provisions. These categories gained general support from respondents.

4.2 We considered the balance between primary and secondary legislation. Overall, most respondents to the Scoping Paper considered the current balance to be broadly correct. We agree, subject to one or two detailed adjustments.

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6 At **page 64** of the Consultation Paper.

7 Including those relating to transport infrastructure, mobile homes, high hedges, and protected wrecks.

4.3 We looked at the inclusion of some principles currently found in case law, where they are well-established, and sufficiently precise to form a provision in a statute. In particular, we have considered whether it might be possible to clarify the definitions of some of the terms used in the legislation, such as "curtilage" and "material considerations". There was limited support for this in principle, but some respondents suggested that it might prove to be difficult in practice. We have generally found such reservations to have been justified, and that there is less scope for such "codification" than we initially expected.

4.4 We also considered codifying general planning concepts arising from judicial decisions – such as those relating to the commencement of development without complying with all the conditions attached to it (enunciated in *Whitley v Secretary of State*); the principle of abandonment of a use; and the lawfulness of conditions. Here too some respondents considered that clarifying the law would be helpful; others urged caution.

4.5 We put forward in the Scoping Paper a number of specific proposals, and invited respondents to suggest others. In this most recent phase of the exercise, we considered again our earlier suggestions, and explored those suggested by respondents; and we have come up with a number of further proposals in the course of our work.

4.6 We consider these various points in Part 2 of the Consultation Paper, where we put forward a number of provisional proposals and invite comments.

Part two: specific topics

References in square brackets are to the principal questions within the Consultation Paper.

CHAPTER FIVE: INTRODUCTORY PROVISIONS

Principles underlying the Planning Code

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

5.2 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 provisionally consider 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. **[5-1].**

5.3 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 (and it may not be possible) to define that phrase, but we provisionally consider that it would be helpful for the duty to be applied explicitly to the exercise of all functions under the Code. We also suggest that it would be helpful for the word "material" to be replaced by "relevant" in the English language version, in line with current English usage. **[5-2; 5-3]**

5.4 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 provisionally consider that it would be sensible for any public body exercising any function in relation to any historic asset (including a scheduled monuments and a world heritage site) to have regard to the desirability of preserving or enhancing the asset, its features and its setting. **[5-4]**

5.5 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 provisionally consider that such considerations should apply in relation to the exercise of any functions under the Code, so far as relevant to the exercise of that function, by being explicitly included as a relevant consideration (see para 5.3 above). **[5-5]**

5.6 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 provisionally consider that they too should be explicitly included in the list of relevant considerations. **[5-6]**

5.7 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 provisionally consider that the general duty under section 3 of the Well-being Act applies to all planning functions; and 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]**

5.8 In the light of the above considerations, we do not presently consider that there is a need for a statutory provision as to the overall purpose of the planning system. **[5-10]**

Administration of the planning system

5.9 We have considered whether there should be a brief provision in the Code explicitly recognising the existence of the Planning Inspectorate. We have reached no provisional conclusion, but it might be helpful if persons appointed by the Welsh Ministers to discharge various functions were to be referred to in primary and secondary legislation not as "persons appointed" but as inspectors, so as to conform to current practice, or possibly as "examiners". [**5-11]**

5.10 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 consider that there is no need to include in the Bill powers for enterprise zone authorities, urban development corporations, housing action trusts and new town development corporations to be designated as planning authorities. **[5-12]**

5.11 We also provisionally consider 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

6.1 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.

6.2 There were almost no comments from respondents to our Scoping Paper in relation to the preparation of the development plan. Further, the amendments to the relevant primary legislation are of recent origin, and have not yet been extensively tested in practice. We therefore provisionally consider that the provisions currently in Part 6 of PCPA 2004, as amended, should simply be restated in the Bill. **[6-1]**

6.3 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. We therefore invite views as to the need for the SEA process as a separate requirement alongside the requirement for sustainability appraisal. **[6-3]**

Planning blight

6.4 We provisionally consider 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"

7.1 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.

7.2 The law regarding the need for planning permission to be obtained for demolition is notoriously complex. We provisionally consider 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]**

7.3 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 provisionally consider 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]**

7.4 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 provisionally consider that it would be more straightforward if any change in the number of dwellings in a building were to be categorised a material change of use, and thus development. **[7-5]**

7.5 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.

7.6 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 ask consultees whether both could be abolished. **[7-9, 7-10]**

Certificates of lawfulness

7.7 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 provisionally consider that the statutory provisions relating to such certificates should be included alongside those relating to the need for planning permission – as they were prior to 1991 – rather than linked to enforcement. **[7-11]**

7.8 We also propose 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. **[7-12]**

CHAPTER EIGHT: APPLICATIONS TO THE PLANNING AUTHORITY

Seeking planning permission

8.1 At present, it is possible to submit an application for full planning permission to carry out development. Such permission may be granted 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.

8.2 We provisionally consider 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. An applicant would be able to invite the planning authority to grant permission reserving for future approval one or more matters not sufficiently particularised in the application – which the authority may or may not agree to do. We also provisionally propose that an authority would, as at present, be able to grant permission subject to conditions reserving particular matters for subsequent approval. **[8-1]**

8.3 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 provisionally consider that section 327A of the TCPA 1990 – which provides that an authority must not entertain such an application, is unhelpful, and should not be restated in the new Bill. **[8-2]**

Determining planning applications

8.4 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 provisionally 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 a number of practical advantages. **[8-4, 8-5]**

Conditions attached to planning permission

8.5 We provisionally propose to do away with the distinction between conditions and limitations. **[8-8]**

8.6 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 provisionally consider that this should be included in primary legislation. **[8-9]**

8.7 We also provisionally propose that an explicit power should be included to impose certain types of conditions. **[8-10, 8-11, 8-14 and 8-16]**

8.8 There is currently uncertainty as to the effect in law of pre-commencement conditions – that is, conditions requiring something to be done before the development is started. We provisionally consider 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. We also ask consultees for their views as to other ways of resolving this uncertainty. **[8-13]**

Approval of details required by conditions

8.9 Where conditions attached to a planning permission require certain details to be approved subsequently, the procedure governing the obtaining of such approval is not as clear as would be desirable, and we provisionally propose that it be tightened up. **[8-17 to 8-19]**

8.10 Where planning permission is granted by a development order, there is in some cases (notably in relation to agriculture and forestry) a requirement that the authority be notified before the work is started, so that it can ask for an opportunity to approve details of the proposed works. We provisionally propose that there should be a time limit within which the authority has to respond to such a notification. **[8-20]**

Variation of planning permission

8.11 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. We provisionally propose that these procedures be brought together into a single procedure to enable an applicant to apply for the variation of a permission. **[8-21]**

8.12 We also propose the introduction of an expedited procedure to enable an applicant to seek approval for the variation of a permission once the development has started. **[8-22]**

CHAPTER NINE: APPLICATIONS TO THE WELSH MINISTERS

9.1 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 propose any change. **[9-1]**

9.2 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 propose any change other than as to one or two minor details **[9-2 to 9-4]**

9.3 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 provisionally consider that they should be abolished. **[9-5]**

CHAPTER TEN: THE PROVISION OF INFRASTRUCTURE AND OTHER IMPROVEMENTS

Community infrastructure levy (CIL)

10.1 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 the operation of CIL in Wales, and it would seem to be premature to pre-empt such a review.

10.2 We therefore provisionally consider 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

10.3 We provisionally propose 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]**

10.4 We also propose that the enforcement of a planning obligation be made more straightforward by including the breach of such an obligation within the definition of a breach of planning control. **[10-5]**

10.5 We ask whether 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. **[10-8]**

10.6 We also suggest 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. **[10-10, 10-11]**

CHAPTER ELEVEN: APPEALS AND OTHER SUPPLEMENTARY PROVISIONS

Appeals

11.1 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 propose that the Bill should make it plain that they will always consider the applications afresh. **[11-1]**

11.2 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 in that way. We therefore provisionally propose that the Bill should provide that all appeals are determined by inspectors (or examiners; see para 5.09 above), unless provided otherwise – rather than the reverse. **[11-2]**

11.3 We also propose 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

11.4 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 what is the start of the 12-month time period within which to serve the notice. We propose that the Bill should clarify that it is the decision on the appeal. **[11-5]**

11.5 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 both a public highway and a private road) under section 1 of the Road Traffic Regulation Act 1984. We therefore suggest that sections 249 and 250 of the TCPA 1990 should not be restated in the Bill. **[11-8]**

CHAPTER TWELVE: UNAUTHORISED DEVELOPMENT

12.1 In this Chapter, we make a number of relatively minor proposals as to procedural reforms, 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

12.2 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 provisionally suggest that it would be preferable for there to be a single procedure. **[12-1]**

12.3 Some enforcement procedures are modified in their application to "dwellinghouses" – entry without prior warning; service of temporary stop notices and stop notices. We

provisionally propose that this should apply in relation to all dwellings, including flats. **[12-2, 12-5, 12-15]**

Enforcement notices

12.4 We provisionally consider that it would be helpful for an enforcement notice to specify the purpose or purposes that are intended to be achieved by the steps it requires to be taken, and that a notice relating to an unauthorised change of use may require the removal of building works integral to the change of use. **[12-9, 12-10]**

12.5 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 provisionally propose instead 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.

Stop notices

12.6 A stop notice is currently "served" on those responsible. We provisionally propose 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. **[12-16, 12-17]**

Criminal penalties

12.7 We have reviewed the penalties for the various offences created by the TCPA 1990, and suggest 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.

CHAPTER THIRTEEN: WORKS AFFECTING LISTED BUILDINGS AND CONSERVATION AREAS

Overlapping consents

13.1 At present, some development affecting a listed building requires planning permission, some requires listed building consent, 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, but planning permission is granted automatically (by a development order). Determining which forms of approval is required for any particular proposal can be bewilderingly complex.

13.2 Where two types of permission are required, that will require two applications, two committee reports, two decisions; 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.

13.3 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.

13.4 In view of the significant overlap between the various consents, in our Scoping Paper we sought views as to whether it would be worth unifying them into a single form of approval. The majority (61%) of those responding were in favour; others raised various concerns. We have therefore considered various options, ranging from no change (retaining planning permission listed building consent and conservation area consent, as at present), through to extending the definition of development so as to incorporate all works that currently require listed building consent – the demolition of a listed building, the alteration or extension of a listed building so as to affect its character as a building of special architectural or historic interest, and the demolition of an unlisted building in a conservation area.

13.5 We provisionally consider that there would be considerable advantages to be gained from merging all three consents into one. This would not remove the need to obtain approval for any works that currently require one or more of the three consents; nor would it change the policy basis on which the application for approval would be determined. **[13-1]**

Detailed points

13.6 We consider whether merging of the three consents should mean that planning permission for any such works could in principle be granted by a development order or a heritage partnership agreement. It could also automatically enable anyone to obtain a certificate of lawfulness to determine whether permission would be required. **[13-2 to 13-4]**

13.7 We also provisionally propose that grounds of appeal against the refusal of planning permission should be amended, so as to include the existing specific grounds relating to listed buildings and conservation areas. **[13-5]**

Unauthorised works

13.8 We suggest 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]**

13.9 We similarly propose that the time limits within which it is possible to take enforcement action should not apply in the case of heritage development. And the grounds of appeal against enforcement notices could be amended, so as to include the existing specific grounds relating to listed buildings and conservation areas. **[13-7, 13-8]**

Other points

13.10 We do not propose 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]**

13.11 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 its reference to objects and structures in the curtilage of a building included in the list. We propose 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]**

13.12 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 suggest that the power to designate them should be abolished. **[13-11]**

CHAPTER FOURTEEN: OUTDOOR ADVERTISING

Definitions

14.1 The definition of "advertisement", in section 336 of the TCPA 1990, is unsatisfactory – not least because it is circular. We propose that it be clarified. We also propose that the word "land" be used in place of "site"; and that a clearer definition be provided of "person displaying an advertisement". We also propose that these definitions should be included in the Bill alongside the other provisions relating to advertising. **[14-1 to 14-4]**

Deemed consent

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

14.3 We provisionally propose that the procedures relating to discontinuance notices – removing the deemed consent for particular advertisements – should be tightened up, so that 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 the procedures into line with those relating to enforcement notices. **[14-5]**

14.4 We also propose that deemed consent should be granted for a display of advertisements that has the benefit of planning permission (such as a shop fascia) – to avoid two approvals being necessary. We also propose that the display of an advertisement on the exterior of a vehicle (other than on a highway) should be brought within the scope of the regulations, and normally benefit from deemed consent, so as to enable planning authorities to bring within control particular displays. **[14-7, 14-8]**

14.5 We provisionally consider 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

propose 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 one on a site that has been used since 1974. **[14-9, 14-10]**

Unauthorised advertisements

14.6 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 in the pre-1996 county of Dyfed). We provisionally propose the introduction of a single procedure enabling the removal of any unauthorised advertisement, including the hoarding. **[14-12]**

14.7 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 through unauthorised advertising, we provisionally consider that the maximum sentence on conviction for unauthorised advertising be increased to an unlimited fine. **[14-13]**

CHAPTER FIFTEEN: WORKS TO PROTECTED TREES

Making of tree preservation orders

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

15.2 We provisionally propose 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 an area, or groups of trees or woodlands. However, the use of area orders, other than on a short-term basis, can be problematic; and we therefore propose that, when they are confirmed, they should be converted into individual or group orders. **[15-3]**

Need for consent

15.3 We note that the new system for making tree preservation orders, introduced by the Planning Act 2008, has not yet been brought into effect in Wales. We assume that it will be.

15.4 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 provisionally consider that the exemption from consent should only apply where works are urgently necessary to remove an immediate risk of serious harm, or as agreed by the planning authority. **[15-5]**

15.5 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 have reached the provisional view that it would be preferable to remove the exemption altogether. **[15-6]**

15.6 We also suggest 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 a result of a tree replacement notice or a planning condition. **[15-7]**

15.7 We provisionally propose 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. **[15-8]**

Tree replacement

15.8 Where a protected tree has been felled unlawfully, or removed because it is dead, dying or dangerous, and a replacement has to be planted, we provisionally consider that 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. **[15-10]**

Unauthorised works

15.9 It is currently an offence (under section 210(1) of the TCPA 1990) to destroy a tree wilfully, or to damage it wilfully in a manner likely to destroy it. We provisionally propose 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. **[15-13]**

15.10 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 also suggest 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 tree preservation order (or tree preservation regulations under the new system) – with the sentence varying in accordance with the seriousness of the offence. We also propose that the prosecution should have to prove that the order had been served on the accused, or was available for public inspection. **[15-14]**

Trees in conservation areas

15.11 At present, a person carrying out works to a tree in a conservation area has to 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 has to seek consent under the order. We propose 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. **[15-16]**

CHAPTER SIXTEEN: IMPROVEMENT, REGENERATION AND RENEWAL

Unsightly land and buildings

16.1 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 propose 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. And we propose that appeals against such notices should generally be determined by inspectors. **[16-1 to 16-3]**

16.2 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 unsightly land regardless of why that has occurred, and can carry out landscaping works on any land; and can if necessary acquire the land. We propose that this be brought into the new Bill. We also propose that there should be a new power enabling the authority to take action where the owner is unknown or cannot be contacted. **[16-4]**

Graffiti and fly-posting

16.3 There used to be specific provisions to enable planning authorities in Wales to deal with graffiti and fly-posting. We are proposing that these should be reinstated, by Welsh Ministers making regulations to enable authorities to take appropriate action to secure the removal of unsightly or offensive graffiti and to deal with persistent unauthorised advertising. **[16-6]**

Area-based initiatives

16.4 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 provisionally propose that the system of enterprise zones set up under the 1980 Act be abolished in Wales (which would leave in place the system of enterprise zones under the 2012 Act). **[16-7]**

16.5 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 propose that all these schemes should be abolished. **[16-8 to 16-11]**

CHAPTER SEVENTEEN: HIGH COURT CHALLENGES

17.1 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.

17.2 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).

17.3 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.

17.4 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.

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

CHAPTER EIGHTEEN: MISCELLANEOUS AND SUPPLEMENARY PROVISIONS

18.1 The final 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

18.2 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 propose 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

18.3 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 propose that these are rationalised as far as possible. **[18-5]**

18.4 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. 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

18.5 There are an increasing number of situations in which the Welsh Ministers and planning authorities may charge for the performance of planning functions. We provisionally propose that the Bill includes a power enabling Welsh Ministers to publish a scale of fees relating to the performance of any such functions, on the understanding that the income from the fees so charged does not exceed the cost of performing the function in question. **[18-10]**

Inquiries, hearings and other proceedings

18.6 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 claimant has to be able to show that the opposing party has behaved unreasonably, and that that behaviour has led to incur unnecessary expense. We propose that this principle should be included in the Bill. **[18-13]**

Definitions

18.7 We have considered whether there are technical terms, used in the TCPA 1990 and subordinate legislation, that should be defined more clearly. We have looked in particular at the definition of “dwelling” and “dwellinghouse”, “curtilage”, and “agriculture” and related expressions. And we invite consultees to say if they consider there are others. **[18-15]**

18.8 The term “dwellinghouse” is used in a variety of contexts, and there are different statutory definitions, some mutually contradictory. We suggest that the word might be replaced with the term “dwelling”, defined so to include a house and a flat. **[18-16]**

18.9 “Curtilage” is another word not in everyday use, and for which there is no obvious synonym. We provisionally propose 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 is to 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. **[18-17]**