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

Planning Law in Wales

Cyfraith Cynllunio yng Nghymru

Consultation Paper
November 2017
Law Com No 233

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THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Rt Hon Lord Justice Bean, *Chairman,* Professor Nicholas Hopkins, Stephen Lewis, Professor David Ormerod QC, Nicholas Paines QC. The Chief Executive is Phillip Golding.

Topic of this consultation: Planning Law in Wales. This consultation paper does the following:

- examines the provisions of the Town and Country Planning Act 1990 and related legislation, as they apply in Wales;
- assesses the extent to which the current law could be improved; and
- makes a number of provisional proposals and asks a number of consultation questions.

Geographical scope: This consultation paper applies to the law of England and Wales, as it applies in Wales.

Availability of materials: The consultation paper is available on our website at http://www.lawcom.gov.uk/planning-law-in-wales/.

Duration of the consultation: We invite responses from 30 November 2017 to 1 March 2018.

Comments may be sent:

By email to planning_wales@lawcommission.gov.uk

OR

By post to Public Law Team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

Tel: 020 3334 3100 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency.

The Principles are available on the Cabinet Office website at: https://www.gov.uk/government/publications/consultation-principles-guidance.

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PLANNING LAW IN WALES: CONSULTATION PAPER

A summary of this Consultation Paper is available as a separate document

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GLOSSARY

Ancient Monuments Act	Ancient Monuments and Archaeological Areas Act
Blight 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 its allocation in the development plan (or in a similar document)
Breach of condition notice	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.
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 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.- includes local and strategic plans and the National Development Framework

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 by 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 (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.
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
Local infrastructure tariff (LIT)	A proposed replacement for the community infrastructure levy, applying a low tariff to most new developments.
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 the local 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 that use or those 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.
Purchase Notice	A notice served by the owner of land on a planning authority, requiring it to purchase land that has been rendered useless 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 consent	Consent needed to demolish or carry almost any works affecting a scheduled ancient monument, obtained from the Welsh Ministers.
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 served by the planning authority along with a copy of an enforcement notice, requiring unauthorised development to stop immediately, subject to a right to compensation in certain circumstances.
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 local 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 redevelopment of an urban area.

OTHER ABBREVIATIONS

CBC	County Borough Council
CLA	Country Land and Business Association
DC	District Council
DMP(W)O	Development Management Procedure (Wales) Order
ECHR	European Convention on Human Rights
GPDO	Town and Country Planning (General Permitted Development) Order
PCPA	Planning and Compulsory Purchase Act
POSW	Planning Officers Society (Wales)
P(W)A	Planning (Wales) Act
TCP	Town and Country Planning
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 **Note that this 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. There is also a Summary available on that website.**

0.4 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.

0.5 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.

0.6 There is a complete list consultation questions at the end of Part Two.

0.7 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 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.

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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 13-14** of the Consultation Paper.

YOUR RESPONSE

0.8 **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 1 March 2018. They should preferably be sent by email to:**

planning_wales@lawcommission.gov.uk.

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

cynllunio_cymru@lawcommission.gov.uk.

0.10 **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.**

0.11 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.

0.12 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.

0.13 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.

0.14 In the light of the responses we receive to this Consultation Paper, we will be issuing a Final Report in 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

BACKGROUND

1.1 The exercise presently being carried out by the Law Commission, at the request of the Welsh Government, contemplates the simplification and codification of planning and related legislation as it applies to the use and development of land in Wales. It follows the approach recommended in our Report on the Form and Accessibility of the Law Applicable in Wales,[1] and contributes to a pilot project being undertaken by the Welsh Government of codification, consolidation and better presentation of the law. It will hopefully contribute to the emergence in due course of a Planning Code that will replace all or part of 30 or so statutes, and around 100 regulations, rules and orders.[2]

1.2 This Consultation Paper sets out our proposals as to the content of a planning Bill that would become the principal piece of primary legislation within that Code. That Bill would incorporate much of what exists at present, but in a clearer pattern, and in a single place 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, whose continuing presence makes understanding and use of the planning system unnecessarily difficult.

1.3 Over the seventy years that have elapsed since the Town and Country Planning Act ("TCPA") 1947 was first enacted, the existence, in principle, of a planning system has generally served England and Wales well. It has led to the bringing forward of development – both by private landowners and by public sector organisations – where it has been required; and has helped to prevent the carrying out of development where it would have been inappropriate.

1.4 However, to regulate this system, there has grown up an extensive system of primary and secondary legislation, much altered by successive governments of differing political persuasions in response to new political pressures and priorities. That legislation is supplemented by a mass of policy guidance of various kinds, both national and local. As a result of this evolutionary process, the law that governs the

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

2 In the course of our drafting this Consultation Paper, the Welsh Government has published its response to our report on *Form and Accessibility* . We are pleased that it has accepted almost all of our recommendations. However, whereas we had recommended each new piece of primary legislation to be called a Code, the Welsh Government has decided to use the term "Code" to describe a compendium of primary and secondary legislation together with associated policy and guidance. That is exclusively a matter for the Welsh Government.

planning system – contained in Acts, Regulations, Orders, Rules and directions – is now exceedingly complex.

1.5 The part of the planning system that is most in the eye of the public is policy, or "planning judgement" as it sometimes known. This determines how the system is likely to operate in relation to any category of particular proposal – identifying which published policies and other factors are relevant, and balancing competing considerations against each other, to achieve a decision that is in the overall public interest.

1.6 It is now relatively straightforward to find Welsh Government policy on planning – in *Planning Policy Wales* and the Technical Advice Notes (TANs)[3] – and associated guidance.[4] Policy is generally outside the scope of the present exercise – even though many of the problems with the planning system, not least as perceived both by relevant professionals and more generally by the public, are in reality concerns as to policy rather than law. However, the preparation and application of planning policy and the exercise of planning judgement need to be based on a secure legal foundation – in particular, to determine:

(1) which categories of development require specific authorisation of some kind, which should in general be permitted automatically, and which require authorisation only in particular cases;

(2) how such authorisation can be obtained (if necessary, on appeal), in such a manner as to ensure that decisions are made in the light of all relevant considerations;

(3) which organisations and persons are to have a role in the decision-making process;

(4) on what policy basis land use and development should be managed (that is, which recognised categories of policy are to be taken into account, and how much weight should be given to each);

(5) how infrastructure should be provided that is made necessary as a result of development;

(6) how disputes should be resolved;

(7) what the consequences are of failing to obtain authorisation; and

(8) how central and local government and other public agencies (on behalf of the community) may plan and carry out their own development.[5]

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3 See **para 1.23**.

4 See for example *Local Development Plan Manual*, edn 2, Welsh Government, August 2015; and *Development Management Manual*, Welsh Government, November 2016.

5 The order of the topics in the list reflects the order in which they fall to be considered in the development management process.

THE PRESENT POSITION

1.7 In England and Wales as a whole, there are now over 50 Acts of Parliament and of the Assembly dealing in whole or part with planning and related matters – the precise number depending on what is considered to be "planning".[6] There are in addition around 150 pieces of secondary legislation – regulations, rules and orders – that determine how the system operates in detail, as well as national and local policy documents.

1.8 The resulting mass of primary and secondary legislation has grown inexorably and to no particularly obvious pattern. Following the first Planning Act in 1947, the relevant law and Government policy could be contained, along with commentary, within a single loose-leaf volume (then the *Encyclopaedia of Planning, Compulsory Purchase and Compensation*). Seventy years later, the "planning" element of that work has now grown to ten volumes.[7]

1.9 Many of these Acts and regulations have been the subject of judicial interpretation in the courts over the last 70 years. And the whole system has been the subject of numerous pieces of guidance, produced either by central government departments and other public bodies or by relevant professionals or others.

1.10 The law is difficult enough to navigate for specialist professionals, who also have available on-line resources. For non-specialists, let alone members of the public, the law – albeit simple enough in principle – is now almost impenetrably complex in practice.

1.11 In recent years, a further complicating factor has been that both the United Kingdom Parliament and the National Assembly for Wales now produce legislation that "extends" to both Wales and England, although some of it "applies" only to one or the other.[8] The position is now in many cases clear as to secondary legislation, since the title of each new set of regulations makes clear whether they apply in England, in Wales or in both. But the position as to primary legislation is in many cases far from straightforward. Again, professionals familiar with the law find this difficult to understand with certainty; for lay people it must be even worse. The system needs complete, radical overhaul.

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6 See **para 1.46 and footnote 38** below**.**

7 The law as to compulsory purchase and compensation, more complex than planning law but with less policy and guidance, is now to be found in a separate three-volume work.

8 There is an important legal distinction between an Act "extending" to a territory and to one "applying" there. Most Acts of the UK Parliament and all Acts of the Assembly "extend" to England and Wales. This means that they are part of the general law throughout that territory; and at present it is impossible for an Act of either Parliament or the Assembly to extend to only part of it. But this is an entirely different matter from discovering which parts of that territory an Act "applies" to. In the case of an Act of Parliament, finding out where (or to whom or what) it applies is a matter of reading the Act. However, as the following paragraphs demonstrate, this is often not clearly or conspicuously stated. For a fuller discussion, see *Form and Accessibility of the Law Applicable in Wales*, Law Commission Consultation Paper No 223, paras 1.43 to 1.46.

DEVELOPMENT OF THE PLANNING SYSTEM IN WALES

Original pattern: mainstream planning control in England and Wales

1.12 The planning system was created after the end of the Second World War. It was originally underpinned by three major statutes: the New Towns Act 1946, the TCPA 1947[9], and the National Parks and Access to the Countryside Act 1949.

1.13 Of those three Acts, the most significant turned out to be the TCPA 1947, which applied to England and Wales, and came into force on 1 July 1948. That Act established the following principles:

(1) that development plans were to be prepared by planning authorities, to guide the location and form of development;

(2) that authorisation was to be obtained for almost any development, and for outdoor advertising, with enforcement mechanisms to deal with breaches of planning control;

(3) that additional protection was to be given to buildings of special interest and trees of amenity value; and

(4) that land could be acquired by public authorities for planning purposes.

1.14 Those principles are still in existence today, albeit that the details have been changed on many occasions.

1.15 The TCPA 1947 also contained complex financial provisions, to secure that a development charge was paid to the state where permission was granted for development not in accordance with the plan, and that compensation would be payable by the state in certain circumstances where permission was refused.[10] Those provisions have long since been abolished – largely by the TCPA 1953 and the Planning and Compensation Act 1991.

1.16 The 1947 Act was amended on several occasions during the 1950s, and the law was subsequently consolidated into the TCPA 1962. That Act was in turn significantly amended by legislation relating to office and industrial development, and by the TCPA 1968, which introduced many technical improvements into general planning legislation (such as those relating to appeals) that are now part of the established pattern of the law. The 1968 Act also introduced some new concepts that have survived (including the terms "listed building" and "listed building consent") – as well as others that have not (such as established use certificates, and structure and local plans), and others that have survived but without ever being used (such as planning inquiry commissions). The extent of the changes was such that they led to a further consolidation, creating the TCPA 1971.

1.17 The 1971 Act was then amended by the TCP (Amendment) Act 1972, the Town and Country Amenities Act 1974 and the Housing and Planning Act 1986 – which brought in a variety of worthwhile but relatively minor amendments to mainstream planning legislation, and introduced conservation areas (much used since) and simplified

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9 In this Consultation Paper we use a number of abbreviations for the titles of pieces of legislation. They are listed on **page xv**.

10 TCPA 1947, Parts 6, 7.

planning zones (hardly used at all). The Local Government, Planning and Land Act 1980 also amended the legislation, and launched enterprise zones and urban development corporations.

1.18 The UK Government then invited the Law Commission to consolidate planning legislation again, this time incorporating a small number of minor technical amendments.[11] The exercise resulted in the appearance of four statutes – principally the TCPA 1990, but also the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act 1990"), the Planning (Hazardous Substances) Act 1990, and the Planning (Consequential Provisions) Act 1990.

1.19 However, no sooner was the consolidation complete than the process of amendment started all over again – starting with the changes to the planning enforcement regime made by the Planning and Compensation Act 1991. The Environment Act 1995, which primarily concerned aspects of environmental law other than planning, also brought up-to-date the law relating to old planning permissions for minerals extraction, and made significant changes to planning control in national parks.

Planning law in Wales

1.20 All the items of planning legislation noted above – and almost all associated secondary legislation – applied to Wales as well as England, and in general applied in both countries identically.

1.21 In addition, although the Secretary of State for Wales had been responsible for town and country planning since 1965[12], policy was also generally the same in the two countries, at least until the 1990s. Circulars and policy guidance (PPGs and MPGs) were issued jointly by the Welsh Office and the Department of the Environment – although the Welsh Office occasionally declined to adopt English circulars,[13] and sometimes issued circulars without English equivalents, such as those relating to the Welsh language[14] and the historic environment.[15]

1.22 The Local Government (Wales) Act 1994 introduced a unitary system of local government throughout Wales, providing that the 22 new authorities would be local planning authorities for all purposes, and adopted in Wales the system of unitary development plans that had previously applied only in the major metropolitan areas in England.[16] A year later, the Environment Act 1995 introduced the three national park authorities in Wales.

1.23 This was echoed by the development of a distinctive suite of planning policy applying only in Wales. Initially, this consisted primarily of two documents, issued by the Welsh

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11 Law Com 189, Cm 958.

12 See, for example, HC Deb, 19 November 1964, Vol 602, col 623.

13 For example, Department of the Environment Circular 8/87 (*Historic Buildings – Policy and Procedures*) applied only in England.

14 Welsh Office Circular 53/88 (*The Welsh Language, Development Plans and Development Control*) – replaced in 2000 by the first edition of TAN 20.

15 Welsh Office Circular 60/96 (*Archaeology*) and 61/96 (*Historic Buildings and Conservation Areas*) – both in force until replaced by TAN 24 in 2017 – had no direct English equivalent.

16 TCPA 1990, Part 2, Chapter 1, amended by Local Government (Wales) Act 1994, Part 2. The three national park authorities in Wales, created under the Environment Act 1995, were constituted as local planning authorities by SI 1995 No 2803.

Office in May 1996, entitled *Planning Guidance (Wales): Unitary Development Plans* and *Planning Guidance (Wales): Planning Policy*. The latter set out national planning policy applying to Wales – a model that was only adopted in England some 16 years later, with the introduction of the National Planning Policy Framework (NPPF). The two national policy documents were accompanied by a range of Technical Advice Notes, providing more detailed advice on specific topics (again, presaging the online National Planning Practice Guidance (NPPG) issued some years later in England).

1.24 The Government of Wales Act 1998 then started a process whereby the responsibilities of Parliament and the Secretary of State for the Environment were gradually transferred to their Welsh equivalents. Initially, the National Assembly for Wales had no power to enact primary legislation, but took over the responsibilities of the Secretary of State for Wales.[17] From then on, secondary legislation relating to planning and related matters was generally made by the Assembly so as to apply only in Wales.[18]

1.25 The Planning and Compulsory Purchase Act ("PCPA") 2004 introduced quite distinct systems of development plans for England (in Part 2) and Wales (in Part 6). The remainder of the Act made various changes to planning legislation, applying in both England and Wales, in the same manner as earlier statutes.

The Government of Wales Act 2006

1.26 The Government of Wales Act 2006 significantly extended the devolution process by providing (in Part 3) that the Assembly could pass Measures that would have the status of primary legislation. Following a referendum in March 2011, this was superseded by the coming into force two months later of Part 4 of the 2006 Act, which empowered the Assembly to pass Acts, instead of Measures.

1.27 Under Part 3 of the 2006 Act, Measures passed by the Assembly would only fall within its legislative competence if they dealt with one or more of the matters listed in Schedule 5; none of the 22 Measures passed by the Assembly directly related to planning. Under Part 4 of the Act, Acts passed by the Assembly would only fall within its legislative competence if they dealt with one or more of the subjects listed in Schedule 7.

1.28 The lists in both Schedule 5 and Schedule 7 included:

(1) town and country planning,

(2) ancient monuments and historic buildings,

(3) agriculture, fisheries, forestry and rural development, and

(4) environment,

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17 Government of Wales Act 1998, s 21; National Assembly for Wales (Transfer of Functions) Order 1999 (SI No 672).

18 There were a few earlier examples of secondary legislation being made for the two countries: see for example SIs 1991 No 2647 (Wales) and No 2512 (England), which both relate to compensation under the ancient monuments legislation.

as well as a large range of other topics that are indirectly relevant to planning.[19]

1.29 Within Schedule 7, the subjects listed under "town and country planning" were as follows:

> Town and country planning, including listed buildings and conservation areas. Caravan sites. Spatial planning. Mineral workings. Urban development. New towns. Protection of visual amenity.[20]

The list explicitly excluded development consent under the Planning Act 2008, touched upon later.[21]

1.30 Subjects listed under "Ancient monuments and historic buildings" were:

> Archaeological remains. Ancient monuments. Buildings and places of historical or architectural interest. Historic wrecks.[22]

"Agriculture, fisheries, forestry and rural development" included:

> Agriculture, including animal health and welfare. Plant health. Plant varieties and seeds. Horticulture. Fisheries. Fish health. Forestry. Rural development.[23]

"Environment" included:

> Environmental protection, including pollution, nuisances and hazardous substances. Prevention, reduction, collection, management, treatment and disposal of waste. Land drainage and land improvement. Countryside and open spaces (including the designation and regulation of national parks and areas of outstanding natural beauty). Nature conservation and sites of special scientific interest. Protection of natural habitats, coast and marine environment (including seabed). Biodiversity. Genetically modified organisms. Smallholdings and allotments. Common land. Town and village greens. Burial and cremation, except coroners' functions.[24]

Relevant Welsh Assembly legislation since 2006

1.31 Using its new powers under Part 4 of the 2006 Act, the National Assembly for Wales has passed a number of Acts that are directly or indirectly relevant to the present exercise, including:

(1) the Mobile Homes (Wales) Act 2013;

(2) the Well-being of Future Generations (Wales) Act ("Well-being Act") 2015;

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19 Government of Wales Act 2006, Sched 7, as amended by subsequent legislation (see following footnotes).

20 Government of Wales Act 2006, Sched 7, para 18, as amended by SI 2007 No 2143.

21 2020 SI 2968; and Localism Act 2011, Sched 13; see **paras 3.113**, **9.12 to 9.14**.

22 Government of Wales Act 2006, Sched 7, para 2.

23 Government of Wales Act 2006, Sched 7, para 1, as amended by SI 2010 No 2968.

24 Government of Wales Act 2006, Sched 7, para 6, as amended by SIs 2007 No 2143, 2010 No 2968.

(3) the Planning (Wales) Act ("P(W)A") 2015;

(4) the Local Government (Wales) Act 2015;

(5) the Environment (Wales) Act 2016; and

(6) the Historic Environment (Wales) Act 2016.

1.32 The P(W)A 2015 significantly amended planning legislation as it applies to development in Wales – partly Part 6 of the PCPA 2004 as regards development plans, and partly the TCPA 1990 as it provided for the management of development generally. Some of those amendments were similar to those that had been made for England by the Localism Act 2011 (see below), but the 2011 and 2015 Acts were by no means identical. For example, the system of neighbourhood planning introduced in England by the 2011 Act was not introduced in Wales.

1.33 The Historic Environment (Wales) Act 2016 also made significant amendments both to the Listed Buildings Act 1990 and to the Ancient Monuments and Archaeological Areas Act 1979 as they applied in Wales. Here too, the amendments to the 1990 Act were similar but by no means identical to those introduced in England by the Enterprise and Regulatory Reform Act 2013 – and the amendments to the 1979 Act were not matched by any corresponding amendments to that Act as it applied in England.[25]

1.34 The Mobile Homes (Wales) Act 2013 effectively consolidated the law in Wales relating to the licensing of mobile homes. The Well-being Act 2015 was a new freestanding piece of legislation, replacing the slightly more limited sustainability duty that had previously been in the PCPA 2004; and the Environment (Wales) Act 2016 contains a number of provisions amending the general law on the sustainable management of natural resources, replacing the biodiversity duty that had been in the Natural Environment and Rural Communities Act 2006.[26] The Local Government (Wales) Act 2015 enabled the merger of two or more neighbouring local authorities.

Other related legislation

1.35 The New Towns Act 1946, the first of the three early post-War Acts dealing with land use and development,[27] led to the creation of 21 new towns in England, and two in Wales – one almost 70 years ago, the other 50 years ago – and in both cases the development corporation has been wound up long since. The 1946 Act was amended on a number of occasions, and the relevant legislation is now in the New Towns Act 1981, which was amended by the New Towns and Urban Development Corporations Act 1985 to provide for the eventual winding-up of the new towns programme.[28]

1.36 Further legislation relating to urban regeneration is contained in the Local Government, Planning and Land Act 1980, which provided for the establishment of

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25 Although some amendments had been made to the 1979 Act as it applied in Scotland; see **para 1.82 below**.

26 PCPA 2004, s 39, in effect now applies only in England, as does the Natural Environment and Rural Communities Act 2006.

27 See **para 1.12**.

28 See **paras 16.75 to 16.79**.

urban development corporations (only one of which was ever created in Wales)[29] and the designation of enterprise zones.[30]

1.37 The Welsh Development Agency Act 1975 and the Development of Rural Wales Act 1976 set up the Welsh Development Agency ("WDA") and provided further powers for regeneration in Wales. The powers of the WDA under the 1975 Act were extended by the Government of Wales Act 1998, and have now been passed to the Welsh Ministers.[31] The 1998 Act also abolished the Development Board for Rural Wales, the Land Authority for Wales, and Housing for Wales.

1.38 The third of the three post-war Acts, the National Parks and Access to the Countryside Act 1949, is still in force. It has been substantially amended and supplemented over the ensuing 70 years by the Countryside Act 1968, the Wildlife and Countryside Act 1981, the Environment Act 1995, the Countryside and Rights of Way Act 2000, and the Natural Environment and Rural Communities Act 2006.

Westminster legislation since 2006

1.39 The passage of the Government of Wales Act 2006 did not prevent the Westminster Government continuing to pass some planning legislation that would affect Wales. The Planning Act 2008 established a new regime whereby major projects (such as airports and power stations) required "development consent" rather than planning permission; this regime applies somewhat differently in England and Wales.[32] That Act also made some amendments to mainstream planning control legislation – some applying only in England, a few only in Wales, and some[33] in both England and Wales. It is noteworthy that in some instances it also gave the Welsh Ministers powers to make amendments to the law in Wales similar to those that were being introduced in England.[34]

1.40 Further amendments have been made by the UK Parliament to planning and related legislation, generally applying only in England except insofar as they related to the development consent regime and compulsory purchase. They include changes made by the Sustainable Communities Act 2007, the Housing and Regeneration Act 2008, the Localism Act 2011, the Enterprise and Regulatory Reform Act 2013, the Growth and Infrastructure Act 2013, the Infrastructure Act 2015, and the Housing and Planning Act 2016. As noted above, changes similar – but not necessarily identical – to some of them were introduced by the P(W)A 2015.

1.41 Other changes have been made that apply in both England and Wales, notably in relation to the special regime of challenging planning decisions in the High Court, introduced by the Criminal Justice and Courts Act 2015.

Wales Act 2017

1.42 Finally, as a result of the Wales Act 2017, legislative competence for primary legislation relating to planning and related matters has been almost entirely devolved

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29 Local Government, Planning and Land Act 1980, ss 134-136, Scheds 26-31; see **paras 16.80 to 16.86**.

30 Local Government, Planning and Land Act 1980, ss 179, Sched 32; see **paras 16.61 to 16.74**.

31 See **paras 3.70 to3.73**.

32 See **paras 9.12 to 9.14**.

33 Notably as to trees; see **Chapter 15**.

34 Planning Act 2008, s 203.

to the Assembly. That Act (which is expected to come into force in 2018) inserted a new Schedule 7A into the Government of Wales Act 2006, which lists those matters that are reserved to the UK Parliament.

1.43 In relation to the topics that are relevant to the subject of this Consultation Paper, the principal subjects thus reserved are as follows:

(1) planning, but only insofar as it relates to certain categories of major infrastructure projects;[35]

(2) compensation for the compulsory purchase of land;[36] and

(3) control of the design and construction of buildings under the Building Regulations, in relation to works by the Crown and by statutory undertakers.[37]

1.44 The broader consequences of this are explored in **Chapter 3**. One specific consequence is that it is likely that a new system of authorising major infrastructure projects may be introduced in the next few years (as noted in **Chapter 9**). And responsibility for the Community Infrastructure Levy (CIL) was passed to the Welsh Assembly during the course of the Bill's passage through Parliament (see **Chapter 10)**.

RESULTING PROBLEMS

Difficulty of identifying the applicable legislation

1.45 As a result of the legislative history described above, the planning and management of land use and development in Wales, including the historic environment, is the subject of all or part of over 30 statutes, as listed in **Table 1-1** overleaf. Between them they broadly replace the New Towns Act 1946 and the Town and Country Planning Act 1947 – along with many related legislative developments introduced in the following 70 years. Clearly some are more directly related than others to the core of the planning system; and it will not be appropriate to include all of them within the new Planning Code.[38]

1.46 Since the last time this area of law was consolidated, much of the new legislation has been in the form of amendments to the four 1990 Acts.

1.47 The effect of this process of amendment, repeal and addition is illustrated by comparing the current size of the four principal Westminster statutes relating to planning in England and Wales with their size as originally enacted. As enacted, they

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35 GOWA 2006, Sched 7A, para 184; see **para 3.113**, **Chapter 9**.

36 GOWA 2006, Sched 7A, para 185, Sched 7B, paras 1-3; see **paras 3.114-3.120**.

37 GOWA 2006, Sched 7A, para 184; see **paras 3.124**.

38 The Scoping Paper listed (at para.4.3) 48 statutes relating to planning and land use (hence also the figure of around 50 at **para. 1.7** above). However, as well as those in **Table 1-1**, that list also included some Acts that have been largely but not entirely repealed (see **Table B-3** in **Appendix B**), and some applying only in England (see **Table B-5** in **Appendix B**).

contained between them 479 sections and 26 schedules; currently they contain 595 sections and 35 schedules.[39]

1.48 However, the PCPA 2004 introduced some new freestanding material. The 2004 Act originally contained 67 freestanding sections that were directly relevant to planning in England and Wales; it has since been amended, and now extends to 91 such sections. The Planning Act 2008 followed a similar pattern.

1.49 In addition, the statutory code relating to the rural environment, access and rights of way in Wales and England – originally in the National Parks and Access to the Countryside Act 1949 – has also been gradually elaborated, and the law is now to be found in ten statutes, listed in **Table B-6** in Appendix B.

1.50 Finally, as noted above, the primary legislation regulating the planning system has always been supplemented by numerous regulations, orders, and directions: there are now around 150, applying either to both England and Wales or just to Wales – again, the precise number depending on which topics are included within the scope of "planning". Some used to apply to both England and Wales, but now only to Wales.

Resulting complexity

1.51 The pattern of legislation (in both England and Wales) has contributed significantly to the complexity of the planning system – as has been noted by practitioners:

> Planning has become extremely complex. … Unlike other regulatory systems, planning is able to address a proposal holistically, and so ends up looking at every issue unless there is good reason why it should not. There are, though, two other reasons why planning encompasses so much, and good reasons they are too. Planning is the epitome of public consultation. Whatever problems may arise in practice … there is a determination to include the public in the process in a way which is unmatched in other regulatory systems. Finally, and most importantly, it is the democratic regulatory system. Decisions are either taken by politicians or, if that is not the case, then those officials making decisions, whether council officers or planning inspectors, are subject to closer political scrutiny than in any other area of regulation.
>
> Beyond the fair reasons for complexity, there are some well-intentioned but less good ones. Concern at the perceived slowness or misuse of the planning system has prompted a variety of adjustments, tweaks and alternatives. Some have produced a legislative dead-end, unused even by the governments that devised them, such as section 76A major infrastructure inquiries or planning inquiry commissions. Others have added exceptions, loopholes and detail, which is the enemy of efficiency and public understanding, for little if any public benefit.[40]

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39 So, for example, P(W)A 2015, s 3 replaced s. 60 of the PCPA 2004 (as originally drafted) by sections 60 to 60D, resulting in a net increase of three sections in the length of the 2004 Act. See **Table B-1**.

40 *Planning Permission*, Richard Harwood OBE QC, first edition, Bloomsbury Professional, 2016, pp vii-viii.

Table 1-1

Primary legislation governing management of land use and development in Wales

(1)	National Parks and Access to the Countryside Act 1949	Section 89
(2)	Historic Buildings and Ancient Monuments Act 1953	The whole Act
(3)	Local Authorities (Land) Act 1963	The whole Act
(4)	Agriculture Act 1967	Part 3; Schedule 5
(5)	Civic Amenities Act 1967	The whole Act
(6)	Welsh Development Agency Act 1976	The whole Act
(7)	Development of Rural Wales Act 1976	The whole Act
(8)	Inner Urban Areas Act 1978	The whole Act
(9)	Ancient Monuments and Archaeological Areas Act 1979	The whole Act
(10)	Local Government, Planning and Land Act 1980	Parts 15, 16, 17, 18; Schedules 25 to 32
(11)	New Towns Act 1981	The whole Act
(12)	New Towns and Urban Development Corporations Act 1985	Schedule 2
(13)	Housing and Planning Act 1986	Part 3; sections 40, 55
(14)	Housing Act 1988	Part 3; Schedules 7 to 10
(15)	Town and Country Planning Act 1990	The whole Act
(16)	Planning (Listed Buildings and Conservation Areas) Act 1990	The whole Act
(17)	Planning (Consequential Provisions) Act 1990	The whole Act
(18)	Planning and Compensation Act 1991	Part 1; Schedules 1 to 7
(19)	Leasehold Reform, Housing and Urban Development Act 1993	Sections 177 to 182
(20)	Local Government (Wales) Act 1994	Sections 18 to 20; Schedules 4 to 6
(21)	Environment Act 1995	Sections 96, 97; Schedules 13, 14.
(22)	Anti-social Behaviour Act 2003	Part 8

(23)	Planning and Compulsory Purchase Act 2004	Section 38; Parts 4 to 6; Part 7, Chapter 1; Schedules 1 to 4, 6
(24)	Planning-gain Supplement (Preparations) Act 2007	The whole Act
(25)	Planning Act 2008	Parts 9 to 12; Schedules 7, 8, 10
(26)	Localism Act 2011	Part 6, Chapter 2
(27)	Mobile Homes (Wales) Act 2013	The whole Act
(28)	Criminal Justice and Courts Act 2015	Sections 91, 92; Schedule 16
(29)	Well-being of Future Generations (Wales) Act 2015	Sections 2 to 5
(30)	Planning (Wales) Act 2015	The whole Act
(31)	Historic Environment (Wales) Act 2016	The whole Act

Unclear structure

1.52 In addition to the sheer quantity of the legislation, the structure of it is confused. Some of the relevant provisions are in the body of an Act; some are in schedules to an Act. Some are in pieces of secondary legislation – which may be called orders, regulations, or rules. Some are in Ministerial directions. And unfortunately, in some cases, there is no particular logic as to what goes where.

1.53 Even within the primary legislation, some provisions are in the main 1990 Acts; others are in amendments to such provisions; others are in new provisions inserted into the Acts; yet others are in freestanding statutes outside the 1990 legislation altogether. So, for example, the duty to make planning decisions in accordance with the development plan – which is a fundamental principle of the system – is in section 38(6) of the Planning and Compulsory Purchase Act 2004, and not in the 1990 Act. Indeed, it is noteworthy that of the numerous duties laid upon planning authorities when determining planning applications, only two are in the 1990 Act itself.[41]

1.54 A further problem is that many provisions that are rarely used take up large parts of principal statutes. So, for example, provisions relating to the revocation of planning permission, and the service of blight notices and purchase notices, take up a significant proportion of the 1990 Act, even though they are almost never used in practice.[42] Some provisions are encountered only by very specific groups, such as statutory undertakers.[43]

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41 See **Chapter 5**.

42 See **paras 6.42 to 6.49**, **11.50 to 11.58**.

43 See **para 18.7 to 18.33**.

1.55 Other provisions have not been used for some years – and some have never been used at all. This may simply be a result of the passage of time (as with the surviving provisions as to wartime breaches of planning control). But such provisions also seem to have been introduced for various other reasons:

(1) the UK Government has periodically sought to introduce special procedures to cope with large infrastructure projects, which have been considered to be unsuitable for the mainstream planning process (hence planning inquiry commissions, and the special procedures for nationally significant infrastructure projects ("NSIPs"));

(2) it has sought to speed up procedures for dealing with applications for development that is small scale or in an area where regeneration is to be encouraged – or to exempt such development from control altogether (hence local development orders and simplified planning zones); or

(3) it has sought to introduce different types of planning regimes in areas subject to particular pressures (hence new towns, urban development corporations, housing action trusts).

1.56 Such legislative innovations have sometimes been made use of. Local development orders, for example, are a live policy tool that is being used and pursued by the Welsh Government[44]; and neighbourhood plans have proved popular in England. But in many cases the legislation has been so hedged about with precautions to avoid inappropriate use that they are hardly if ever used in practice – as with simplified planning zones.

Special problems in Wales: which Westminster legislation applies?

1.57 Many of the problems touched upon above arise in relation to both England and Wales. However, they have been exacerbated in recent years by the gradual development of separate legislation for the two nations.

1.58 Assembly Acts only apply in Wales.[45] But Acts of the United Kingdom Parliament can apply only in England, or only in Wales, or both in England and Wales (we have already noted the difference between the "application" of an Act and its "extent"[46]). As a result of the successive devolution settlements, many provisions in planning-related legislation enacted at Westminster in the last ten years have been drafted so that they apply only in England.

1.59 But this is not always obvious from the text of the Act. For example, Schedule 4B to the TCPA 1990, which provides for the making of neighbourhood development orders, contains on its face no reference to either England or Wales.[47] However, Schedule 4B is introduced by section 61E(3) of the TCPA 1990; and section 61E

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44 For example Newport Council have recently adopted the Newport City Centre Local Development Order, and Rhondda Cynon Taf Council are in the process of adopting the Treforest Industrial Estate and Parc Nantgarw Local Development Order.

45 Government of Wales Act 2006, s.108A, inserted by Wales Act 2017, s.3. The expression used in that section is ""in relation to Wales", which means more or less (but not exactly) the same thing.

46 See **footnote 8** above.

47 Sections 61E to 61Q of and Schedule 4B to the TCPA 1990 were inserted by Schedule 9 to the Localism Act 2011; the 2011 Act itself is stated to extend to England and Wales (see s 239).

states that the section, and thus by implication the Schedule, only applies to action by a local planning authority in England.

1.60 The same difficulties arise in principle in relation to secondary legislation, but there the position is usually clearer, due to explicit titles: for example, the Developments of National Significance (Wales) Regulations 2016. And in the field of planning there are relatively few examples of England and Wales regulations still applying in Wales – although there are instances where regulations that used to apply in both countries have been replaced in relation to England but still apply in Wales (notably the TCP (Control of Advertisements) Regulations 1992 and the TCP (Trees) Regulations 1999, both of which were amended some while ago so as not to apply in England[48].

1.61 As noted above, all legislation produced by the National Assembly for Wales only applies in relation to Wales.[49] That makes the position clearer. However, the resulting statutory code is gradually starting to diverge on either side of the border. On the two occasions when the Assembly has legislated directly in relation to planning – in the Planning (Wales) Act and the Historic Environment (Wales) Act – it has introduced some changes to the system provided for in the 1990 Acts that are similar (but by no means identical) to those introduced in England, and others that are quite distinct.

1.62 A notable example of the problems that arise is the Planning Act 2008. Parts 1 to 8 of that Act introduced a new regime of "development consent" for major projects in certain categories, which applies in principle throughout both England and Wales, although with some significant differences as to details on either side of the border. Part 9 introduced various changes to the details of the mainstream planning regime, most of which applied in England only, but some applied in both England and Wales. As to the latter category, some of the changes have been brought into force in relation to Wales as well as England, but on different dates;[50] others have been brought into force in England, but not yet in Wales (and in some cases the old arrangements have since been modified in Wales, rather than being replaced).[51] Part 10 amended the scope of the Assembly's devolved powers, and empowered the Welsh Ministers to make regulations to introduce into Wales some of the England-only changes in Part 9; such regulations have been made in respect of some, but not all, of those changes. Part 11 introduced Community Infrastructure Levy (CIL), which applies in both England and Wales; but in Wales only three local planning authorities have introduced CIL, with a further five following in due course.

1.63 It is almost inevitable that the divergence between the law applying in Wales and England will increase further in future. Once the Assembly has in effect full legislative competence in relation to planning (save for some specific types of development, development consent, and compensation for compulsory purchase), it is to be expected that it will use that competence to develop gradually a legal code that will be a distinctive response to the specific land-use issues arising in Wales. And the UK Parliament will equally be introducing new provisions applying only in England. If this is done, in either case, merely by amending the 1990 Acts, the result will be a system that will be increasingly unsatisfactory and eventually incomprehensible in

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48 See **paras 14.8, 15.2**.

49 See now Wales Act 2017, s 3.

50 See for example Planning Act 2008, s 188; SIs 2009 No 1303, 2012 No 802 (local development orders).

51 See for example Planning Act 2008, ss 192, 193; SIs 20012 No 605, 792 (tree preservation orders).

both countries. If on the other hand it is achieved by passing further, separate pieces of legislation that, in effect, simply by-pass the 1990 Acts, the position will be even worse.

1.64 A related problem is that the Westminster statute book is becoming increasingly untidy, with sections of statutes containing a jumble of subsections applying in England and subsections applying in Wales. Sometimes subsections – indeed entire sections – that have the same numbering are worded differently in their application to England and in their application to Wales.

1.65 A good example of a jumble of England-related and Wales-related subsections is found in the opening section of the TCPA 1990. **Table 1-2** separates out the parts of that section applying in England and those applying in Wales.[52]

1.66 A reader of the section who is interested in finding out which are the planning authorities in Wales has to read all the provisions of section 1, and work out that more than half of them are irrelevant.

1.67 Occasionally, such complexities even mislead Parliament itself. For example, section 196D of the TCPA 1990 – which applies only to buildings in conservation areas in England – refers to such a building that is subject to a direction under section 75(2) of the Listed Buildings Act 1990. But section 75(2) applies only to buildings subject to section 74, which itself only applies to conservation areas in Wales.

1.68 Nor is it possible to resolve such uncertainties simply by resort to the Legislation.gov.uk website maintained by the National Archives. As a result of the complexities outlined above, the identification of which legislation applies in England and which in Wales is far from straightforward. We recommended in our Final Report on the Commission's *Form and Accessibility of the Law in Wales* project that online versions of legislation should identify the territorial applicability of the legislation. However, to do that exercise in such a way that the result could be wholly reliable would require a very substantial commitment of resources, which does not seem likely for the foreseeable future.[53]

Welsh language

1.69 Legislation produced by the UK Parliament in Westminster is always only in English.[54] By contrast, all legislation passed by the National Assembly for Wales has been produced from the outset both in English and in Welsh; but not insofar as it amends a Westminster statute. The result is that a significant proportion of the legislation directly or indirectly related to planning in Wales is available only in English.

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[52] It will be noted that the collection of provisions applying in Wales omits subsection (5)(c). As with the whole of section 1, this is part of the law in Wales as well as in England, but it has no application in Wales because it refers to subsection (3), which itself does not apply in Wales.

[53] *Form and Accessibility of the Law Applicable in Wales*, Final Report, Law Com No 355, paras 13.63 to 13.65, Recommendation 27.

[54] Save perhaps where it amends an Act of the Assembly.

Table 1-2.

Section 1 of the Town and Country Planning Act 1990 (local planning authorities) as it applies in England and as it applies in Wales

England

1 (1) In a non-metropolitan county—

(a) the council of a county is the county planning authority for the county, and

(b) the council of a district is the district planning authority for the district,

and references in the planning Acts to a local planning authority in relation to a non-metropolitan county shall be construed, subject to any express provision to the contrary, as references to both the county planning authority and the district planning authorities.

(2) The council of a metropolitan district is the local planning authority for the district and the council of a London borough is the local planning authority for the borough. But, in the case of a London borough, see also sections 2A to 2E (Mayor of London).

(3) In England (exclusive of the metropolitan counties, Greater London and the Isles of Scilly) all functions conferred on local planning authorities by or under the planning Acts shall be exercisable both by county planning authorities and district planning authorities.

(4) In this Act "mineral planning authority" means —

(a) in respect of a site in a non-metropolitan county, the county planning authority; and

(b) in respect of a site in a metropolitan district or London borough, the local planning authority.

(5) This section has effect subject to any express provision to the contrary in the planning Acts and, in particular—

(a) this section has effect subject to [sections 4A, 5, 6, 7, 7A, 8 and 8A] of this Act ; and

(b) subsections (1) [and] (2) have effect subject to sections 2 and 9; and

(c) subsection (3) has effect subject to Schedule 1 (which contains provisions as to the exercise of certain functions under this Act by particular authorities and liaison between them).

Wales

1 (1B) In Wales—

(a) the local planning authority for a county is the county council; and

(b) the local planning authority for a county borough is the county borough council.

(4B) As to any site in Wales, the local planning authority is also the mineral planning authority.

(5) This section has effect subject to any express provision to the contrary in the planning Acts and, in particular—

(a) this section has effect subject to [sections 4A, 6, 7 and 8] of this Act; and

(b) [subsection (1B) has] effect subject to sections 2 and 9.

(6) The exercise, in relation to Wales, of functions conferred on local planning authorities is subject to Schedule 1A.

The resulting difficulties for users

1.70 It is hardly surprising that professionals find it difficult to be certain as to what is the law in force in Wales; and members of the public do not stand a chance. The system is already confusing for users – courts, lawyers, planners and inspectors administering the system, other professionals (planning consultants, surveyors, architects etc), landowners, householders, developers, amenity groups, third parties, and members of the Assembly and Parliament when changing the law.

1.71 The problems have been noted in the recent debates in the House of Lords on the Wales Bill. Baroness Morgan of Ely observed:

> The laws of England and Wales—already vast—must now absorb the increasing divergence between laws that apply only to Wales and those that apply only to England. This is highly complex, so how can we be sure that the citizens will understand the law or even that solicitors, barristers and judges will apply the correct law? This is not a debating point: these are real practical risks and they are increasing.[55]

1.72 Lord Morris of Aberavon added:

> The serious issue is the consolidation of legislation already passed by the Welsh Assembly. Over the years that the Assembly has been in existence, Act after Act has been passed, particularly during the most recent period. Any practitioner, be they in Wales or in England, who has to advise a client in Wales on a matter arising in Wales concerning property, employment and so on, has to turn up a whole host of literature in order to give proper and responsible advice, otherwise he will be accused of being negligent. I hope that before it is too late the Welsh Assembly will use its powers and resources to consolidate the existing legislation and thus make it easier for practitioners and ordinary litigants.[56]

1.73 More recently, we received a query from an architect in North Wales, who had been seeking, without success, to find out from the House of Commons Library and the Welsh Government website which sections of the Housing and Planning Act 2016 applied in Wales. Not entirely surprisingly, she had received advice that confused the concepts of "application" and "extent"[57]; or possibly she had received correct advice, but had misunderstood it; either way, she was still no further forward.[58] She subsequently commented:

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55 HL debates, 31 October 2016, Vol 776, col 466.

56 HL debates, 31 October 2016, Vol 776, col 473. Lord Morris was Secretary of State for Wales from 1974 to 1979, Shadow Attorney-General from 1983 to 1997, and Attorney-General from 1997 to 1999.

57 See **footnote 8** above.

58 In most cases, the name of each Part of the Housing and Planning Act 2016 states clearly "in England". The exceptions are

- In Part 5 (housing etc: other changes), sections 122, 123, 131 – 138;
- Part 7 (compulsory purchase), which applies in both England and Wales (since compulsory purchase is not yet a devolved matter); and
- Part 8 (public authority land).

> It has always seemed to me that if law is written in such a way that it can't be understood by the average school-leaver, then it is not fit for purpose, and rather undemocratic. I don't mean that it should be written by school leavers but that it should be understandable by them, with the aid of a crib sheet of definitions.

It may be imagined that others have had similar, frustrating experiences.

1.74 The author of one textbook summed up the current position as follows:

> Since 2010, ministers in England have had great success in cutting down the volume of planning policy with the publication of the NPPF and the NPPG.[59] There has also been a programme of reform of secondary legislation, much of it low-key, which has operated as a brake on the legislative juggernaut if not yet a reverse gear. Primary legislative reform has further to go. Through the maze of the redundant provisions and unhelpful bits of assistance, a relatively simple process still exists. It is time to put it on display.[60]

1.75 We agree that the planning system is, in principle, simple. But we also consider, and those who have responded to our consultation have universally agreed, that it appears to be extremely complex.[61] The following Chapters considers how the system can once again be made simple – at least in Wales.

FUTURE MAINTENANCE OF THE CODE

1.76 Many of the problems outlined above arise as a result of the continual process of amending primary legislation. There have been more than a dozen Acts amending the TCPA 1990 since it was first enacted. These arise as the result of a wide variety of political pressures, and to meet a variety of policy objectives.

1.77 Clearly we cannot prevent this process of continual change. However, one of the principles underlying the codification proposal, as envisaged in the Report on the Commission's *Form and Accessibility* project, was that there would be a discipline to ensure that a Code, once in place, would contain all of the statute law on a particular topic as it applies in Wales, and that any future changes would be incorporated into the Code, rather than left as freestanding statutory provisions alongside it. [62]

But on closer examination, section 131, 133, 134, 135 and 138 apply only in England; and sections 136 and 137 and part 8 probably only have effect in England (Part 8 does not apply to authorities that only operate in Wales). That leaves only section 132 as apparently applying in Wales, which suggests that it does not, although it is not entirely clear why.

59 20 years after the same result was achieved in Wales; see **para 1.23** above.

60 *Planning Permission* , Richard Harwood OBE QC, First edn, 2016, p viii.

61 See **Chapter 2**.

62 *Form and Accessibility of the Law Applicable in Wales*, Final Report, Law Com No 355, paras 4.26 to 4.45, Recommendations 9, 10.

PLANNING LAW IN OTHER PARTS OF THE BRITISH ISLES

1.78 Finally, we should record that, in formulating our proposals in this Consultation Paper, we have also looked at the legislation regulating development elsewhere in the British Isles.

Scotland

1.79 The Town and Country Planning (Scotland) Acts of 1947, 1972 and 1997 were in very similar terms to the Town and Country Planning Acts of 1947, 1971 and 1990 applying in England and Wales – even though Scotland is a separate jurisdiction from England and Wales. The Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 was very similar to the Listed Buildings Act 1990. And the amendments to those Acts were generally very similar north and south of the border.

1.80 The main change was that the Scottish Act of 1972 was amended by the Local Government (Scotland) Act 1973 to take account of the introduction of a single-tier system of local government – including renaming "local planning authorities" simply as "planning authorities".[63] And the Scottish Act of 1997 was able to incorporate amendments made by the Planning and Compensation Act 1991, which in England and Wales had to wait until after the 1990 consolidation.

1.81 Otherwise, the pattern of planning legislation in Scotland until the turn of the century was broadly similar to the legislation applying in England and Wales.

1.82 But there has been much more change recently, particularly following the creation of the Scottish Parliament and the devolution to it of law-making powers in relation to planning.[64] Historic environment legislation has also been much altered recently.[65] The changes made are, not surprisingly, similar but not identical to some of those that have been enacted in Westminster. We have had regard to these, and where appropriate are proposing similar changes in Wales.[66]

1.83 We have also been aware that there are a few pieces of relevant legislation that apply throughout Great Britain, notably the Forestry Act 1967 and the Ancient Monuments and Archaeological Areas Act 1979. However, we are making no proposals in relation to those.

Northern Ireland

1.84 Northern Ireland has always had a separate system of planning control. This is broadly the same as in Great Britain, save that until recently there was a single planning authority – the Department of the Environment – rather than local planning authorities. The legislation there was consolidated in the Planning (Northern Ireland) Order 1991; unlike the corresponding exercises in England and Wales in 1990 and Scotland in 1997, that consolidation retained a single, substantial piece of legislation, rather than splitting it into four.

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

64 See in particular Planning etc (Scotland) Act 2006.

65 Historic Environment (Amendment) Scotland) Act 2011, and Historic Environment (Scotland) Act 2014.

66 See for example the removal of the exemption relating to the felling of trees in the interest of public safety (see **para 15.66**).

1.85 More recently, the planning system in Northern Ireland has been the subject of a major reorganisation – to bring about a change from a unitary system of planning control to a two-tier system, and at the same time to incorporate some substantive reforms, including some (but not all) of the changes that had recently been introduced in England. The Planning Act (Northern Ireland) 2011 was thus in part a traditional consolidation of the legislation that had previously existed, but it also incorporated a number of changes. On the other hand, it did not incorporate changes of the kind we are proposing – either omitting some of the redundant provisions, or including other minor technical changes or case law.

1.86 The 2011 Act only came into effect in 2015, some four years after it obtained Royal assent, and in the meantime most of the relevant statutory instruments had been rewritten. The new Act, and all of the relevant regulations, can now easily be referred to via one website.[67]

1.87 We have visited Northern Ireland, and met with the team that produced the 2011 Act and the subsequent secondary legislation, to see what lessons can be learnt from the experience of those involved in that consolidation exercise.

Republic of Ireland

1.88 The planning system in the Republic of Ireland is regulated by the Planning and Development Act 2000, which was the result of a major consolidation exercise.

1.89 That system is broadly similar to the system that operates in the United Kingdom; but we have taken into account various features of the legislation that are different, not least:

(1) the provisions relating to An Bord Pleanála, the Irish equivalent of the Planning Inspectorate[68], and

(2) those relating to the treatment of outdoor advertising, which in the Republic is regulated as development requiring planning permission.[69]

1.90 The 2016 report on the operation of An Bord Pleanála noted that planning legislation in the Republic was due for a major overhaul.[70]

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67 http://www.planningni.gov.uk/index/policy_legislation.htm

68 See **paras 5.124 to 5.130**.

69 See **paras 14.50 to 14.56**.

70 *Organisational Review of An Bord Pleanála*, Independent Review Group, March 2016, paras 2.9, 2.10.

Chapter 2: Towards a new planning code

INTRODUCTION

2.1 Our terms of reference were initially to review the law relating to Town and Country Planning in Wales, and make recommendations to simplify and modernise the law.[1] We carried out a critical examination of the way in which the development management process operates, and spoke with a range of key stakeholders.

2.2 We did not find that there was a need for further fundamental policy-driven reform. That exercise had largely been done by the Welsh Government, resulting in the passing of a number of pieces of significant legislation, including the Well-being of Future Generations (Wales) Act 2015, the Planning (Wales) Act 2015 and the Historic Environment (Wales) Act 2016.

2.3 However, widespread concern was expressed as to the complexity and inaccessibility of the law in this area.

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

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

(2) the making of adjustments to make 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.

THE 2016 SCOPING PAPER

2.5 In light of our discussions, 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 on them. This was to enable us to establish that the project would be manageable, and likely to result in a product that has substantial public benefit.

2.6 The Scoping Paper was made available online, and a wide range of key stakeholders – including planning authorities and other public bodies, professional organisations, heritage and other third sector groups, and individual practitioners – were sent a copy or notified of its existence.

2.7 Since the publication of the Scoping Paper, we have continued to consult with officers of the Welsh Government, as well as with a selection of stakeholders, including Planning Officers Society Wales (POSW), the Planning Inspectorate, Cadw, the

[1] *Twelfth Programme of Reform* (2014), Law Com 354.

Planning and Environment Bar Association (PEBA), the Law Society, and Natural Resources Wales – both generally and in response to specific points. And we have given presentations at various conferences and seminars.

Responses to the Scoping Paper

2.8 Over 60 organisations and individuals responded to that Scoping Paper, or met us to discuss its contents. They are listed at **Appendix A** to this Consultation Paper, and include the following:

(1) the Planning Inspectorate;

(2) the three branches of the Planning Officers Society Wales ("POSW"), and eight individual planning authorities;

(3) seven community councils;

(4) a range of public bodies;

(5) all of the relevant professional organisations;

(6) representatives of landowners, including the Country Landowners and Business Association ("CLA");

(7) heritage bodies, and third sector groups;

(8) a selection of prominent individual practitioners.

2.9 A full analysis of the responses is available separately and key points are noted at appropriate points throughout this Paper.[2] In this Chapter we highlight the key points made by respondents in relation to the project as a whole.

PROBLEMS CAUSED BY THE PRESENT SYSTEM

2.10 In the Scoping Paper, we asked stakeholders to provide us with any available figures, estimates or experience of costs caused by over-complicated or otherwise defective planning legislation.[3]

2.11 Sixteen consultees responded to this question. They commented on the following principal monetised and non-monetised costs arising from defective planning legislation: delays to the work and decisions of local planning authorities; the costs associated with needing to seek legal advice; the errors which local planning authorities are making; and the inconsistencies of practice as between local planning authorities.

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2 *Planning in Wales: Scoping Paper Consultation Analysis*, available online at https://www.lawcom.gov.uk/project/planning-law-in-wales .

3 *Planning Law in Wales: Scoping Paper*, Question 1-1.

Delays to local planning authorities' work

2.12 Ten consultees, including six local planning authorities, told us that the over-complicated legislative framework causes delays in that local planning authorities have to spend time in trying to identify the correct legislative framework.

2.13 One council explained how trawling though the legislative framework 'results in a significant waste of time for officers'. And another commented on this delay, noting that 'cross-referencing between documents which have not been consolidated is slow, and gives rise to uncertainty that might require consultation with legal colleagues'. Similar comments were made by other authorities, and by POSW (South West Wales).

The need to seek legal advice

2.14 Five consultees commented on the need to pay for legal advice. Various planning authorities helpfully gave details of the amount of money they had spent on legal advice because of legislative planning issues; one told us that legal advice is not explicitly costed, as it is provided in-house, but it is 'likely to be significant over the financial year'. And examples were provided of where complicated legislation had necessitated paying for legal advice. RWE Generation also noted that overly-complicated or defective planning processes can lead to additional professional costs of legal and technical experts. Natural Resources Wales commented on the financial implications in the following terms:

> From our experience the absence of definitions to clarify certain terms within the current suite of legislation can lead to different interpretations of those terms by different actors within the planning system. This may lead to legal advice being sought to clarify terms. This process, time spent and costs associated with it, can potentially be avoided if ambiguous terms are defined in appropriate legislation.

Local planning authority errors

2.15 Four consultees commented on the errors which are currently being made by local planning authorities as a result of the complicated legal framework. One council said that the differences between the English and Welsh versions of the same legislation can lead to mistakes being made which can lead to judicial review, which is both time-intensive and costly. It provided an example of a decision that had been wrongly made on the basis of the law and guidance applying only in England, leading to a successful court challenge that resulted in the decision having to be made again.[4]

2.16 Newtown and Llanllwchaiarn Town Council thought that any clarification of the law is likely to reduce the number of appealed decisions, with resulting staff cost reductions. Similar comments were made by the CLA and POSW (South West Wales).

Inconsistencies between different local planning authorities

2.17 Three consultees told us that inconsistencies can arise amongst local planning authorities because of, at least in part, the over-complicated planning framework. The

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[4] The Council had relied on TCPA 1990, s 70A (power to decline a subsequent planning application for similar development), but had used the version of s 70A inserted by PCPA 2004, s 43, which had only been brought into force in England. Following counsel's opinion, the matter was settled out of court.

CLA informed us that research that it has conducted suggests that the charging regimes differed amongst local planning authorities.

2.18 RTPI Cymru commented on inaccuracies in the *Encyclopaedia of Planning Law and Practice*, suggesting that local planning authorities have difficulties in keeping up-to-date with the changing position as to planning law and guidance in Wales.[5]

BENEFITS OF CONSOLIDATION AND SIMPLIFICATION

2.19 In the Scoping Paper, we asked stakeholders to provide us with examples of benefits that could be gained from consolidation and simplification of planning legislation.[6]

2.20 Twenty eight consultees responded to this question. Consultees commented on the following principal benefits that could be gained from consolidation and simplification: clarity, a better use of resources and a better understanding and accessibility of the planning system in Wales.

Clarity

2.21 Nine consultees told us that the consolidation and simplification of planning legislation would lead to greater clarity. Neath Port Talbot BC and POSW (South West Wales) thought that a codified and simplified system would make it far more straightforward to train future planning officers. POSW (South East Wales) believed that the process would lead to better decision making because the legislation would be clearer. This would also result in 'less room for dispute about the meaning of legislation'. According to Rhondda Cynon Taf CBC:

> The codification of the law would establish and set out the law solely as it applies to Wales which would be a great benefit. It would provide clarity for those who may not deal in legal issues on a day to day basis but require clarity on the law as it applies to them. It would be of benefit to developers who propose to operate in Wales, especially those that operate on both sides of the border, as we frequently deal with developers who assume the law in Wales is the same as in England which expends officer time in separating and explaining the separate jurisdictional issues.

2.22 National Trust Wales thought that 'the continuation of this process will undoubtedly provide clarity', which in turn would make planning law more accessible and hopefully increase engagement.

Better use of resources

2.23 Thirteen consultees thought that consolidation and simplification of the planning system would lead to a better use of resources including saving time and money. Merthyr Tydfil CBC thought that time and money would be saved in not needing to seek legal advice. Monmouthshire CC also thought that consolidation and simplification of planning legislation would make more efficient use of resources.

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5 And see the comment from Natural Resources Wales at **para 2.14**.

6 *Planning Law in Wales: Scoping Paper*, Question 1-2.

2.24 Newport BC thought that consolidation and simplification would reduce the time spent in checking codes and would reduce the risk of missing important details, such as in relation to enactment or extent of geographical application.

2.25 Torfaen BC noted that simplification of the legislation would mean that resources would be able to be used more productively, in that less time might be spent researching an ever-changing legal position, in England-orientated publications. For example, the *Planning Law Encyclopaedia* (which deals in some sections with Welsh planning law) costs about £1,700 for an initial subscription and £1,300 for annual updates; but much of the contents do not apply in Wales.

Greater understanding and accessibility of the planning system in Wales

2.26 Eleven consultees thought that consolidation and simplification of the planning system would lead to better public understanding and accessibility of the planning system in Wales. Rhondda Cynon Taf BC said that the simplification of planning legislation would make it more-user friendly for both the legal and non-legal professional. Torfaen CBC said that the major benefit of a consolidation and simplification of planning would be a system which benefits everyone; professionals and the public alike. They told us the following:

> From the public perspective the law in relation to planning should be more understandable and easier to access, this will mean that the public will be able to engage better with the system from a "householder" perspective.

2.27 Newtown and Llanllwchaiarn Town Council suggested that a lack of public understanding of the planning process during a public inquiry into the Mid-Wales wind farms had led to local people feeling that their views had been disregarded. Monmouthshire CC thought that consolidation and simplification of planning legislation would be welcome, as it should be more accessible (for practitioners and the public); it should also be more user-friendly, which would hopefully facilitate more consistency in the interpretation of the law to aid decision making and make more efficient use of resources. Cardiff Council thought that consolidation and simplification would potentially lead to a reduction in enquiries [from the public] as it would improve the ability of users to access and interpret the law.

Other benefits of codification

2.28 A number of consultees used this question to comment on the codification and simplification process more generally. For example, the response from the National Grid to this question noted the following:

> Planning in Wales is undergoing a significant change. This process of change will continue for a number of years. This process could be aided by having a clearly articulated strategy which makes the direction of travel, and the intended outcomes of the many changes, clear. This would help those operating and using the system as it evolves. It is also likely to help build investor confidence in the outcome that Wales seeks to achieve.

2.29 The CLA said the following:

> Unnecessary legislation that is no longer needed and that adds to the cost of providing new houses and enterprise in rural areas should be cut

> as part of this consolidation exercise to reduce and consolidate primary planning legislation. The changes must aim to simplify the planning process, but should not change planning policy or environmental protections. The outcomes must deliver sensible changes to regulatory burdens that deliver a smooth/streamlined journey through the planning application process, from pre-application advice, validation, decision-making and conditions, to planning permissions for applicants.

THE CASE FOR A NEW PLANNING CODE

2.30 The discussion above highlights specific benefits that would arise from codification. In the light of those benefits, or simply as a more generalised opinion, we asked stakeholders whether they agreed with our provisional view that there was a strong case for creating a new Planning Code.[7]

2.31 A large majority of those who responded to this question agreed that there is a strong case for a new Planning Code for Wales.[8] For example, the Town and Country Planning Association thought a new Planning Code would help to "clarify differences from planning law in England" and "reduce the likelihood of there being anomalies or incompatibilities between parts of the legislation". Richard Harwood QC also endorsed the view that there is a need to reform planning legislation:

> A problem in both Wales and England has been its increased complexity as a result of bolt-ons which do not materially assist the process. Planning legislation ought to be sufficiently clear that it can be operated by non-lawyers, in particular planners, architects, councillors and interested members of the public, without regular recourse to the legislation. It is not in that condition.

2.32 All of the local planning authorities that responded agreed that there is a strong case for a new Planning Code. Rhondda Cynon Taf CBC saw a clear need to review the existing law, which has become very convoluted, noting that "a Planning Code which sets out clearly and succinctly as possible the law as it applies in Wales will be a benefit to the public and practitioners". POSW (South West Wales) noted that there is a need to secure clarity and consistency going forward; the new Code 'needs to be future proof'. It commented on the future-proofing of the Planning Code in the following terms:

> If this consolidation exercise is to be successful going forward, legislation needs to be designed so that any updates and future amendments replace the original legislation. For example Planning Policy Wales is a living document which is available as an electronic document on the Welsh Government website. Every time it is updated it is given a different version number.

2.33 Torfaen CBC, whilst acknowledging that moving towards a more streamlined framework would 'reduce complexity and increase accessibility and transparency',

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7 *Planning Law in Wales: Scoping Paper*, Question 3-1.

8 48 consultees responded to this question: 45 agreed that there is a strong case for a new Planning Code, 2 disagreed and 1 held an equivocal position.

warned that what is proposed in the Scoping Paper is 'a large project which may need considerable resources'.

2.34 All professional bodies or groups that wrote to us agreed that there was a strong case for a Planning Code. The Bar Council agreed with the simplification of the planning system, noting that 'it ought to be made more accessible, whether this is through the creation of a new Planning Code as envisaged in the Scoping Paper, or by other means'. It did however give a word of warning in the following terms:

> The process required to achieve this Planning Code nevertheless may well 'suffer' from the necessary complexity of 'unpicking' existing legislation and reflecting the latest reforms.

2.35 One consultee held an equivocal position. According to the CLA:

> It is difficult to make comment on the merit of the creation of a planning code. Whilst on the surface it would appear to be a good idea, it is only in knowledge of the intended outcomes and whether they will deliver a streamlined process that full comment can be made.

2.36 Two consultees did not see a strong case for a new Planning Code. The Residential Landlords Association told us that they "agree that codification of the law has the potential to provide benefits of clarity and accuracy of the law", provided that "adequate protections" are put in place. Instead, the Association would rather introduce a better system of interacting between common law and statutory law, and clarification of which law applies to the different regions in the UK. The most reasonable route to achieving these objectives would be to organise existing databases to cope better with common and statute law, rather than introducing a system of codification.

> We are dubious about the whole "tear it up and start again" approach which is implicit in the Scoping Paper. Perhaps more significantly, we are very concerned about the substance of current planning law with the restrictions which it places on development, particularly the need for new homes to house people in Wales.

2.37 One community council merely stated that it was opposed to the reforms outlined in the Scoping Paper as it feared that they could be prejudicial to local democracy and decision making – although it offered no more detailed reasons in support of that view.

2.38 In agreement with the overwhelming majority of consultees, we are convinced of the benefits of codifying, simplifying and modernising the legislation relating to Planning in Wales.

THIS CONSULTATION EXERCISE

2.39 The preceding sections of this Chapter have highlighted a general awareness amongst respondents to the Scoping Paper of the costs arising from over-complicated or otherwise defective planning legislation, and the benefits that would

flow from an exercise of consolidation and simplification.[9] We also received overwhelming support from respondents for the principle of such an exercise.[10] We have accordingly not sought to revisit those broader questions in this Consultation Paper.

2.40 We also expressed in the Scoping Paper our preliminary view as to the possible scope of such a codification exercise. At that stage, we envisaged that the resulting Code would contain all the primary legislation on planning and related matters applying in Wales – in line with the approach we had outlined in our Report on *The Form and Accessibility of the Law in Wales*.[11] And we noted that a Code might be enacted in several phases. We therefore invited stakeholders to express a view as to the scope of an initial piece of codified planning law, focussing on planning policy and development management, and on the subject matter of later phases and a suggested wider scheme of codification.[12]

2.41 Since the publication of that Scoping Paper, the Welsh Government has broadly accepted the recommendations of our *Form and Accessibility* report, but has decided that codification will involve the drawing together of Assembly Acts, secondary legislation and related Government guidance on a particular topic. We therefore now envisage the present exercise as geared towards the production of a Planning Bill, to form the principal element in the new Planning Code. We have also been in extensive discussions with the Welsh Government as to the scope of such a Bill.

2.42 As a result of the views expressed in response to the Scoping Paper, and in the light of those discussions, Chapter 3 of this Consultation Paper sets out our conclusions as to the extent of the present exercise.

2.43 Finally, we sought views as to possible technical reforms – both generally[13] and in relation to three specific issues: the balance between primary and secondary legislation, the unifying of overlapping consent regimes and the codifying of case law.[14] In Chapter 4, we set out our conclusions as to the general principles of making technical reforms to the legislation. And in the second part of the Consultation Paper, we outline a number of provisional proposals and consultation questions relating to specific reforms, grouped by subject matter.

2.44 It is the description of those detailed technical reforms that forms the bulk of the Consultation Paper, and it is in relation to those reforms that we seek the views of stakeholders.

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9 *Scoping Paper*, consultation questions 1-1, 1-2; see paras 2.10 to 2.29 above.

10 *Scoping Paper*, consultation question 3-1; see paras 2.30 to 2.38 above.

11 *Form and Accessibility of the Law Applicable in Wales* (Law Com No 366).

12 *Scoping Paper*, consultation question 4-1, 4-2.

13 *Scoping Paper*, consultation questions 5-1, 5-2.

14 *Scoping Paper*, consultation questions 3-2, 6-1 to 6-4, and 7-1, 7-2.

Chapter 3: Scope of the codification exercise

INTRODUCTION

3.1 In the Scoping Paper, we explained that some thought had been given as to the phasing of a more extensive codification exercise. We expressed a provisional view that a workable scheme of codification could proceed in five phases, covering:

(1) development planning and development management;

(2) the historic environment;

(3) the rural environment;

(4) regeneration and development; and

(5) hazardous substances.[1]

3.2 We sought the views of consultees as to whether this was the best way forward, both as to the first phase and as to the subsequent programme.

3.3 A number of consultees expressed views on particular aspects of the exercise (for example, the historic environment, or the rural environment), but there was generally little comment on the overall scope of the exercise. RTPI Cymru thought that five phases would be too many in terms of completing the project within a reasonable timescale. Instead, it suggested three phases of work would be better, either by combining phases two and three, and phases four and five or by leaving phase two as is proposed and then combining phases three, four and five.

3.4 We have considered the question of scope in light of the responses we received, and in light of our further work on the project generally. We have also taken into account the altered powers available to the Assembly in light of the amendments to the Government of Wales Act 2006 made by the Wales Act 2017, and the pilot programme of consolidation announced by the Counsel General for Wales in December 2016.

3.5 As will become clear, we now recommend a slightly different approach from what we suggested in the Scoping Paper. In particular, we recommend that more material should be brought into the Planning Bill from the outset, but we are less prescriptive about what later stages of the codification process might contain.

3.6 Our proposal to focus on development planning and development management received strong support from stakeholders; and we are still of the view that that should be at the heart of the present exercise. We also see advantages in codifying the provisions of the Town and Country Planning Act ("TCPA") 1990 that deal with regeneration, and at the same time discarding a number for redundant provisions, as

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1 *Planning Law in Wales: Scoping Paper*, para 4.8.

part of the present exercise. We therefore now consider that it would be preferable for the present codification exercise to encompass the law on development planning, development management (including works to historic buildings, the display of advertisements, and works to protected trees), and regeneration – that is, Phases (1) and (4) of the five provisionally identified in the Scoping Paper.

3.7 The general legislation on the historic environment (Phase (2)) is the subject of a codification exercise being carried out in parallel with the production of the Planning Code, as a separate part of the Welsh Government's pilot programme.[2] We suggest that the law on the rural environment and hazardous substances (Phases (3) and (5)) be considered for codification in due course.

3.8 In the remainder of this Chapter we discuss each of the five topics listed in paragraph 3.3 above. We then refer briefly to some other topics that we have considered for inclusion but rejected. Finally we set out the possible shape of a Bill giving effect to our provisional proposals.

GENERAL APPROACH

3.9 Before proceeding further, it may be helpful to reiterate some general principles that have informed our approach.

3.10 First, it is desirable that, as far as possible, all legislation that affects any particular area of activity should be within a single statute. It is not a problem that, for example, the legislation relating to planning is separate from the Building Act 1984 and the Building Regulations, as the latter are conceptually quite distinct, and relate to a different phase of the development process. But it is unsatisfactory that the law governing the formulation of development plans in Wales is currently contained in the Planning and Compulsory Purchase Act ("PCPA") 2004 whereas the legislation relating to the application of that policy is in the TCPA 1990 – in both cases, as amended by the Planning (Wales) Act ("P(W)A") 2015.

3.11 Secondly, the more that is incorporated in a codification exercise, or any phase of a larger codification, the more satisfactory will be the overall clarity – in principle – of the resulting code. Equally obviously, the larger the scope of any such exercise, the more complex it will be, and the greater the demands it will place on the resources of all involved – including policy officials, lawyers, drafters, and legislators. From the point of view of the users of the Code, too many apparently unrelated pieces of legislation are unsatisfactory; but one enormous consolidated Act may also be unwieldy and hard to use. Such considerations mean that a balance has to be struck as to how much should be included.

3.12 Thirdly, it is clear that the codification of planning and development management on its own would require significant amendment to be made to other related legislation – for example, the provisions relating to the historic environment, trees, and

[2] See **paras 3.87 to 3.100**.

regeneration. If all or at least some of that other legislation is included in the Code at the outset, that would avoid the need for possibly complex amending provisions.

3.13 Thus for example the Tax Law Rewrite project introduced a completely new tax code; but because of the sheer scale of that exercise, the new code was introduced in a number of tranches, resulting in complex amendments in the transitional phases.[3] Learning from the experience of that exercise, we consider that it would be better if as much as possible of the relevant legislation were to be included in the exercise at the outset, with the number of subsequent phases minimised. But "as much as possible" means precisely that – the scope of any exercise of this kind has to be considered in light of the drafting and other professional resources available to produce the Code.

3.14 Fourthly, the introduction of new legislation on any scale will also require a significant administrative exercise on the part of those operating the planning system on a day-to-day basis – including the production of explanatory material for users of the legislation, and the undertaking of appropriate training – which would have to be repeated to some extent at each further phase of a multi-phase codification exercise. That too suggests that the more that can be achieved in each phase, the simpler it will be overall for the users of the system. Again, however, that principle should not be taken too far, as trying to absorb too many changes at once would become difficult for users.

3.15 Finally, it is important to remember that much of the relevant law in this field is to be found in secondary legislation – currently regulations, rules and orders. There are almost 100 directly relevant pieces of secondary legislation[4], alongside other pieces that are indirectly relevant. It would be helpful – and consonant with the Welsh Government's concept of a Code – for as many as possible of these to be updated, consolidated and rationalised alongside the reshaping of the primary legislation; but that too is obviously a major, resource-intensive operation.

3.16 It is noteworthy that the relatively recent consolidation of planning law in Northern Ireland involved the appearance of a new Planning Act, which gained Royal assent in 2011 and came into effect in 2015, accompanied by a complete suite of new secondary legislation.

3.17 For all these reasons, it seems sensible, at this stage, to embark on a reasonably ambitious programme of codification – whilst having regard to the resources available to the Welsh Government to achieve it.

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[3] This was a major consolidation exercise, carried out by a large team drawn from both the HMRC and the Office of Parliamentary Counsel, resulting in the replacement of a large number tax statutes with seven major Acts, from the Capital Allowances Act 2001 to the Taxation (International and Other Provisions Act) 2010. For an independent assessment, see *Review of Rewritten Income Tax Legislation*, Ipsos MORI (on behalf of HMRC) Research Report 104, 2011.

[4] See the *Encyclopedia of Planning Law*, Vol 8.

DEVELOPMENT PLANNING AND DEVELOPMENT MANAGEMENT

Responses to the Scoping Paper

3.18 In our Scoping Paper, we proposed that the focus of the first phase of codification should be on development planning and development management – in particular,

(1) core planning provisions;

(2) ancillary planning provisions; and

(3) other consent regimes.[5]

3.19 We invited the views of consultees to the Scoping Paper as to the proposed scope of an initial piece of planning law, focussing on planning and development management.[6]

3.20 The majority of those who responded supported the proposed scope.[7] For example, Richard Harwood QC agreed with the broad scope of the project identified in the paper, noting that "development management is the key part of the regime, and there is plenty to be done".

3.21 According to the Town and Country Planning Association, the initial focus of the code should be on preparing a planning code for plan-making and development management. Similarly, Monmouthshire CC noted that concentrating on the areas of everyday use would be a more manageable exercise than attempting to tackle the whole gamut of planning legislation. The Bar Council noted that:

> We agree with the Law Commission that this would represent quite an exceptional and extensive piece of work, with all the accompanying costs and in terms of both time and resource. In light of this, we have considered whether it is workable to further divide up the proposed initial phase. We have concluded that, on balance, the Law Commission is correct in its identification of the issues to be included in the first phase and this should address development management.

3.22 Torfaen CBC told us that "the initial scope for the codification of planning law should be manageable". It noted that the topic of development planning and development management is 'a significant and sizeable area of law'. It suggested that the topic should be further broken down into discrete, stand-alone areas. They suggested the following further categorisations:

(1) appeals

(2) enforcement

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5 *Planning Law in Wales: Scoping Paper*, Chapter 4.

6 *Planning Law in Wales: Scoping Paper*, question 4-1.

7 36 consultees expressed a view on the scope of the planning code: 24 agreed, 5 disagreed and 7 held equivocal positions.

(3) planning permissions

3.23 RTPI Cymru thought that five phases would be too many in terms of completing the project within a reasonable timescale. Instead, it suggested three phases of work would be better, either by combining phases two and three, and phases four and five or by leaving phase two as is proposed and then combining phases three, four and five.

3.24 We now consider in turn each of the three broad areas referred to in Paragraph 3.18 above.

CORE PLANNING PROVISIONS

3.25 In the first category of topics to be included in the new Code – described as "core planning provisions" – the Scoping Paper identified a number of topics, including the following:

(1) the purpose of the planning system;

(2) how the planning system is administered;

(3) the plan-making process;

(4) the nature of development;

(5) the process of seeking planning permission;

(6) remedies; and

(7) enforcement.[8]

The purpose of the planning system, and how it is administered

3.26 The current legislation does not make any explicit statement as to the purpose of the planning system; and the general duties that are laid upon all public authorities – including those determining planning applications – are widely scattered. Provisions have been introduced in what now seems to be a somewhat random manner over the last 70 years, and we consider in **Chapter 5** of this Consultation Paper the extent to which they should be brought together into a coherent statement as to what is the basis of the system, at the start of the new Code.

3.27 The law governing the administration of the planning system is partly to be found in Part 1 of the TCPA 1990, although this has been significantly amended and is now very unclear in its application to Wales. It is also the subject of various pieces of secondary legislation. This too is considered in **Chapter 5**.

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8 *Planning Law in Wales: Scoping Paper*, paras 4.20 – 4.52.

Plan-making

3.28 The plan-making process was originally in Part 2 of the TCPA 1990; that was repealed by the PCPA 2004. The new arrangements, now governed by Part 6 of the 2004 Act (not, it will be noted, the 1990 Act), were then substantially amended by P(W)A 2015. These provisions are too new for their effectiveness to be realistically reviewed, but they do need to be brought together into the main Planning Bill. This is considered in **Chapter 6**, along with the associated topic of planning blight.

The nature of development

3.29 The nature of development – that is, building, engineering, mining and other operations, and the making of a material change in the use of land – lies at the heart of the planning system. Much development is relatively trivial, and is permitted by a development order; more substantial projects need to be the subject of a planning application.

3.30 The law on this subject is currently not particularly clearly presented; and we explain in in **Chapter 7** (the need for a planning application) our proposals to present it in a way that is more readily intelligible to users.

The process of seeking planning permission (including remedies)

3.31 The process of managing development (formerly referred to as "development control") is the subject of Part 3 of the TCPA 1990. But it has been significantly amended by numerous subsequent Acts, some applying just in England, some just in Wales, and some in both, and elaborated by complex secondary legislation. It has been further complicated by the introduction, in the P(W)A 2015, of a new consent procedure for developments of national significance; and that may itself be revisited in light of the changes made by the Wales Act 2017.[9]

3.32 We thus conclude that the statutory provisions relating to development management should form the heart of the new Planning Bill.

3.33 We explain our proposals to present the law in a way that is readily intelligible to users – principally in **Chapter 8** (applications to planning authorities); and **Chapter 9** (applications to the Welsh Ministers). The TCPA 1990 also includes a number of other provisions, necessary to the smooth running of the planning system as a whole – in particular, those relating to appeals. These are all dealt with in **Chapter 11.**

3.34 That Chapter also deals with a number of other provisions that are supplementary to the main provisions for development management. It thus touches on the provisions relating to:

(1) the modification and revocation of planning permission, and the consequential right to compensation;

(2) the discontinuance of existing uses (with associated compensation);

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9 See **Chapter 9**.

(3) the service of purchase notices; (where land is rendered useless as a result of a planning decision); and

(4) the treatment of highways affected by the planning process.

3.35 These provisions are rarely encountered in practice, but they do need to be stated in such a way that they do not hinder access to and comprehension of the more commonly used provisions governing the development management process.

Unauthorised development

3.36 The final topic identified in the Scoping Paper as a "core provision" was enforcement.[10]

3.37 It would also be helpful to include the provisions relating to applying for and granting planning permission for development that has already been carried out.[11] No-one challenged the view, expressed in the Scoping Paper, that the Code should include the provisions relating to unauthorised development.

3.38 We set out our proposals in relation to unauthorised development and enforcement in **Chapter 12**.

PROVISIONS ANCILLARY TO THE DEVELOPMENT MANAGEMENT SYSTEM

Topics identified in the Scoping Paper

3.39 The second category of topics to be included was described in the Scoping Paper as "ancillary planning provisions". Under this heading, we noted that there are a number of other, ancillary provisions that are necessary to the efficient operation of the core provisions. Some of these, directly linked to the development management system, have been mentioned above.[12]

3.40 There are in addition a range of other provisions in the TCPA 1990 and linked legislation, that relate to the planning system as a whole. They include the following:

(1) the provisions, currently in Parts 11 and 13 of the TCPA 1990, adjusting the process to incorporate the special requirements of statutory undertakers and Crown land ;

(2) the application of the planning system to the special requirements of mining development;

(3) the provisions, principally in Part 12 of the TCPA 1990, governing the making of challenges in the courts to the validity of various planning decisions; and

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10 *Planning Law in Wales: Scoping Paper*, paras 4.47 – 4.52.

11 TCPA 1990, s 73A.

12 Planning blight (see **para 3.28**); modification and revocation, discontinuance, purchase notices, and highways (**para 3.34**).

(4) the general provisions in the remainder of the TCPA – notably Part 14 (financial provisions) and Part 15 (miscellaneous and supplementary provisions, including interpretation).

3.41 It is perhaps no surprise that few of those responding to the Scoping Paper referred to these ancillary provisions. Persimmon Homes West Wales agreed that they should be included in the Code. The inclusion within the Code of the special provisions relating to statutory undertakers was supported by RWE Generation, Innogy Renewables, and Dŵr Cymru (Welsh Water). But the Residential Landlords Association suggested that there was enough substance in the core provisions, without also including the rather specialised topics listed above (other than, perhaps, validity).

3.42 These provisions generally relate to matters that are rarely encountered in practice, but are essential to the operation of the whole planning system, and thus cannot simply be abolished. Nor can they sensibly be located anywhere other than in the same piece of legislation as those core provisions. However, the way in which they are presented within the Bill can have significant effect on its overall legibility, and so needs to be given careful thought. A number are now otiose or redundant, and need not be restated in the new Code.

3.43 These general provisions are considered in the final **Chapters 17 and 18.**

The provision of infrastructure

3.44 One topic not mentioned by the Scoping Paper was infrastructure funding, because at that time the Community Infrastructure Levy (CIL) was not devolved to the Welsh Assembly.[13] However, it soon will be (once the changes made in the Wales Act 2017 have been implemented), and we accordingly consider here whether the relevant legislation should be included in the Planning Code, as it is in practice one of the more significant of the provisions ancillary to the development management system.

3.45 The bulk of the legislation relating to CIL is contained in secondary legislation, which can be updated and rewritten for Wales – along with supporting policy and guidance – as time allows. But it would be unfortunate if this opportunity were to be lost to include the relevant primary legislation within the main Planning Bill, to ensure that the two funding mechanisms (site-specific planning obligations and CIL) are seen as parts of an integrated package. In addition, planning obligations may deal with matters other than funding.

3.46 We therefore propose that both funding mechanisms, considered together, should be amongst the topics included in the codification, as part of the consideration of mainstream development management. We discuss this further in **Chapter 10**.

[13] See **para 1.44**.

OTHER CONSENT REGIMES

3.47 Under the third heading referred to above[14], "other consent regimes", the Scoping Paper considered the controls relating to works affecting listed buildings, conservation areas, advertisements and trees.

Works to listed buildings and in conservation areas

3.48 Most works to listed buildings and demolition in conservation areas require planning permission; but in addition they need special consent, also obtained from the planning authority (or, on appeal, from the Welsh Ministers) – under the Listed Buildings Act 1990. The two applications are dealt with together, and decided in parallel. The Scoping Paper explored the desirability of incorporating some or all of those special regimes into mainstream planning control.[15]

3.49 In light of the many comments that we received in response, we consider this issue further in **Chapter 13**. We therefore propose that – subject to a number of relatively minor technical amendments being made to the legislation to ensure that there is no loss of protection – it would be both possible and desirable to merge listed building consent and conservation area consent with planning permission.

Works to scheduled monuments

3.50 Works to scheduled monuments, on the other hand, are somewhat different. Such works almost always require "scheduled monument consent", under the Ancient Monuments and Archaeological Areas Act ("Ancient Monuments Act") 1979.

3.51 As we explain in **Chapter 13**, we do not recommend that scheduled monument consent is unified with planning permission.[16]

Outdoor advertising

3.52 Outdoor advertising generally requires separate consent, which is almost entirely the subject of separate Advertisements Regulations. That system seems to works broadly satisfactorily, and we see no reason to propose any major change.[17] In particular, we do not consider that it would be appropriate for consent for advertising, under the Regulations, to be subsumed into mainstream planning permission.

3.53 However, it would be helpful if the primary legislation governing the control of advertising were to be included within the main Planning Code. In particular, it is important to emphasise the policy basis of such control, and to ensure that the regime fits in with other planning controls (for example, in relation to statutory undertakers). It follows that primary legislation – which is in any event relatively limited in extent – should be contained within the Code.

3.54 No respondents to the Scoping Paper disagreed with the inclusion of advertising consent within the Code; although POSW (South West Wales) considered that

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14 See **para 3.18**.

15 *Planning Law in Wales: Scoping Paper*, paras 4.65 – 4.71.

16 See **paras 13.181 to 13.185**.

17 Although see **para 14.75 to 14.84** on the provisions for the removal of unauthorised billboards.

advertising should be explicitly included within the definition of development, so that control of advertising would then come within mainstream planning control. We consider this further in **Chapter 14**.[18]

Works to trees and hedgerows

3.55 Works to trees are the subject of **Chapter 15**. They may need to be the subject of consent under a tree preservation order (obtained from the planning authority or the Welsh Ministers on appeal) or may need to be notified to the authority if within a conservation area, or may require a felling licence from National Resources Wales. The legislation relating to the controls of such works is scattered in various places.

3.56 In the Scoping Paper, we suggested that controls relating to trees, in the form of TPOs, would be better codified elsewhere within the wider programme of work, but not within the core areas.[19] The Town and Country Planning Association, Planning Aid Wales, Persimmon Homes West Wales and the Bar Council agreed that controls relating to trees should not be included in the first part of the Code.

3.57 The Woodland Trust disagreed, and pointed to the strong links between the TPO system and the control of development – a point also made by Newport BC. RTPI Cymru also had reservations about removing controls relating to trees from the scope of the first stage of the project, noting that the contribution of trees to the landscape and biodiversity and green infrastructure generally are an ”increasingly important aspect within the development management process and should not be overlooked”.

3.58 We do not consider that it would be appropriate for consent for works to trees to be subsumed into mainstream planning permission.[20] However, it would be helpful if the legislation was to be brought together into a coherent, simplified system of control, and if the legislation governing that system were to be included within the Planning Bill.

3.59 As for the felling licence provisions currently in the Forestry Act 1967, their inclusion would indeed be desirable. However, they fall largely within the ambit of the Natural Resources Management Team, a section of the Welsh Government distinct from the Planning Division. The relevant provisions are also currently the subject of a consultation exercise relating to wildlife and countryside more generally, which is likely to result in new legislation. We have therefore concluded that the inclusion of those provisions would not be appropriate, at least at this stage; but the Bill should be drafted in such a way as to enable equivalent provisions to be included in the future.

3.60 The Country Land and Business Association (“CLA”) noted that, if the present codification exercise were to extend to include the regulation of works to trees, then it would be worth considering including the Hedgerow Regulations 1997. We agree that that would be desirable. However, we note that the relevant primary legislation is very limited in extent, and that the Regulations (almost untouched since they were

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18 See **paras14.50 to 14.56**.

19 *Planning Law in Wales: Scoping Paper*, para 4.75.

20 See **paras 15.53 to 15.58**.

first made) will in due course be ripe for revisiting, to see if they are still fit for purpose. We consider that that exercise would best be carried out as part of the review of countryside legislation generally, referred to later in this Chapter.[21]

Other consent regimes: conclusion

3.61 We have accordingly concluded that the Planning Code should include the primary legislation regulating the management of:

(1) works to listed buildings and in conservation areas;

(2) outdoor advertising; and

(3) works to protected trees.

3.62 But we do not consider that the legislation relating to the management of works to scheduled monuments should be included. Instead, that should be restated, along with the other primary legislation relating to the historic environment generally, in a separate Historic Environment Code. We discuss this in more detail later in this Chapter.

IMPROVEMENT, REGENERATION AND RENEWAL

Positive planning

3.63 The statutory provisions considered so far relate to:

(1) the overall structure of the Planning Code,

(2) the preparation of planning policy,

(3) the obtaining of consent (in one form or another) by those who wish to carry out development on their land, and

(4) the financial and other consequences of development being carried out.

3.64 In addition, 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.

3.65 In short, many of the powers thus created have been introduced over the last seventy years as a result of various policy-driven initiatives by governments of various political complexions 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.

3.66 This is clearly an integral part of the planning system – indeed, the reason why it is known as "the planning system", rather than the "development control system", is

[21] See **para 3.101 to 3.105**.

because it was based on the notion of positive action by "planners", rather than simply reacting to proposals by landowners and developers.

3.67 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.

3.68 It will be noted that there are no duties, but only discretionary powers, to take action. This is partly because the possibility of such action is constrained by the limited ability of public authorities to acquire private land required to implement the desired initiatives. In practice, of course, it is also severely dependent upon the availability of the finance necessary either to enable such acquisition or to fund the carrying out of works or other activity.

3.69 There are also potential problems in relation to the compatibility of the exercise of such powers with the rights of property owners concerned, particularly in light of the Human Rights Act 1998.

Statutory powers

3.70 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. They form no remotely logical statutory scheme. 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.

3.71 Under the first of the three headings above, local authorities have powers to make financial advances to promote development;[22] to require owners to maintain their land and buildings[23]; to require them to remove or obliterate graffiti[24]; and to remove high hedges[25]. If owners do not comply with such requirements, the authority may enter the land and carry out the necessary action itself. The Welsh Ministers too, may give financial assistance; give advice, and take other action to promote development.[26]

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22 Local Authorities (Land) Act 1963, ss 3, 4.

23 TCPA 1990, Part 8, Ch 2.

24 TCPA 1990, ss 225F to 225K.

25 Anti-social behaviour Act 2003, Part 8.

26 TCPA 1990, ss 304, 304A; Welsh Development Agency Act 1975; Derelict Land Act 1982, s 2.

3.72 Under the second heading, planning authorities have a general power to carry out development on private land[27]; 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.[28] The Welsh Ministers may carry out reclamation and improvement works.[29]

3.73 Under the third heading, planning authorities may acquire land for planning purposes[30]; and Welsh Ministers have similar powers.[31]

Obsolete provisions

3.74 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.

3.75 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).[32]

Proposal in the Scoping Paper

3.76 In the Scoping Paper we provisionally proposed that the law relating to regeneration and development should be codified as the fourth of the five stages of codification.[33] We also suggested the removal of some of the obsolete legislation.

3.77 Persimmon Homes West Wales agreed that a subsequent phase of codification should include regeneration and development. And the Planning and Environment Bar Association (PEBA) agreed that there was a case for the inclusion of powers enabling authorities to bring forward or facilitate schemes of development or improvement in their area.[34]

3.78 The Woodland Trust observed that 'urban woods and trees' did not seem to fit obviously into any phase of codification; but street trees are of particular concern as they make an important contribution to the urban streetscape. The Trust also noted that the wider urban environment seems to have been excluded from consideration

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27 Local Authorities (Land) Act 1963, s 2.

28 National Parks and Access to the Countryside Act 1949, s 89; Local Authorities (Land) Act 1962, s 5; Derelict Land Act 1982, s 3.

29 Welsh Development Agency Act 1975, s 16; Derelict Land Act 1982, a 2.

30 TCPA 1990, Pt 9.

31 TCPA 1990, s 228; Welsh Development Agency Act 1975, ss 16, 21A.

32 TCPA 1990, ss 7, 8; New Towns Act 1981 s 7.

33 See **para 3.1** above.

34 See **paras 3.119 to 3.120**.

as it falls between the historic environment and the rural environment; an explicit reference should be made to greening of the built environment under the heading of Regeneration and Development.

Conclusion

3.79 We suspect that there is very limited awareness of the powers already available to public authorities to achieve improvement, regeneration and renewal. We conclude that, alongside the codification and simplification of the widely dispersed law relating to the formulation of the development plan and the management of development, it would be desirable 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.

3.80 However, once again we are well aware of the limitations of resources; and we therefore consider that the emphasis at this stage should be on the inclusion of the powers and duties currently in the TCPA 1990, with provisions from other Acts included only insofar as they are necessary to make sense of those powers and duties. This will enable the TCPA 1990 to be almost completely discarded insofar as it relates to Wales. It would also be worth seeking to abolish as far as reasonably possible the redundant provisions noted above as far as they apply in Wales.

3.81 However, we consider that it would not be appropriate to include in the Bill, at least at this stage, the powers of compulsory acquisition currently in the TCPA 1990.

3.82 Our proposals in this regard are in **Chapter 16.**

PLANNING BILL: CONCLUSION

3.83 As a result of the considerations set out above, we accordingly conclude 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; and

(3) outdoor advertising, and works to protected trees;

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

(5) supplementary and miscellaneous provisions.

3.84 We set out in **Table 3-1** a preliminary indication of a possible shape for a new Planning (Wales) Bill, to form the centrepiece of the new Code. The chapters of Part Two of this Consultation Paper broadly follow this outline.

Table 3-1:
Indicative contents of a possible Planning (Wales) Bill

Introductory provisions

Elements forming part of the Planning Code

Principles underlying the Planning Code

Administration of the planning system

Formulation of planning policy

National development framework

Strategic planning

Local development planning

Planning blight

Applying for planning permission

The need for planning permission

Operational development

Changes of use

Ways in which planning permission may be granted

Permission granted by development order

Other forms of planning permission

Applications for certificate of lawful development

Planning applications to the planning authority

Application procedure

Determining planning applications

Conditions

Approval of details

Variation of planning permission

Deemed planning permission

Environmental impact assessment

Call-in of applications by the Welsh Ministers

Applications to the Welsh Ministers

Applications in the area of underperforming authorities

Developments of national significance

Provision of infrastructure and other improvements

Community infrastructure levy (CIL)

Planning obligations

Appeals

Appeals to the Welsh Ministers

Unauthorised development

Enforcement warning notices

Temporary stop notices

Breach of condition notices

Enforcement notices

Stop notices

Outdoor advertising

Definition of advertisements

Consent for advertising

Unauthorised advertising

Works to trees and hedgerows

Tree preservation orders

Works to protected trees

Unauthorised works to trees

Trees in conservation areas

Improvement, regeneration and renewal

Improvement of unsightly land and buildings

Graffiti and fly-posting

Miscellaneous and supplementary provisions

Statutory undertakers

Other special cases

Minerals

Interpretation

3.85 This should be set alongside **Table 1-1**, which summarises the present, unsatisfactory state of the law.

3.86 We emphasise that this is only an indicative idea of what might be possible, and is not intended to restrict in any way the eventual form and content of the new Planning Bill; clearly the detailed drafting process is likely to throw up suggestions for an alternative structure. But it does indicate our view as to the overall scope of the exercise.

THE HISTORIC ENVIRONMENT

The law relating to the historic environment generally

3.87 We have already recommended that the provisions governing the control of works to listed buildings and in conservation areas be included within the Planning Code.[35] As noted in the Scoping Paper, this results in a number of provisions being "left behind".[36]

3.88 Some of these provisions are in the Listed Buildings Act 1990, as amended by the Planning and Compensation Act 1991 and the Historic Environment (Wales) Act 2016. They deal with the listing of buildings of special interest, the designation of conservation areas, heritage partnership agreements, the prevention of deterioration and damage, and grants and loans. The legislation relating to these matters, from its first appearance in the 1940s right up until 1990, was always embedded within the main planning Act – both in England and Wales and in Scotland.

3.89 The general legislation relating to listed buildings and conservation areas has always been in the main Planning Order in Northern Ireland, and still is in the main planning Act. It has also always been in the main Planning Act in the Republic of Ireland.

3.90 There are similar provisions relating to the protection of ancient monuments – again, including those relating to heritage partnership agreements, the prevention of deterioration and damage, and grants and loans – as well as scheduled monument consent. These are generally in the Ancient Monuments and Archaeological Areas Act 1979, as amended by the 2016 Act.

3.91 There are also related provisions in other legislation, notably the Historic Buildings and Ancient Monuments Act 1953 and the Civic Amenities Act 1967

3.92 When the Historic Environment (Wales) Bill was going through the Assembly, a number of those giving evidence expressed the view that that Bill was a missed opportunity to bring about a general consolidation of the legislation relating to the historic environment – monuments, buildings and areas.

3.93 In response to our Scoping Paper, Planning Aid Wales agreed that legislation on the historic environment would fit into the wider scheme of consolidation of mainstream planning legislation, but suggested that it should be pursued as a subsequent phase.

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35 See **paras 3.48, 3.49**, and **Chapter 13**.

36 *Planning Law in Wales: Scoping Paper*, para 4.66.

Persimmon Homes West Wales agreed that the historic environment should be the subject of a later phase of codification. The CLA agreed in principle that it would be beneficial to consolidate historic environment law.

3.94 RTPI Cymru, on the other hand, commented that there may be considerable debate about 'unpicking listed building and conservation area provisions' between this first phase and the proposed second phase dealing with the historic environment.

3.95 It is noticeable that, of all the duties laid upon planning authorities by various pieces of legislation, noted earlier and in more detail in **Chapter 5** of this Consultation Paper, the only ones that are actually referred to in the TCPA 1990 itself are those (currently to be found in various sections of the Listed Buildings Act 1990) relating to listed buildings and conservation areas. And in practice the substantial quantity of litigation relating to the historic environment in recent years has arisen almost entirely in connection with its interaction with mainstream planning control.[37] Such considerations suggest that at the very least those duties should continue to be referred to in the new Planning Code, alongside the various other duties applying to the exercise of planning powers and duties.[38]

3.96 More fundamentally, however, we have already noted that the degree of overlap between the provisions relating to planning permission, listed building consent and conservation area consent mean that they should be brought together.[39] That would result in around three-quarters of the Listed Buildings Act 1990 being superseded insofar as it applies in Wales.

3.97 The remainder of the Listed Buildings Act 1990 – that is, the provisions in it other than those governing the control of works to listed buildings and demolition in conservation areas – along with the remaining provisions in the Historic Buildings and Ancient Monuments Act 1953 and the Civic Amenities Act 1967 – could form the subject of a separate consolidation exercise.

3.98 In December 2016 the Counsel General for Wales announced that the Welsh Government would undertake a pilot programme of consolidation, codification and better publication of law. In May 2017, in evidence to the Constitutional and Legislative Affairs Committee of the Welsh Assembly, he indicated that the historic environment legislation had been selected for codification on account, amongst other reasons, of its relationship with planning law.[40]

3.99 The changes introduced in the Historic Environment (Wales) Act 2016 – amending both the Ancient Monuments Act 1979 and the Listed Buildings Act 1990 – were deliberately designed to bring together the various types of historic assets, and it

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37 *East Northamptonshire DC v Secretary of State* [2014] EWCA Civ 137, and related litigation; see **para 13.50**.

38 See **paras 5.41 to 5.56**.

39 See **Chapter 13, Consultation question 13-1**.

40 See the paper presented by the Counsel General to the Welsh Assembly Constitutional and Legislative Affairs Committee to the Welsh Assembly Constitutional and Legislative Affairs Committee, and the minutes of 8 May 2017, paras. 233, 272, 273.

would be unfortunate if that were to be undone by the two legislative codes being separated. If therefore the legislation regarding listed buildings and conservation areas is to be consolidated, we would recommend that the corresponding provisions relating to ancient monuments be included as well.

3.100 It seems likely that the result of this exercise could therefore be a new Historic Environment Code, emerging at (or around) the same time as the Planning Code that is the subject of this Consultation Paper – although the precise timetable for any new legislation is obviously subject to resource constraints. Again, we set out (in **Table - 3-2**) a preliminary indication of how we see the possible shape of a possible Historic Environment (Wales) Bill, to form the centrepiece of such a Code; but we emphasise that we have not been involved in its preparation.

Table 3-2:
Indicative contents of a possible Historic Environment (Wales) Bill

Introductory provisions
Elements forming part of the Code
Administration

World heritage sites
Definition
General duty

Ancient monuments
Definitions
Schedule of monuments of national importance
Interim protection
General duty
Works affecting scheduled monuments

Listed buildings
List of buildings of special interest
Interim protection
Extent of listing
General duty
Listed buildings in poor repair
Acquisition of listed buildings

Conservation areas
Designation of conservation areas
General duty
Urgent works

Other heritage assets
Historic parks and gardens
Other registers

Supplementary provisions
Heritage partnership agreements
Financial assistance
Historic environment records
Historic place names
Advisory panel

Miscellaneous and supplementary provisions
Special cases
Interpretation

THE COUNTRYSIDE AND RIGHTS OF WAY

3.101 The primary legislation relating to the protection of the countryside, public access to private land, and pedestrian rights of way is contained in largely the same group of Acts: notably, 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 found in the Highways Act 1980 and (in relation to England only) the Deregulation Act 2015.

3.102 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.

3.103 Much of this law also links in with the legislation relating to protecting wildlife, which was the subject of a recent Law Commission review.[41] 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 light of Britain's impending departure from the European Union.

3.104 For all those reasons, we recommend that this area of law is not included within the proposed Planning Code at this stage, but that it be kept under review and considered for codification in due course – either as further part of the Planning Code or as a separate Countryside and Rights of Way Code.

3.105 We do recommend in a later Chapter that the general duties in the Code to have due regard to various matters could usefully be incorporated into each of the statutes mentioned under this heading.

HAZARDOUS SUBSTANCES

3.106 The storage of certain substances (such as industrial chemicals and certain powders) on land may be inherently hazardous. To introduce such substances onto land for the first time may amount to a material change in the use of the land, which will therefore be subject to the need for planning permission. Such permission, if granted, can be subject to appropriate conditions, designed to ensure that the substances are stored safely. In the Scoping Paper, we provisionally proposed that the law relating to hazardous substances could form the fifth and final phase of the present codification exercise.

3.107 Planning Aid Wales, the Town and Country Planning Association, and Persimmon Homes West Wales thought hazardous substances should not be included in the first

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41 *Wildlife Law: Report*, November 2015, Law Commission Report No 362.

part of the code. The Health and Safety Executive (HSE) noted that for hazardous substances consent to be outside the scope of the code would not present any problems for them. It observed:

> In relation to hazardous substances consent, we note the guidance regarding consultation with HSE on proposed development in the vicinity of hazardous installations contained in Circular 20/01 - Planning Controls for Hazardous Substances. HSE suggests that consideration is given to including some guidance for LPAs on the need to ensure that their land-use, or other relevant policies, takes account of controls set out in Article 13 of the Seveso III Directive aimed at preventing major accidents and limiting the consequences of such accidents for human health and the environment.

3.108 The Wales Planning Consultants Forum, however, thought that even though hazardous substances consent is not an everyday challenge for most planning authorities or consultants, it nevertheless forms an important part of the current planning legislation.

3.109 The legislation on hazardous substances appears to be operating satisfactorily. It is a relatively self-contained topic and is covered by a single piece of legislation.[42] There does not appear to be a pressing need to incorporate it into the Planning Code at this stage.

OTHER TOPICS WE HAVE CONSIDERED BUT EXCLUDED

3.110 Finally, we briefly mention some other topics that we have decided should not form part of the Planning Bill, at least at this stage. This is either:

(1) because they are not within the legislative competence of the Assembly, as it will be following the coming into force of the Wales Act 2017; or

(2) because, while related to planning, they are self-contained topics that are best dealt with in separate legislation.

3.111 As to the topics in the second category, primary legislation covering some of them might usefully be included within the Planning Code at some future stage; in others, the legislation is probably best located elsewhere. Decisions on that will be influenced by how the pattern of Codes in Wales develops in the future.

3.112 In short, we have concluded that the Code should not include the law and guidance relating to the following topics:

(1) major infrastructure projects;

(2) compulsory purchase and compensation;

[42] The Planning (Hazardous Substances) Act 1990.

(3) control under the Building Regulations; and

(4) other self-contained codes (transport infrastructure, mobile homes, high hedges, and protected wrecks)

We consider each of these topics briefly below.

Major infrastructure projects

3.113 Relevant nationally significant infrastructure projects requiring "development consent" are reserved to the UK Government,[43] reflecting perhaps the desire of the UK Government to ensure that projects of national importance are planned and approved on a UK-wide basis. Planning permission in relation to "developments of national significance" is within the National Assembly's competence, however, and will be considered further in **Chapter 9**.

Compulsory purchase and compensation

3.114 The ability for public authorities to acquire land to use in the public interest, and the assessment of a fair and reasonable amount of compensation payable for such acquisition, is of vital social and economic importance. It is also clearly related to the process of planning and regeneration.

3.115 Under the Government of Wales Act 2006 – both as introduced and as amended following the referendum in 2011 – the power to legislate as to compulsory purchase procedure and compensation was not devolved.[44] That was possibly because it was considered desirable that there should be a uniform code operating throughout England and Wales, especially in relation to the entitlement to compensation. For that reason, the Scoping Paper in respect of the present project made little reference to it.

3.116 However, in the final stages of the passage of the Wales Bill through Parliament, the Government implicitly accepted that the power to legislate on compulsory purchase procedure should be devolved, by amending the Bill so as to reserve to the UK Parliament legislative powers relating to compensation only in respect of:

(1) the interference with rights in land by exercise of a statutory power; and

(2) depreciation in the value of land as a result of works or land provided or used in the exercise of a statutory power.

3.117 That formulation remains in the Wales Act as it was finally enacted.[45] In other words, the UK Parliament has reserved to itself the right to legislate in relation to compensation for compulsory purchase, severance and disturbance, but not in relation to compulsory purchase more generally. It would therefore be possible for the Welsh Assembly to legislate for the procedural aspects of compulsory purchase,

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43 See the Government of Wales Act 2006, Sch 7A, para 184(a).

44 Although some statutes relating to devolved matters may contain provisions enabling the acquisition of land either using compulsory powers or by agreement.

45 Government of Wales Act 2006, Sched 7A, para 185, as inserted by Wales Act 2017, Sched 1.

subject to potential problems in relation to the modification of general property law, which is outside the powers of the Assembly. [46]

3.118 The general law as to 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 two reports some ten years ago.[47] We therefore do not consider that it would be within the scope of the present exercise.

3.119 However, 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.[48] The TCPA 1990 is no exception, and section 226 empowers a local authority to acquire compulsorily any land in its area

(1) if the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land, or

(2) if the land is required for a purpose which it is necessary to achieve in the interests of the proper planning of the area.

The remainder of Part 9 of the TCPA 1990 then elaborates that principle in more detail.

3.120 It would be possible to restate the provisions of Part 9 (and related provisions in Parts 10 and 11) in the new Bill. However, after discussion with the Welsh Government, we consider that this would add significantly to the complexity of the exercise, and thus delay the production of the Bill. We have accordingly concluded that it should not be included in the Bill; although it may be that it could be included at a later stage, possibly along with other provisions currently in the Welsh Development Agency Act 1975 and related legislation mentioned earlier in this Chapter.[49]

Approval under the Building Regulations

3.121 Those wishing to carry out a building project generally require both planning permission and approval under the Building Regulations. It might therefore seem at first sight that a codification and simplification exercise of the kind envisaged here should also include the Building Regulations – and the relevant primary legislation, under the Building Act 1984.

3.122 However, the two legislative codes are conceptually quite distinct. Control under the planning Acts is to enable the relevant local authority to ascertain the desirability of a particular type of building or land use in principle. Control under the Building Regulations, by contrast, is to enable the authority to regulate the physical details of the building works involved – including structural safety, safety in relation to fire, ground conditions, sound insulation, ventilation, services, drainage and so forth.

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46 Government of Wales Act 2006, Sched 7B, para 7, as inserted by Wales Act 2017, Sched 2.

47 *Towards a Compulsory Purchase Code: (1) Compensation*, 2003, Law Com 286; and *Towards a Compulsory Purchase Code: (2) Procedure*, 2004, Law Com 291.

48 For example, Public Health Act 1875, s 164; Forestry Act 1967, s 39; Highways Act 1980, s 239(3).

49 See **para 3.70**.

3.123 The two processes are usually relevant at different stages in the evolution of a project, and are controlled by different local authority officers.

3.124 Additionally, it may be noted that, under the Wales Bill as originally introduced into Parliament, one of the matters reserved to the UK Parliament was "the regulation of the design and construction of buildings and related matters the demolition of buildings, and services, fittings and equipment provided in or in connection with buildings". [50] As a result of amendments made to the Bill, that reservation was limited only to such regulation as it applied to land held or used by the Crown, a Government department, or certain statutory undertakers. Legislation that might one day be passed by the Assembly could not regulate buildings on such land.

3.125 In the Scoping Paper, we did not envisage including in the Planning Code the legislation governing control under the Building Regulations; and we remain of the view that it should be excluded.

Other self-contained codes

Transport infrastructure

3.126 The authorisation of certain transport projects (notably railways, tramways, guided transport systems, and works interfering with navigation rights) is more complex than simply the grant of planning permission, as frequently the implementation of such a scheme will involve not just the carrying out of engineering or other works, but also a variety of ancillary matters such as the acquisition of land, the extinguishment of rights, the charging of tolls or fares, and the making of bye-laws.

Mobile homes

3.127 Some mobile homes, commonly referred to as *"park homes"*, are used by their owners all year round as their primary residence. The stationing of mobile homes has been a constant source of problems over many years, and has accordingly been the subject of much litigation – although that seems to have diminished in recent years. The law relating to the licensing of caravan sites and regulating mobile home occupation is generally separate from mainstream planning law, although it is linked by virtue of the provision in the General Permitted Development Order whereby planning permission is granted for the stationing of caravans in circumstances where a site licence is not required. [51]

3.128 Other caravans are stationed on domestic or other property, typically in suburban front gardens. These too can cause planning problems, but they are dealt with by normal planning controls.

High hedges

3.129 Disputes about high hedges on the boundary between neighbouring residential properties used to be a major source of anxiety and irritation. After much public pressure and a series of private members' Bills, they were dealt with in Part 8 of the Anti-social Behaviour Act 2003, which applies in both England and Wales. That

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50 Government of Wales Act 2006, Sched 7B, para 7, as inserted by Wales Act 2017, Sched 2.

51 Planning (General Permitted Development) Order 1995, Sched 2, Pt 5, Class A; Caravan Sites and Control of Development Act 1960, Sched 1, paras 2-10.

provides that the owner (A) of a garden that is overshadowed by a high hedge may ask the local authority to issue a notice on the owner of the hedge (B). If such a notice is issued, B may appeal to the Planning Inspectorate; if it is not, A may appeal.[52]

Protected wrecks

3.130 We discuss archaeology generally elsewhere in the Consultation Paper.[53] One particular category that currently enjoys protection under a wholly separate statutory regime is off-shore wrecks, protected under the Protection of Wrecks Act 1973. There are currently six wrecks off the coast of Wales, designated under the Act and protected by Cadw.[54] The system of protection under the 1973 Act is entirely separate from other forms of protection for the historic environment. And the protected wrecks are not likely to be affected by development proposals.

Conclusion

3.131 The various statutory schemes considered above seem to be operating reasonably satisfactorily. Given the limitations on resources, there seems to be no particular need to incorporate the relevant legislation into the Planning Bill at this stage – although they could be brought within the Code at a later stage, perhaps when a particular body of legislation is being brought together for other reasons.

CONSEQUENTIAL AMENDMENTS AND REPEALS

3.132 Alongside the two new Bills envisaged above – relating to planning and the historic environment – there would need to be a further piece of legislation, introducing the necessary changes to other legislation remaining in force.

3.133 First, there will be a number of pieces of legislation – either in whole or part – that apply only in Wales, and can simply be repealed. The Planning (Wales) Act 2015 can be repealed in its entirety, along with portions of a further eight, listed in **Table B-2** in Appendix B.

3.134 In addition, it will be necessary to ensure that the existing legislation that is to be replaced by the new Bills, in relation to Wales, is amended so as to ensure that it continues to operate coherently in England. We envisage that there will be around 20 pieces of legislation that will continue to apply in England, but which will (at least in part) no longer apply in Wales, listed in **Table B-4** in Appendix B.[55]

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52 High Hedges (Appeals) (Wales) Regulations 2004 (SI 3240); High Hedges (Fees) (Wales) Regulations 2004 (SI 3241).

53 See **paras 3.199, 13.181 to 13.185.**

54 The Royal Yacht Mary, off the Skerries, Ynys Mon (wrecked 1675, protected 1974); the Pwll Fanog Wreck, in the Menai Strait (wrecked in medieval times, protected 1979); the Tal-y-Bont Wreck, in Cardigan Bay (wrecked 1677, protected 1989); the Small Reefs Wreck (wrecked c.1100, protected 1995); Resurgam, at Rhyl (wrecked 1880, protected 1996); and The Diamond, in Cardigan Bay (wrecked in the nineteenth century, protected 2002).

55 If a similar exercise were to be subsequently undertaken in England, it would be possible to repeal the pieces of legislation in **Table B-4** in their entirety.

3.135 And there will be a substantial number of amendments will need to be made to other legislation applying (ranging from the Acquisition of Land Act 1981 to the Zoo Licensing Act of the same year). These will come to light as the detailed drafting of the Code progresses. They are not considered further at this stage.

3.136 We envisage that this third piece of legislation would not form part of a Code, and would not need to be considered in practice by users of the Codes in Wales, or by users of the relevant legislation as it continues to apply in England.

Chapter 4: Technical reforms to the legislation

INTRODUCTION

4.1 In **Chapter 2**, we noted that our terms of reference include consolidation, together with the streamlining and rationalising of the existing legislation, and also the bringing into statute of propositions derived from case law.[1] This is consistent with our recommendation, in our earlier report on *The Form and Accessibility of the Law Applicable in Wales*, that codification should involve:

(1) bringing together legislation, whose subject matter is within the competence of the Assembly and which is currently scattered across various pieces of legislation of the UK Parliament and/or the Assembly, in a single piece of Assembly legislation; and

(2) reform of the legislation as appropriate.[2]

4.2 In this Chapter, we consider how and to what extent the codification exercise should involve reform of the legislation, in addition to mere restatement. We consider first technical reforms generally, including the specific issue of the balance between primary and secondary legislation, and then possible reforms to codify case law.

4.3 Each specific change referred to in this Chapter is dealt with in more detail in the relevant topic chapter in Part Two of this Consultation Paper.

TECHNICAL REFORMS GENERALLY

The Scoping Paper

4.4 In Chapter 5 of the Scoping Paper, we noted that the law on all topics that formed part of the proposed Planning Code would need to be reviewed in order to identify areas where technical improvements might be beneficial, although we observed that those parts of the system that are more frequently used and amended would be likely to need closer attention. We also indicated that this project did not aim to extend to issues that might require reform of planning principle or policy; we would therefore consider reform only so far as it would further the broader aim of the project: clearer, simpler and more accessible planning law for Wales.

4.5 We suggested that this exercise provides an opportunity to simplify areas of unnecessary complexity and remove obvious redundancy or duplication. We invited

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1 See **para 2.4**.

2 *Form and Accessibility of the Law Applicable in Wales*, Law Com No 366, Recommendation 2.

the views of stakeholders as to whether technical reform of that kind should be pursued in principle, and as to desirable areas for such reform.[3]

4.6 In particular, we 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) amendment where provisions do not reflect established practice; and

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

4.7 Under each of those headings, we noted some areas of the law that seemed appropriate for technical reform, and invited the views of stakeholders on those, and on any other topics they considered appropriate – under those or any other headings.

4.8 As to the general principle of technical reform, almost all consultees were in favour.[4] Some made this explicitly clear; others implicitly supported the principle, by accepting our proposals or proposing others.

4.9 However, a few consultees raised concerns. Some considered that technical reforms of the kind we proposed in the Scoping Paper did not go far enough. The Country Land and Business Association (CLA), for example, considered that the project to be "a missed opportunity, as it merely seeks to tidy up around the edges, as opposed to delivering change". Others thought that reforms should be identified separately from the consolidation exercise, so as to provide a clearer picture of the law as it stands without attempting any alteration at this stage.[5]

Categories of technical reform proposed in the Scoping Paper

4.10 The first three of the categories noted above concerned areas of planning legislation that should be retained, but which might with advantage be amended to ensure that they operated more effectively.

4.11 The first related to clarifying provisions in the current legislation that are unclear in their application or inconsistent in their wording. As examples of this problem, we cited the provisions relating to the considerations to be taken into account in making planning decisions, the approval of reserved matters, the operational land of statutory undertakers, and the contents of an enforcement notice. These suggestions were generally supported.

4.12 The one possible exception was in relation to our suggestion that it might be preferable to identify matters to be taken into account in the determination of

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3 *Planning Law in Wales: Scoping Paper*, Chapter 5.

4 25 consultees responded to this question: 23 agreed that we should be pursuing technical reform in the substantive phase of the project; 2 were equivocal.

5 Torfaen CBC; the Residential Landlords Association made similar comments.

applications and appeals; one consultee suggested that this might be better achieved by way of guidance than legislation.

4.13 The second category related to improving provisions in the current law that have the potential effect of slowing down the operation of the system, producing inconsistencies and anomalies, and hindering the ability of people to take part in the planning process. As examples, we cited problems with amendments to planning permissions, conditions as to time limits, other specific types of conditions, the consequence of non-compliance with procedural requirements as to applications, twin-tracking appeals, and concealed breaches of planning control. Our suggestions were generally supported.

4.14 Thirdly, we noted the importance of ensuring that there are no gaps in the legislative scheme, and eliminating existing provisions that do not reflect established practice. By way of example, we noted that there was no right to appeal against a condition imposed on a reserved matters approval. This approach was also supported.

Obsolete, duplicative and uncommenced provisions

4.15 The fourth category of technical reform suggested in the Scoping Paper was the repeal of proposals that were for one reason or another redundant. It is an unfortunate feature of the legislative process that Parliament has hitherto been more inclined to introduce new legislation than to dispose of old legislation that is no longer required.

4.16 We noted that rural development boards (introduced in 1967) had only been used once, in England, and that planning inquiry commissions (1968) had never been used at all. Areas of archaeological importance (1979) had never been created in Wales, and were proposed for abolition by the Government in 1996. Only one urban development corporation had ever been created in Wales (in 1987), and simplified planning zones (introduced in 1986) had only been introduced, very rarely, in England. We suggested that all of these could be removed; none of the consultees to the Scoping Paper suggested otherwise.

4.17 We also suggested that, following the changes made to the Civil Procedure Rules in 2013, and the enactment of the Criminal Justice and Courts Act 2015, there was now no justification for separate systems of statutory challenges to planning decisions, and we suggested that Part 12 of the TCPA 1990 did not need to be brought forward into the Code. This too was generally supported.

4.18 More generally, we noted in the Scoping Paper the importance of distinguishing between provisions that are used rarely, but which need to be retained, and those that are in reality never going to be used. POSW (South East) agreed with that, commenting that, before deleting what appear to be obsolete areas of existing legislation, it might be worth asking whether they could be one day be revived to good purpose.

Reforms suggested by respondents to the Scoping Paper

4.19 In the Scoping Paper, as well as putting forward a number of proposals for possible change, we also asked stakeholders to identify further areas of legislation that could with advantage be amended or deleted.

4.20 In relation to the need for planning permission, respondents suggested that there is scope for clarification as to whether (or in what circumstances) "development" includes the conversion of two dwellings into one, or material change of use by intensification, and whether a separate use class should be introduced for holiday homes.

4.21 Other possible changes suggested by respondents included the following:

(1) the rules as to development authorised by Government departments should be brought into line with other types of development authorised by permission;

(2) the rules as to the making of planning applications and the submission of environmental statements should be rationalised;

(3) the criteria for validating applications should be clarified, and the power of planning authorities to produce a local list of required supporting information should be abolished;

(4) the charging of fees for listed building consent applications should be considered; and

(5) the status of objections made after the end of the stipulated 21-day period should be clarified.

4.22 Respondents also suggested that secondary legislation should be consolidated, including in particular the orders relating to permitted development rights and development management procedure (as occurred in England in 2015) and appeals and inquiries.

4.23 A number of further suggestions were made as to the imposition of conditions on planning permissions, as to the mechanics of planning obligations, and as to the reversion to a previous use of land following enforcement.

4.24 Further provisions that were said to be redundant, and which could therefore simply be abolished, were identified. These included provisions as to war-time breaches of planning control, providing false certificates to support applications, the initiation of development, and the power to permit development not conforming with the development plan.

4.25 Each of these points is dealt with in the relevant topic Chapter in Part Two. We generally support the suggestions that have been made, but not in all cases.

Unifying consent regimes

4.26 One specific reform to which we referred in the Scoping Paper was in relation to the overlap between planning permission and other statutory consents – particularly those relating to listed buildings and conservation areas. We identified some of the issues, and expressed a view that the drawing together of such consents – either as a single system or within a single Code – would be likely to deliver a system that would be more open, accessible, and consistent.

4.27 We invited the views of stakeholders on the practical benefits that might be derived from such an exercise, and as to which of the various statutory consents would be most appropriate for such an approach.[6]

4.28 This suggestion provoked a high level of response. We accordingly consider it in a separate Chapter in Part Two (**Chapter 13**) in relation to listed buildings and conservation areas; and touch upon it in **Chapters 14 and 15** in relation to consents for advertising and works to trees.

THE BALANCE BETWEEN PRIMARY AND SECONDARY LEGISLATION

4.29 This project is primarily focussed on primary legislation – that is, the possible reforms that might be incorporated in a new Planning Bill. However, we noted in our report on the form and accessibility of the law in Wales that the benefits of codification will be enhanced if relevant secondary legislation is also made more accessible.[7]

4.30 We have accordingly made a number of references throughout this Consultation Paper to possible improvements to secondary legislation. This is particularly significant in relation to topics where the law that is used in practice is almost entirely contained in regulations – such as the control of outdoor advertising and works to protected trees.[8]

4.31 In addition, one particular category of possible technical reform to which we drew attention in our Scoping Paper was adjusting the balance between primary and secondary legislation in this area of the law. We noted that the proposed creation of a Planning Code offers a unique opportunity to review the desirability of this.[9]

4.32 Clearly, Acts would become very unwieldy if they contained all of the more detailed provisions currently found in statutory instruments. On the other hand, whilst secondary legislation is subject to approval by the Assembly, it inevitably receives less scrutiny, due to limitations of time. And users sometimes find it unsatisfactory to have statutory material split between primary and secondary legislation.

4.33 We therefore asked consultees to the Scoping Paper to express views as to the distribution of provisions between primary legislation (either in the body of an Act or in a Schedule to it) and in secondary legislation made under it.[10]

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6 *Planning Law in Wales: Scoping Paper*, Chapter 6.

7 *Form and Accessibility of the Law Applicable in Wales*, Law Com No 366, 29 June 2016, para 5.7.

8 See **Chapters 14 and 15**.

9 *Planning Law in Wales: Scoping Paper*, para 3.38.

10 *Planning Law in Wales: Scoping Paper*, Question 3-2

Response to the Scoping Paper

4.34 The majority of consultees who responded to this question agreed that the balance is broadly correctly struck between primary and secondary legislation.[11]

4.35 Planning Aid Wales, which also thought that the balance was broadly correct, noted the following:

> A particular need is for members of the public and community councils to be able to identify applicable provisions contained in a Schedule and those in secondary legislation. It is generally easier to find provisions where the primary legislation refers to a Schedule in it, rather than conferring a power to make orders, rules or regulations at a later date.

4.36 The Woodland Trust supported the use of secondary legislation, as this "prevents the creation of unwieldy and lengthy acts and allows more flexibility in altering and updating secondary legislation going forward".

4.37 National Grid agreed that there would be advantages in having a single piece of legislation but commented that there would be benefits of using secondary legislation to complement primary legislation. It also noted that "the consolidation and simplification exercise should also exploit the opportunities offered by online media and how these can be utilised to have an integrated, up-to-date resource".

4.38 Some consultees qualified their broad support for the current division. For example the Town and Country Planning Association considered that the current division between primary and secondary elements of planning law is broadly appropriate, but it agreed with the caveats listed in the Scoping Paper, particularly with the suggestion that statutory provisions should wherever possible be contained in a Schedule to a piece of primary legislation, rather than primary legislation conferring on the Welsh Ministers a power to make orders or regulations at some later date.[12]

4.39 Innogy Renewables UK also considered that the current balance between primary and secondary planning legislation is broadly appropriate, subject to the caveats identified in the Scoping Paper.[13] However, it suggested that some planning procedures currently in secondary legislation should be brought into primary legislation, such as those relating to the Environmental Impact Assessment (EIA) and the development plan making process.

4.40 Those consultees who disagreed with the current division thought that there is currently too much detail put in secondary legislation. For example, RWE Generation thought that the split between primary and secondary legislation is "not necessarily right" and that certain provisions, especially relating to the development plan making process, should be brought into primary legislation. It also observed that there are

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11 24 consultees responded to this question: 10 agreed that the balance is broadly correct, 7 consultees thought that the balance is not broadly correctly and 7 consultees held equivocal positions.

12 *Planning Law in Wales: Scoping Paper*, para 3.52.

13 *Planning Law in Wales*: *Scoping Paper*, para 3.52.

many provisions as to planning procedure that are currently in secondary legislation which could be brought together in primary legislation. It also commented:

> Matters such as EIA should be brought into primary legislation, given that after Brexit it may no longer be necessary to make frequent changes to transpose EU Directives (although it would be sensible to implement such changes after the "Brexit" strategy for the UK becomes clearer). On the other hand, permitted development rights are subject to frequent amendment and secondary legislation is appropriate for this, and for the definitions of types of development subject to EIA.

4.41 Similar concerns on the overuse of secondary legislation were expressed by Rhondda Cynon Taf CBC. It reported that locating secondary legislation can sometimes be a difficult task and that, whilst it is accepted that some requirements will be of a technical nature or subject to more frequent review, this should be limited to where "necessary".

4.42 Cardiff Council expressed a preference for the provisions of the Planning Code to be contained, so far as is reasonably practicable, in a single piece of legislation.

4.43 The Residential Landlords Association stressed the importance of including secondary legislation in any Planning Code:

> Planning law is probably unique in that its implementation very much depends on Ministerial policy which, of course, can change quite regularly either because of a change of Government or to meet changing circumstances and evolving Government policies. We would strongly argue that the implementation of a Code can only be a success if the vast amount of matter contained in statutory instruments is also incorporated in the Code. A clear example of this is the important role which is played by permitted development rights. These are fundamental, especially in the householder context.

4.44 The Association also supported the inclusion of guidance:

> A planning policy framework, such as the National Policy Framework in England, needs to be an integral part of any Code, even if there is a different procedure for amending/updating it. Without addressing the issue of the important role of statutory instruments (and their volume) and the incorporation of planning policy, any proposed Code would be nothing of the sort.

4.45 This is the approach adopted by the Welsh Government in its decision that guidance and policy should be an integral part of the Planning Code.

Primary and secondary legislation: conclusions

4.46 Secondary legislation is normally used to provide for the fine detail of statutory requirements. This could, for example, provide the minutiae of what is within the definition of development and what requires specific planning permission – as with the Use Classes Order and the General Permitted Development Order. It could regulate procedural requirements, as with the General Development Management

Procedure Order, and the various appeals and inquiries rules. In each case, the broad principles are approved by Parliament or the Assembly, subject to periodic debates, and are enshrined in general terms within primary legislation, but the detail can sensibly be left to regulations.

4.47 So, for example, the TCPA 1990 provides that the Welsh Ministers can grant automatic permission by means of a development order for various categories of development that are either of limited significance (such as small extensions to private houses) or are approved under other procedures (such as works by statutory undertakers). The detailed limits of such categories (such as whether the domestic extensions thus approved can be 10% or 15% of the volume of the original, and what conditions should be attached to such approval) can then be provided in an order, which can be changed from time to time in accordance with current policy imperatives.

4.48 Secondly, a set of regulations can usefully provide a complete freestanding code to govern the regulation of a particular activity – for example, as noted above, the display of advertisements or works to protected trees. The precise details of what does or does not require consent and how such consent is to be obtained may change from time to time, but it is convenient for those using the code to find all the details they require in a single location. We have also suggested that the law on certain other matters – such as graffiti and fly-posting – should be in secondary legislation.[14]

4.49 Thirdly, minor procedural and administrative details can be provided in secondary legislation. We consider that it is easier for that to be, as far as possible, in the form of "regulations" rather than "rules" or "orders", as this provides flexibility for provisions to be moved from one piece of secondary legislation to another. We also consider that it would be better for matters to be prescribed by the Welsh Ministers in the form of regulations, where they relate to a wide range of cases; "directions" should be reserved for matters that relate only to a specific case.

4.50 However, overall, we consider that the present balance between primary and secondary legislation is broadly correct. We further recognise that change for its own sake can be confusing to users. But we have identified one or two areas where we consider that it might be appropriate to provide more information in primary legislation.[15] And we also make some suggestions as to the transfer of very detailed provisions from primary to secondary legislation.[16]

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[14] See **para 16.55**.

[15] For example, in relation to the matters that may form the subject of a planning obligation (currently in secondary legislation) (see **Consultation question 10-3**).

[16] For example, in relation to the inclusion of energy policies in development plans (see **Consultation question 6-2).**

CODIFICATION OF CASE LAW

General principles

4.51 A further category of possible technical reform is to incorporate into the legislation principles established in decisions that have been made over the years by the courts.

4.52 Planning law, unlike some other areas of law, is largely based on statute. That is, the various Acts of Parliament (and, more recently, the Assembly) together provide a "comprehensive code imposed in the public interest".[17] However, over the last seventy years there have been a large number of judicial decisions that have examined, in the context of particular cases, certain parts of the statutory code that are unclear – either generally, or possibly in relation to particular factual situations – and some topics that are not dealt with exhaustively, or at all, in the relevant legislation.

4.53 In the Scoping Paper, we asked stakeholders to express views on whether the Planning Code should incorporate some of the rules currently to be found in such case law, in particular:

(1) to make explicit the principles of planning law;

(2) to clarify the meaning of undefined statutory terms; and

(3) to fill gaps where the scope of statutory provisions is unclear.[18]

And we invited suggestions as to items of case law that they considered particularly suitable for codification.[19]

4.54 We also outlined a list of criteria that we proposed to use to select case law for codification, as follows:

(1) how settled the case law is;

(2) whether the proposition or principle for which the case law stands is sufficiently clear and precise to enable it to be drafted in the form of a legislative provision; and

(3) whether there are exceptions to the proposition or principle, or any other substantive reasons for not attempting to draft it in legislative form.[20]

4.55 In relation to the first of these, what we had in mind was the extent to which a proposition has been consistently followed by the courts, and accepted more widely by practitioners, so as to have become uncontroversial. This would clearly apply were, for example, it formed the basis of a decision of the House of Lords some years ago, and has often been cited, possibly elaborated but never been questioned – as

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17 *Pioneer Aggregates v Secretary of State* [1985] AC 132, HL, per Lord Scarman at p 141.

18 *Planning Law in Wales: Scoping Paper*, Question 7-1

19 *Planning Law in Wales: Scoping Paper*, Question 7-2.

20 *Planning Law in Wales: Scoping Paper*, para 7.7.

with the test for conditions on planning permissions.[21] But a proposition may also be regarded as "settled" where it has been adopted over a number of years in decisions of the lower courts, without any challenge – probably on the basis that it helpfully clarifies the law and accords with common sense – as with the date at which the curtilage of a building should be considered.[22] The key factor is the extent to which the principle in question has, as expressed in some cases, hardened into a rule of law.[23]

4.56 We also explored some examples of principles established in case law that might be appropriate for incorporation within the statutory code; and invited stakeholders to suggest others.

Response to the Scoping Paper

4.57 Whereas 25 out of 26 respondents to the Scoping Paper who expressed a view as to the inclusion of technical changes in the preparation of the new Planning Code supported that idea, only 18 of the 29 who expressed a view on case law thought that the new Code should seek to codify case law; 11 either disagreed or were equivocal.[24] Further, a large number of those who agreed with the principle of codifying case law qualified their support, emphasising the need to ensure that the case law which is codified reflects accurately and definitively the current legal position. The support for codifying case law was thus significantly less than for incorporating technical amendments generally. We therefore set out below some of the comments made.

4.58 Amongst those who supported codification, POSW (South West) thought that the idea of codification was "welcome news", noting that "a new Code should include a glossary of terms, definitions and where there is clear case law that is fully established this should also be referred to". The Residential Landlords Association thought that without an understanding of the principles that have emerged from case law "it is impossible to understand the current planning system".

4.59 As to the criteria for selecting case law principles for codification, RTPI Cymru considered that those we had suggested appeared sensible. And it proposed two further criteria, namely:

(1) where it would be helpful to provide clarity on a particular issue; and

(2) where there are recognised to be gaps in the current statutory provisions.

4.60 However, as noted above, some of those who supported codification in principle expressed some caution. For example, RWE Generation and Innogy Renewables UK welcomed the inclusion of specific rules into the Planning Code that would simplify

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21 Laid down by the Lords in *Newbury DC v Secretary of State* [1981] AC 578 at pp 607-608 – see **para 8.91**.

22 See the decisions cited in **Chapter 13, footnotes 109 and 110**.

23 As with the "rule of etiquette" – relating to a barrister not being able to sue for fees – that had hardened into a rule of law (noted in *Rondel v Worsley* [1969] 1 AC 191 at p 197, or the "practice of the judges " – as to the anonymity of police informers – which had hardened into a rule of law (noted in *D v NSPCC* [1978] AC 171, at p 218).

24 29 consultees responded to this question: 18 agreed with this question, 4 disagreed and 7 were equivocal.

and consolidate the most accurate definitions and interpretations of planning law principles, but urged that "only longstanding and well-established case law is codified".

4.61 Similarly, the Public Services Ombudsman for Wales commented on codification of case law in the following terms:

> Whilst I believe it would be useful if codification of case law formed part of the wider codification exercise, with everything in one place, I wish to strike a cautionary note. It is my view that if this approach is to be undertaken it will be important that the Code is updated frequently. This in turn means that it will need to be properly resourced to ensure that this happens. Care will also need to be taken to ensure that whatever is included in the Code is generally agreed to reflect the definitive position. Therefore, where there is any ambiguity surrounding case law and / or the matter has potential to evolve further, this should not be included.

4.62 The National Grid expressed its support for the principle of seeking to increase clarity of terms, but only where there is clear evidence that the existing definitions in statute or case law are insufficient, and where there are benefits of having a clearer definition in Welsh law. Neath Port Talbot Council said that definitions are not necessarily easy to put in place and accepted that a criteria-based approach might be appropriate. A similar comment was made by a number of other consultees.

4.63 Six consultees held an equivocal view. For example, Planning Aid Wales questioned whether it would be practical to go beyond defining key principles deriving from case law, noting that this could inhibit desirable flexibility in meeting new situations. Rhondda Cynon Taf CBC accepted that the introduction of these rules into the Planning Code can provide clarity but thought that "care needs to be taken on the drafting and the application of such rules".

4.64 Torfaen CBC held an equivocal view in that it generally agreed that, in the case of exhaustive definitions, codification would be appropriate in relation to settled case law; but in the case of non-exhaustive definitions, careful consideration would have to be given to the specific nature of the provisions. It also noted that codifying principles of planning law might result in complex judicial decisions being rigidly applied and adhered to, rather than being basic foundations on which to build answers to difficult questions.

4.65 Similar caution was expressed by the Planning and Environment Bar Association (PEBA):

> We share the Commission's caution over the risks and potential unintended consequences of seeking to codify case law. On balance, we consider that the opportunities to codify case law in the context of the Commission's current project may be limited. We bear in mind that formulating a new Planning Code is a challenging project in itself, for the reasons given by the Commission early in the Scoping Paper. Although the various elements of the current planning legislation are fragmented and complex, they are also fairly comprehensive, as noticed by the House of Lords as long ago as its decision in *Pioneer Aggregates v Secretary of*

> *State*. We suggest that this aspect of the project might best be confined to very clear-cut cases, where there is a need to codify principles from case law in order to fill obvious "gaps" in the statutory code.

4.66 Four consultees disagreed with the principle of codification of case law. The Town and Country Planning Association thought that whilst wider codification as specified is a useful longer term aim, it may be a bridge too far to include case law in the wider codification. It noted the following:

> The implications of codifying case law principles will need to be considered carefully. It may produce unintended difficulties if new decisions arise that conflict with previous interpretations.

4.67 Similarly, the Planning Inspectorate stated that it did not consider case law appropriate for codification. It described the task as a huge undertaking, requiring much consideration and that ultimately the consolidation of case law would be unnecessary. For example, the definition of "curtilage" does not lend itself well to being set down in statute law; it is very much a matter of fact and degree. This is also the case for "material considerations".

4.68 The British Property Federation expressed particular concern about the differences which may emerge in doing this exercise in Wales, but not in England:

> This divergence in the two regimes could result in not only two entirely different and competing strands of case law emerging from the then separate legislative systems, but including case law itself may then also lead to unintended re-interpretations of that case law as the new legislation itself will be open to detailed scrutiny and interpretation by the Courts. Ultimately, unless a joined-up, cross-border approach is taken, and a very careful approach taken to the integration of case law with legislation, revisions of the nature described may cause more unanticipated complications and confusion which is precisely what the consultation is seeking to resolve.

Definitions

4.69 We made several suggestions in the Scoping Paper as to principles from case law that it might be possible to include in the new Code. We noted, for example, that "curtilage" is not defined in the TCPA 1990 or in associated secondary legislation, and suggested that this omission should be rectified, incorporating some of the many judicial decisions considering the point.[25] It might also be helpful to clarify the date on which the extent of the curtilage is to be considered. Most respondents agreed in principle, but a number considered that it would be very difficult in practice. We expand on this later in this Consultation Paper.

4.70 We suggested that it might be possible to expand upon the meaning of the terms "engineering operations" and "building" in the TCPA 1990. Our preliminary view, in each case, was that it might be preferable to leave the definition as it is, in case law

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[25] For example, *Sinclair-Lockhart's Trustees v Central Land Board* [1951] SC 258 at p 264; *AG ex rel Sutcliffe v Calderdale BC* (1983) 46 P&CR 399, CA; and *Dyer v Dorset CC* [1988] QB 346 at p 353.

– not least in light of a lack of any discernible confusion, at least as to the former.[26] The few who responded on this point tended to agree. Respondents also made the point that any change to such statutory definitions in relation to Wales might cause confusion elsewhere in the UK.

4.71 One key feature of planning law is that many planning decisions are to be made with regard to "material considerations"; that term has been extensively considered by the courts over many years, and in the Scoping Paper we considered whether there might be some advantage in incorporating some of the resulting conclusions into the Code. We noted, as an example, decisions of the Supreme Court in relation to the relevance of financial considerations to decision-making.[27] However, we also observed that careful thought would need to be given as to whether codifying such case law would, in truth, result in greater clarity. Few responded on this point, but the RTPI Cymru thought that some guidance might be useful; the Planning Inspectorate, on the other hand, firmly disagreed.

4.72 A few respondents went further and suggested additional considerations that should be made explicitly material – such as the need for development, the existence of a fall-back position, the community benefits to be provided by a development, and the impact on the Welsh language.

Planning law principles

4.73 We observed in the Scoping Paper that planning law principles are, by their nature, mutable, evolutionary and non-exhaustive; and that particular care must therefore be taken when selecting for codification cases that apparently establish such principles.

4.74 We gave as an example what has become known as the *Whitley* principle, relating to the lawfulness of development commenced before full compliance with all the conditions attached to the relevant permission.[28] This has been the subject of much analysis in the courts, which have sought to clarify exceptions to the so-called "principle".[29] We expressed a preliminary view that, given the number and scope of the qualifications to the *Whitley* principle, it may not be possible to codify it satisfactorily. Respondents to the Scoping Paper tended to share our hesitation; we consider this later in the Consultation Paper.[30]

4.75 By contrast, we considered that it would be appropriate to codify the principle established by the courts that a decision-maker considering an application for the approval of reserved matters is not entitled to refuse it on grounds that go to the

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26 For example, in *Fayrewood Fish Farms v Secretary of State* [1984] JPL 267; *Cheshire CC v Woodward* [1962] 2 QB 126; *Barvis v Ltd v Secretary of State* (1971) 22 P&CR 710.

27 *R (Sainsbury's Supermarkets) v Wolverhampton CC* [2010] UKSC 20, [2011] 1 AC 437; *Health and Safety Executive v Wolverhampton CCC* [2012] UKSC, [2012] 1 WLR 2264.

28 *Whitley v Secretary of State for Wales* (1992) 64 P&CR 296; also *Handoll v Warner, Goodman & Streat* (1995) 70 P&CR 627. See **paras 8.106 to 8.117** for a fuller explanation.

29 For example, *Agecrest v Gwynedd CC* [1998] JPL 325; *Leisure GB plc v Isle of Wight CC* (2000) 80 P&CR 370; *Greyfort Properties v Secretary of State* [2011] EWCA Civ 908, [2012] JPL 34.

30 See **Consultation question 8-13**.

principle of the development itself.[31] The few respondents who commented on this were generally supportive.

4.76 We also suggested that there was scope for incorporating into the Code the principle that an enforcement notice relating to an unauthorised change of use may lawfully require the removal of incidental operational development.[32] Here too, respondents were supportive.

4.77 The need for planning permission for a change in the use of land to a use that may have previously been abandoned is also a point that has been the subject of some judicial attention over many years.[33] In the Scoping Paper, we suggested that there might be some scope for codification of the law relating to abandonment, but we needed to understand the extent of any uncertainty caused by the present state of the law. Several respondents noted that this was an area fraught with doubt, which might usefully be clarified; others urged caution. On reflection, we decided not to pursue this.

Filling gaps in the statutory provisions

4.78 As well as seeking to clarify ambiguities in the existing legislation, at least in relation to particular factual circumstances, the courts have also sought to fill in some gaps where the legislation says nothing, or not enough. It is noticeable that very few respondents to the Scoping Paper commented on the suggestions we made under this heading.

4.79 For example, we noted the law as to time limits for High Court challenges to planning decisions. These must generally be made within six weeks of the decision in question – but it is not entirely clear how that period is to be calculated. The relevant rules applying (for example, as to the inclusion of public holidays) have been the subject of various judicial decisions.[34] We suggested in the Scoping Paper that this could usefully be clarified on the face of the Code.

4.80 We also noted that the TCPA 1990 provides that a planning authority or the Welsh Ministers may grant planning permission subject to "such conditions as they think fit", without specifying what conditions are lawful. This was considered by the House of Lords many years ago, which held that conditions must be imposed for a planning purpose, they must relate to the development permitted, and they must be reasonable.[35] Government guidance has added to that, by requiring conditions to be necessary, enforceable, and precise.[36] In the Scoping Paper, we hesitantly indicated that it may be best to leave the position as it is.

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31 *Thirkell v Secretary of State* [1978] JPL 844; see **Chapter 8**, and particularly **para 8.142**.

32 *Murfitt v Secretary of State* (1980) 40 P&CR 254; *Somak Travel v Secretary of State* (1988) 55 P&CR 250; see **para 12.77**.

33 For example, in *Hartley v Minister of Housing and Local Government* [1970] 1 QB 413; *Trustees of the Castell-y-Mynach Estate v Secretary of State for Wales* [1985] JPL 40.

34 *Griffiths v Secretary of State* [1983] 2 Ac 51; *Stainer v Secretary of State* (1993) 65 P&CR 310.

35 *Newbury DC v Secretary of State* [1981] AC 578, HL.

36 Welsh Government Circular 016/2014, *The Use of Planning Conditions for Development Management*.

4.81 Related to that is possible uncertainty as to the effect of an invalid condition – can it simply be severed from the permission and ignored, or does it invalidate the entire permission? The courts have suggested that the answer depends on whether the condition is incidental or fundamental.[37] We suggested in the Scoping Paper that there might be scope for incorporating that rule into the legislation.

Other proposals

4.82 We also asked respondents to the Scoping Paper to propose other points established in case law that might usefully be codified. A few suggestions were made, although generally without much elaboration.

4.83 As to the need for planning permission, respondents suggested that the meaning of "material change of use" and the extent of the "planning unit" could be codified, as well as the correct method of calculating "ground level". As to applications, suggestions included the codifying of the *Wheatcroft* principle,[38] whereby an applicant for planning permission can change the extent of development following the submission of an application if to do so would not deprive any third parties of an opportunity to object.

4.84 Others asked for more clarification as to the definition of terms such as "abutting", "adjacent", "amenity", "dwelling", "dwellinghouse", and "highway".

Codification of case law: conclusions

4.85 We have considered carefully the issue of codification of case law, in light of the responses to the Scoping Paper and more generally.

4.86 The purpose of this exercise is not to codify case law for its own sake – there are many hundreds of judicial judgments relating directly or indirectly to planning law, and it would be both impractical and unhelpful to seek to codify all of them. And any selection of judgments to be codified is bound to be to some extent arbitrary. Nor is it appropriate to include in the statutory code principles derived from Government policy, which will often change as the years go by.

4.87 However, we are seeking to make the statutory code as clear as reasonably possible, whilst ensuring that it does not become unmanageably lengthy. In that endeavour, an examination of case law has several distinct purposes.

4.88 Firstly, some statutory provisions are the subject of attention by the courts to a much greater extent than others. A casual glance through the *Encyclopedia of Planning Law and Practice*, for example, reveals that the commentary on most sections of the TCPA 1990 extends to a page or two; but the commentary on a few is considerably longer – the notes on section 70 (determination of planning applications) extend to over ninety pages. That in turn indicates that those sections are constantly in use; it also demonstrates that for some reason they are sufficiently uncertain in their meaning as to render justifiable the costs of litigation. And anyone who writes legal textbooks or gives lectures to practitioners knows that one or two provisions engender

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[37] *Hall & Co v Shoreham-by-Sea UDC* [1964] 1 WLR 240, CA; *Kent CC v Kingsway Investments (Kent)* [1971] AC 72, HL.

[38] *Bernard Wheatcroft Ltd v Secretary of State for the Environment* [1982] JPL 37.

far more uncertainty and interest than almost all of the others – for example, section 198(6)(b) of the TCPA 1990 (the meaning of "nuisance" in relation to protected trees)[39] and section 1(5) of the Listed Buildings Act 1990 (the extent of listing)[40].

4.89 In the remainder of this Consultation Paper, we have paid particular attention to those key provisions.

4.90 Secondly, however, judicial decisions explore the correct interpretation of the current law, regardless of whether that interpretation is helpful or not. Judges rightly emphasise that the making of changes to the law is the job of the legislature, not that of the courts. As the House of Lords expressed it in *Pioneer Aggregates*:

> It will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law, it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute or statutory code considered as a whole.[41]

4.91 It does not necessarily help, therefore, simply to incorporate into a statute decisions that are intrinsically unsatisfactory. And of course successive cases – or a single case, as it progresses through successive stages of appeal – may yield differing results.

4.92 It was with such considerations in mind that we put forward criteria for when it was appropriate to incorporate case law, as outlined earlier.[42] But to those we might add a further consideration, namely, whether the position established by case law reflects what is generally felt to be the "best" or most "satisfactory" interpretation of the provision in question, however one might assess that. And indeed it might in some cases be appropriate to incorporate in the Code a rule that is not established in case law, in order to achieve a better result. However, clearly, if there is an element of controversy as to how a provision is best to be interpreted, that would suggest that it may be inappropriate to codify that provision at this stage.

4.93 Thirdly, case law may fill in gaps left by legislation. So, for example, as noted above, the TCPA 1990 itself allows for the imposition of conditions on planning permissions, but makes no provision as to what types of condition are lawful. The courts have filled that gap, as has Government guidance.[43] And such case law or guidance may in practice be entirely uncontroversial.

4.94 In such cases, and there may not be many of them, the existence of a widely followed rule based in case law suggests that there is simply a gap in the statutory code that could easily be filled. It is thus noteworthy that in England the power of planning authorities to impose conditions on planning permissions is in future to be constrained

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39 See **paras 15.70 to 15.80.**

40 See **paras 13.187 to 13.190, 18.139 to 18.145.168**.

41 [1985] AC 132, per Lord Scarman at p 141.

42 See **para 4.54** above.

43 See **paras 8.90, 8.91** above.

by section 100ZA of the TCPA 1990.[44] This will introduce into statute the test currently found in Government guidance, which itself expands upon the rule in *Newbury v Secretary of State*.[45]

4.95 The same position arises in relation to the test for the lawfulness of planning obligations, which used to be in guidance, and is now contained in secondary legislation.[46]

4.96 In light of the considerations above, we suggest that the key is not to codify case law as an end in itself, but rather to explore where the legislation is currently unclear, and how that can best be resolved, in light of case law (if any).

4.97 Finally, in each case, we are well aware that our recommendations and proposals only relate to the law as it applies in Wales. If they are accepted, the existing position would remain unaltered in England. That might lead to an unsatisfactory position, until corresponding changes are made in England – which might not occur for some time, or at all. That would not be a problem where we are proposing simply to codify an existing non-controversial and widely known rule from case law or guidance; but it could be problematic in other cases.

4.98 In light of the responses to the Scoping Paper, and in the spirit of the general observations above, we have reviewed the case law in relation to each of the topics considered in Part Two, and put forward proposals where we consider that to be appropriate. However, in line with the caution expressed in the Scoping Paper, and by a number of those responding to it, we have generally concluded that codification of case law is not as helpful as it might at first sight appear to be.

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44 To be introduced by Neighbourhood Planning Act 2017, s 14 (see **para 8.94**).

45 See **para 4.91** above.

46 Community Infrastructure Regulations 2010, reg.122; see, formerly, Welsh Office Circular 13/97, Annex B.

PART TWO
SPECIFIC TOPICS

Chapter 5: Introductory provisions

INTRODUCTION

5.1 The new Planning Bill will incorporate a number of general provisions underlying its operation. These are likely to include:

(1) an overview of the scope of the Bill, and possibly that of the Planning Code ("the Code") as a whole;

(2) references to the principles forming the basis of decision-making under the Code;

(3) an indication of the key agencies operating the Code – notably planning authorities and possibly the Planning Inspectorate;

(4) the application of the Code in special cases (such as in relation to Crown land, local authority land, and statutory undertakers);

(5) the definitions of terms within it.

5.2 The scope of the Bill has been considered in Part One of this Consultation Paper. Special cases and definitions are dealt with in **Chapter 17**.

5.3 In this Chapter we consider whether there is a need for an explicit statutory purpose within the Planning Bill (and by extension the Planning Code), and how to rationalise and simplify the various statutory duties that currently apply to the exercise of planning functions. We then discuss those provisions which deal with the administration of the planning system.

PRINCIPLES UNDERLYING THE PLANNING CODE

Statutory statement of purpose for the planning system

5.4 One of the earliest statutes relating to town and country planning expressed the task of the Minister of Town and Country Planning as being "securing continuity in the framing and execution of a national policy with respect to the use and development of land throughout England and Wales".[1] The TCPA 1947 contained no such

[1] TCPA 1943, s 1.

overarching principle as to the basis on which the Minister – or planning authorities – should act. Nor was any such principle contained within any of the numerous planning Acts that followed it.

5.5 In our Scoping Paper, we suggested including a statutory statement as to the purpose of the planning system – both plan-making and decision-taking. This received considerable support. The Town and Country Planning Association agreed that the new Planning Code should include a statutory purpose for planning and suggested that this should take into account the definition used in the Planning (Wales) Act ("P(W)A") 2015 as well as other relevant Welsh legislation, in particular the Well-being of Future Generations (Wales) Act ("Well-being Act") 2015. It suggested the following definition:

> The planning system in Wales exists to promote and enable sustainable development by effective plan-making, decision-making and enforcement systems operated in the public interest by local planning authorities, and Welsh Government and its agencies.

5.6 The inclusion of a statutory statement of purpose was also supported by the Country Land and Business Association (CLA), Persimmon Homes West Wales, Planning Aid Wales and Innogy Renewables.

5.7 The Independent Advisory Group (IAG) report of 2012 also recommended that there should be a statutory statement as to the purpose the planning system, along the following lines:

> The purpose of the town and country planning system is the regulation and management of the development and use of land in a way that contributes towards the achievement of sustainable development. [2]

This led to the introduction in the P(W)A 2015 of the sustainable development principle, considered below, but only in relation to certain functions under the TCPA 1990.

5.8 After careful consideration, our provisional view is that, providing the various statutory duties which apply to decision-making within the planning system are rationalised and clarified, there will be no need in the Planning Bill for an explicit statutory purpose for the planning system as a whole. We discuss this further below.[3]

Statutory duties applicable to the exercise of planning functions

5.9 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:

(1) the development plan, so far as material, and

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2 *Towards a Welsh Planning Act: Ensuring the System Delivers*, Report to the Welsh Government by the Independent Advisory Group, June 2012, recommendation 1-3.

3 See **paras 5.119 to 5.121.**

(2) to all other material considerations.

5.10 There are also certain specific material considerations that are highlighted in one way or another:

(1) the preservation or enhancement of listed buildings and conservation areas;

(2) the use of the Welsh language; and

(3) Welsh Government policy.

5.11 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.

5.12 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.

5.13 We noted in the Scoping Paper that there are at present, both within legislation specifically relating to planning and elsewhere, a surprisingly large number of duties laid upon the Welsh Ministers, planning authorities and other public bodies in the exercise of their functions. We suggested that it might be helpful to local planning authorities if the various duties which apply to them when making planning decisions were brought into one place.[4] We suggested that, at the very least, the Planning Code could contain signpost provisions that point to other legislation in which these various duties may be found.

5.14 We noted in our meetings with stakeholders that many were largely unaware of some of the duties in question – particularly those referred to in **paragraph 5.12** above. All knew about the duty to have regard to the development plan, and the duties relating to listed buildings; however, few knew about, for example, the requirements to consider the countryside, and national parks; and almost none were aware of the provisions of the Crime and Disorder Act 1998 relating to crime prevention.

5.15 The National Grid agreed with our provisional view. But the Planning and Environmental Bar Association (PEBA) considered that the "signposting" might be better achieved through non-statutory guidance rather than by being included in the Planning Bill itself.

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4 See *Planning Law in Wales: Scoping Paper*, Law Commission Consultation Paper No 228, 2015, para 5.28.

THE DUTY TO HAVE REGARD TO THE DEVELOPMENT PLAN

The existing law

5.16 Section 70 of the 1990 Act has been significantly amended since it was first enacted. It now applies in Wales as follows:

> (1) Where an application is made to a local planning authority for planning permission—
>
> (a) subject to section 62D(5) and sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit[5]; or
>
> (b) they may refuse planning permission.
>
> (2) In dealing with an application for planning permission the authority shall have regard to—
>
> (a) the provisions of the development plan, so far as material to the application,
>
> (aa) any considerations relating to the use of the Welsh language, so far as material to the application; … and
>
> (c) any other material considerations.
>
> (3) Subsection (1) has effect subject to section 65 and to the following provisions of this Act, to sections 66, 67, 72 and 73 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and to section 15 of the Health Services Act 1976.[6]

5.17 Section 65 of the TCPA 1990 and sections 67 and 73 of the Listed Buildings Act 1990 relate to the need to publicise certain categories of applications; and section 15 of the 1976 Act relates to applications for certain categories of NHS development; they are accordingly dealt with in a later Chapter.[7] Sections 66 and 72 of the Listed Buildings Act 1990 are dealt with below.[8]

5.18 Section 70 of the TCPA 1990 is applied by sections 77(4) and 79(4), which govern the determination of applications called-in by the Welsh Ministers for their own decision, and the determination by them of appeals against the decisions of planning authorities.

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5 Section 62D relates to applications for developments of national significance, and is dealt with in **Chapter 9** of this Consultation Paper. Section 91 deals with planning conditions, and section 92 with outline permission; they are dealt with in **Chapter 8**.

6 Subsection (4) contains definitions; other subsections apply only in England.

7 See **paras 8.197, 8.198, Consultation question 8-29**.

8 See **paras 5.41 to 5.56, Consultation question 5-4**.

5.19 It will be noted that the duty laid on the planning authority is to have regard to the whole development plan, not merely parts of it; but only so far as the plan is relevant to the application in question.

5.20 In addition, a duty to have regard to the development plan, so far as material, explicitly applies in relation to the exercise by an authority of various other powers under the planning Acts. The complete list of functions to which the duty relates is thus as follows:

(1) the determination of planning applications and appeals (under sections 70, 77 and 79 of the TCPA 1990);

(2) the imposition of conditions limiting the duration of a planning permission (under section 91);

(3) the imposition of conditions on an outline planning permission (under section 92);

(4) the revocation or modification of a planning permission (under section 97);

(5) the making of a discontinuance order (under section 102 or Schedule 9);

(6) the issue of an enforcement notice (under section 172);

(7) the grant or modification of a planning permission when determining an appeal against an enforcement notice (under section 177); and

(8) the determination of applications for hazardous substances consent (under section 9 of the Planning (Hazardous Substances) Act 1990).

5.21 A similar duty applies in relation to the exercise of functions relating to the display of advertisements, but only in England.[9]

5.22 The formulation of the development plan is considered in the following Chapter of this Consultation Paper. But the importance of the plan in decision-making is fundamental. Further, the PCPA 2004 gave extra emphasis to this principle, by providing that,

> If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise.[10]

However, it is noteworthy that this emphasis is contained only in the 2004 Act, and not in the 1990 Act itself. The phrase "the planning Acts" refers to the TCPA 1990, the Listed Buildings Act 1990, and the Hazardous Substances Act 1990.

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9 TCP (Control of Advertisements) Regulations (England) 2007, reg. 3(1).

10 PCPA 2004, s 38(6) – superseding TCPA 1990, s.54A (inserted by Planning and Compensation Act 1991).

Possible reform

5.23 Although the duty to have regard to the development plan is applied to a significant range of functions under the TCPA 1990 and other legislation, listed above, the list is by no means comprehensive. It omits, for example, the approval of details required by a condition attached to a planning permission or in a development order; the negotiation of a planning obligation; the exercise of any enforcement powers other than the issue of an enforcement notice; and the withdrawal of an enforcement notice.[11] It also omits the exercise of any functions under Parts 8 to 15 of the TCPA 1990 – relating to, for example, protected trees, unsightly land notices, advertising (at least in Wales), and highways – and all functions under the Listed Buildings Act 1990.

5.24 In reality, the exercise of many of those powers is in fact carried out 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.[12]

5.25 It is also noteworthy that the duty applies at present to only to the exercise by a planning authority of any of various functions, and not to the exercise of such a function by any other public body.

5.26 In any event, if such provisions were relevant to the exercise of a particular function, a public body would be required to take them into account as part of its general common law duty to take into account anything that is relevant when making any decision.[13]

5.27 We therefore provisionally consider that the duty currently in section 70 (and in the other provisions listed at **paragraph 5.20** above) 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 therefore be included at the outset of the Bill, along with the principle as to the primacy of the plan, now currently only found in section 38(6) the PCPA 2004.

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11 TCPA 1990, s 79(1) provides merely that the Welsh Ministers when dealing with an appeal, may deal with it is if it were an application made to them in the first instance.

12 Subject to the decision in *Richmond-upon-Thames v Secretary of State* [2002] 2 PLR 115 (see **para 7.51**).

13 See **paras 5.28 to 5.32** above.

Consultation question 5-1.

We provisionally propose that a provision should be included in the Bill, to the effect that a public body exercising any function under the Code:

(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 relevant considerations indicate otherwise.**

Do consultees agree?

THE GENERAL DUTY TO HAVE REGARD TO OTHER MATERIAL CONSIDERATIONS

The existing law

5.28 In addition to the development plan, each of the various statutory provisions referred to in **paragraph 5.20** above also refers to the duty to take into account "any other material considerations". This is arguably no more than a statutory statement of a basic principle of administrative law:

> A person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'.[14]

5.29 This principle is of critical importance, as decision makers must in many cases to 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. There is also a need to balance different provisions of a plan, or of overlapping plans, which may pull in opposite directions; and this should be done in light of all material considerations.

5.30 As to what types of consideration might be material, the classic formulation is contained in the much-quoted dictum of Cooke J in *Stringer v Minister of Housing and Local Government*:

> Any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular

[14] *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].

> consideration falling within that broad class is material in any given case will depend on circumstances.[15]

5.31 Lord Bingham commented as follows, in *Tesco Stores v Secretary of State and West Oxfordshire DC*:

> I take "material" in this context to mean "relevant". Thus the subsection expresses the familiar rule that a decision-maker must take account of relevant considerations and not take account of irrelevant considerations. … The weight to be given to any consideration properly regarded as relevant is, of course, a matter for the planning decision-maker.[16]

5.32 More recently Lord Carnwath of Notting Hill JSC, in *R (Health and Safety Executive) v Wolverhampton CC)*, held:

> "Material" in ordinary language is the same as "relevant". Where the exercise of the power, in the manner envisaged by the statute, will have both planning and financial consequences, there is no obvious reason to treat either as irrelevant.[17]

Possible reform

5.33 As with the development plan, the list of functions that are explicitly subject to the duty to have regard to "other material considerations" is extensive, but by no means comprehensive. But, again, the duty to have regard to everything that is relevant applies to the exercise by a public body of any function under any legislation, regardless of whether or not that is stated.

5.34 We have already noted that it is helpful in practice for there to be an explicit reference to the duty to have regard to other material considerations.[18] But it seems arbitrary and unhelpful for it to be mentioned only in relation to certain duties. We provisionally consider that the duty should be explicitly applied to the exercise of *any* function under the new Planning Code.

5.35 As to what is a material consideration, the principle in *Stringer*[19] does not seem at first glance to provide a particularly useful test. The Scoping Paper therefore noted that there might be scope for improving the accessibility of the law by codifying the case law on material considerations, with the caveat that careful thought would need to be given to whether the result would actually be greater clarity.[20]

5.36 RTPI Cymru thought that more detail on "the principles of what is and what is not a material consideration" would be useful. Similarly, Merthyr Tydfil County Borough

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15 [1970] 1 WLR 1281, at p 1294.

16 (1994) 68 P&CR 219, CA, at p.227.

17 [2012] UKSC 34, 1 WLR 2264, at [26].

18 See **para 5.29** above.

19 See **para 5.30** above.

20 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 7.36.

Council suggested that the new Planning Code should codify the "need" for a development as a material planning consideration. The Planning Inspectorate, on the other hand, noted that concept of "material considerations" (as with the definition of "curtilage") does not lend itself well to being set down in law.

5.37 Further, if reference is made to particular topics – either within the 1990 Act itself or by reference to other Acts – it may have the result that those topics are likely to be given greater importance (in some cases, much greater importance) in the decision-making process than other topics not so named. The principle explained by the Court of Appeal in the *East Northamptonshire* and *Bath Society* cases, noted below[21] – as to the weight to be given to certain material considerations – apply strictly only in relation to those considerations to which an authority must "pay special attention" or "have special regard". But it is likely that any relevant consideration that is mentioned will be given priority in practice, unless that is explicitly discouraged.

5.38 On reflection, therefore, we consider that the principle outlined in *Stringer* still accurately summarises the position in law; but that it is not readily capable of being worded as a statutory provision. We therefore do not recommend that the phrase "material considerations" is defined in more detail. And, generally, we recommend that the Code does not explicitly refer to specific categories of considerations (subject to the two exceptions noted below.[22]

5.39 On the other hand, we consider that, in light of the increasing tendency of the courts (and others) to refer to particular considerations being "relevant" rather than "material"[23], we consider that it might be more helpful if the phrase "relevant considerations" were used.

5.40 Subject to those points, we therefore provisionally consider that the duty currently under each of the provisions listed at **paragraph 5.20** above to have regard to "other relevant [material] considerations" should be applied to the exercise by any public body of any functions under the Planning Code – not just those functions to which it is currently explicitly applied.

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21 See **paras 5.46 and 5.49**.

22 See **Consultation question 5-5** (Welsh language) and **Consultation question 5-6** (Government policy)**.**

23 See the extracts from decisions of the Supreme Court at **paras 5.31 and 5.32** above.

Consultation question 5-2.

We provisionally consider that;

(1) to attempt to define relevant or material considerations in the Planning Code would cause as many problems as it would solve; and

(2) the term "relevant considerations" would be more appropriate than "material considerations."

Do consultees agree?

Consultation question 5-3.

We provisionally propose that a provision should be included in the Bill, to the effect that a public body exercising any function under the Code must have regard to any other relevant considerations.

Do consultees agree?

SPECIFIC MATERIAL CONSIDERATIONS (1): LISTED BUILDINGS AND CONSERVATION AREAS

Listed buildings: the existing law

5.41 It has been noted above that section 70(3) of the TCPA 1990 (determination of applications: general considerations) explicitly provides that the power to determine planning applications is to be exercised subject to sections 66 and 72 of the Listed Buildings Act 1990.[24]

5.42 Section 66 of the Listed Buildings Act 1990 (entitled "general duty as respects listed buildings in exercise of planning functions") provides, in Wales, as follows:

> (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 Welsh Ministers 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.
>
> (2) Without prejudice to section 72, in the exercise of the powers of appropriation, disposal and development (including redevelopment) conferred by [the TCPA 1990], a local authority shall have regard to

[24] See **para 5.16** above.

> the desirability of preserving features of special architectural or historic interest, and in particular, listed buildings.[25]

5.43 Section 16 imposes a duty on planning authorities and the Welsh Ministers to have special regard to the desirability of preserving a listed building or its setting or any features of special interest – in identical terms to the duty in 66(1) – when dealing with applications for listed building consent.

5.44 Neither duty is explicitly applied to the determination of planning or listed building consent appeals[26], although such a duty is implicitly applied by section 79(1) of the TCPA 1990 and section 22(1)(a) of the Listed Buildings Act 1990.

5.45 It is apparent that, in spite of the title of section 66, the duty to consider listed buildings applies only to the determination of applications for planning permission and listed building consent, and the acquisition and disposal of land – and in one case the duty is to have "special regard" to the desirability of preservation etc' and in the other only to have "regard" to it. It does not apply to the exercise of other functions under the TCPA 1990, nor to the exercise of functions under the PCPA 2004 (relating to development plans).

5.46 As to the weight to be given to the duty, the Court of Appeal has noted that:

> Parliament's intention in enacting section 66(1) was that decision-makers should give 'considerable importance and weight' to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise.[27]

Conservation areas

5.47 Section 72 of the Listed Building Act 1990 ("general duty as respects conservation areas in exercise of planning functions") provides:

> (1) In the exercise, with respect to any buildings or other land in a conservation area, of any [functions under or by virtue of] any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.
>
> (2) The provisions referred to in subsection (1) are the planning Acts and Part I of the Historic Buildings and Ancient Monuments Act 1953 and sections 70 and 73 of the Leasehold Reform, Housing and Urban Development Act 1993.[28]

5.48 The duty to consider conservation areas is more widely framed than the corresponding duty relating to listed buildings, as it applies to the carrying out of any

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25 Duty first introduced in TCPA 1968, s 41, drafted so as to relate both to applications for planning permission and applications for listed building consent.

26 There is thus no provision in either case equivalent to TCPA 1990, s.79(4) (see **para 5.18**).

27 *East Northamptonshire DC v Secretary of State* [2014] EWCA Civ 137, [2015] 1 WLR, CA, per Sulivan LJ at [29], approved in *Mordue v Secretary of State* [2015] EWCA Civ 1243, [2016] 1 WLR 2682, CA.

28 Duty first introduced in Civic Amenities Act 1967, s 1(5), drafted so as to refer to all functions under the TCPA 1971 (now TCPA 1990 and Listed Buildings Act 1990).

function under the planning Acts, and not just to the determination of applications for planning permission and listed building consent. It also applies to limited functions under the 1953 Act (largely related to grants and land acquisition) and the 1993 Act (leasehold enfranchisement), but not to those under the PCPA 2004 (development plans).

5.49 The Court of Appeal has considered the significance of this provision, as follows:

> … in a conservation area the requirement under [section 72 of the Listed Buildings Act 1990] to pay "special attention" should be the first consideration for the decision-maker. It is true that the desirability of preserving or enhancing the character or appearance of the conservation area is, in formal terms, a "material consideration" within [section 70 of the TCPA 1990]. Since, however, it is a consideration to which special attention is to be paid as a matter of statutory duty, it must be regarded as having considerable importance and weight.[29]

Listed building and conservation areas: possible reform

5.50 As noted above, the statutory duties relating to listed buildings and conservation areas are contained in the Listed Buildings Act 1990, and referred to in the TCPA 1990.[30]

5.51 It is noteworthy that there is no statutory duty, general or otherwise, relating to categories of heritage asset (as they are now sometimes referred to) other than listed buildings and conservation areas – notably world heritage sites, scheduled monuments, and registered gardens and landscapes. Given that world heritage sites, in particular, are sites of "of outstanding interest, and therefore need to be preserved as part of the world heritage of mankind as a whole"[31], and that scheduled monuments are stated to have a status equivalent to that of Grade I and II* listed buildings[32], that seems surprising.

5.52 We provisionally consider 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). It would also be appropriate to insert a power to 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.

5.53 Further, it seems illogical that the duty relating to conservation areas applies to the exercise of any function under any of the planning Acts – which is significantly wider than the functions subject to the duty to have regard to the development plan. The duty relating to listed buildings, by contrast, applies only in relation to some of those

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29 *Bath Society v Secretary of State* [1991] 1 WLR 1303, CA, at pp 1318-1319. The case related to TCPA 1971, s 277 (the predecessor to Listed Buildings Act 1990, s 72).

30 See **paras 5.41 to 5.49**.

31 World Heritage Convention, 1972, preamble.

32 WO Circular 60/96, Annex 1, para 4.

functions – and is expressed in slightly different terns in section 66(1) (planning decisions) and section 66(2) (acquisition of land).

5.54 This is in contrast with the duties, considered below[33], to have regard to various aspects of the natural environment, and other matters, each of which applies to any relevant public body when exercising any of its functions.

5.55 It may be noted that the High Court has recently held (in *R v (McClellan) v Lambeth LBC*) that although the duty in section 72 would not apply to the felling by a local authority of a tree in a conservation area where it was not acting in the exercise of any of the functions listed in section 72(2), the existence of the conservation area would nevertheless be a material consideration, which should have been taken into account by the authority.[34]

5.56 We provisionally consider that the duties relating to listed buildings, conservation areas and other historic assets should be applicable to the exercise by any relevant public body when exercising any of its functions in circumstances likely to affect an asset or its setting or its features. We do not consider that the making explicit of such a duty would involve an authority in any significant extra expense – as emphasised by decisions such as *McClennan*, the duty applies in any event when exercising such a function in relation to a heritage asset or its setting.

Consultation question 5-4.

We provisionally propose that a provision or provisions should be included to the effect that:

(1) **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**

(2) **a body exercising functions under the Planning Code and the Historic Environment Code must have special regard to those matters;**

and that "historic 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.

Do consultees agree?

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33 See **paras 5.96 to 5.113**.

34 [2014] EWHC 1964 (Admin), considered in *R (Dillner) v Sheffield CC* [2016] EWHC 945 (Admin), [2016] Env LR 31, per Gilbart J at [168].

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

The existing law

5.57 One of the elements of the sustainable development principle is that a public body must act so as to achieve "a Wales of vibrant culture and thriving Welsh language".[35] However, in addition, the P(W)A 2015 introduced certain specific duties into the planning system.

5.58 Section 3 of the P(W)A 2015 inserted section 60B(2) into the PCPA 2004, so as to require the sustainability appraisal produced in connection with the National Development Framework to include "an assessment of the likely effects of the policies in the draft Framework on the use of the Welsh language". A similar provision was inserted into the PCPA 2004 in relation to the preparation of strategic and local development plans.[36]

5.59 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."

5.60 However, subsection (4) of section 31 provides that:

> (4) The amendments made by this section do not alter—
>
> (a) whether regard is to be had to any particular consideration under subsection (2) of section 70 of the TCPA 1990, or
>
> (b) the weight to be given to any consideration to which regard is had under that subsection.

5.61 In other words – as with the sustainable development principle, below – the explicit reference to the Welsh language does not give it a primacy over and above any other material consideration.

5.62 The duty to have regard to the effect of planning policy and decisions on the use of the Welsh language thus applies to the formulation of the National Development Framework and strategic and local development plans, and to the determination of planning applications. But it does not apply to other functions under the TCPA 1990, nor to any functions under the Listed Buildings Act 1990.

Effect on the use of the Welsh language: possible reform

5.63 As with the development plan, the duty to have regard to the effect of the exercise of a function on the use of the Welsh language applies explicitly only to certain functions under the TCPA 1990 and the PCPA 2004 – principally the formulation of development plans and the determination of planning applications and appeals. As

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35 Well-being Act 2015, s 4. See **para 5.81** below.

36 PCPA 2004, 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).

with the development plan, therefore, it does not explicitly apply to the exercise of any other functions under the planning Acts.

5.64 However, as will be apparent from the commentary above in relation to other considerations[37], any consideration – whether explicitly mentioned in the relevant statute or not – must be taken into account if it is relevant to the exercise of a particular statutory function, and must be ignored if it is irrelevant. That applies to the effect of a decision on the use of the Welsh language just as to any other consideration.

5.65 We recognise that it is probably desirable that there should be some mention in the Planning Bill of the effect of planning decisions on the use of the Welsh language. We therefore accept that this is an exception to the principle, noted above, of generally not mentioning specific relevant considerations.[38] However, there seems to be no reason to limit the range of functions to which the duty applies. If, as we propose, the Planning Bill explicitly requires regard to be had to "other relevant considerations" when exercising any function under the Code, all that would be needed in addition would be the inclusion of a provision to the effect that such considerations would include the effect of the decision in question on the use of the Welsh language, where relevant to that decision.

5.66 For the avoidance of doubt, 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 reference to the Welsh language does not affect whether regard is to be had to any particular consideration, or the weight to be given to any such consideration.

Consultation question 5-5.

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

(1) **the relevant considerations, to which a public body must have regard (in accordance with Consultation question 5-3) when exercising any function under the Code, 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; and**

(2) **the duty to consider the effect 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.**

Do consultees agree?

37 See **paras 5.28 to 5.32**.

38 See **para 5.38**.

SPECIFIC MATERIAL CONSIDERATIONS (3): WELSH GOVERNMENT POLICY

The existing law

5.67 The Wales Spatial Plan, entitled *People, Places, Future*, was approved by the Assembly most recently in an updated version on 8 July 2008.[39] In due course, that Plan will be replaced by the National Development Framework, currently being produced by the Welsh Ministers.[40] It forms part of the development plan, and has weight in development management decisions accordingly.

5.68 In practice, 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 also hugely influential in providing the policy basis for both plan-making and decision-taking.

5.69 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".[41] That phrase is nowhere defined; but Beatson J, in *R (Persimmon Homes Ltd) v Vale of Glamorgan Council*, stated that:

> I have referred to the requirement in section 62(5) of the 2004 Act that local planning authorities must have regard to current national policies; that is the policies of the Welsh Assembly Government. These have been revised from time to time. …
>
> … In light of that, the officers in preparing their report for the elected members were entitled and indeed required to take into account the Welsh Assembly Government's policy on new settlements and to test emerging ideas and options against that policy.[42]

5.70 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.

5.71 However, the courts have stated clearly that:

> There have been some earlier cases in relation to this question, and I have been referred to three authorities. … they do make it clear that policy statements of the Secretary of State are material considerations to which regard should be paid in considering the outcome of a planning application or a planning appeal, and they also make it clear that if there is to be a departure from such a policy statement then clear

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39 PCPA 2004, s 60 (as originally enacted).

40 PCPA 2004, s 60 (as substituted by P(W)A 2015, s 3, from a date to be appointed).

41 PCPA 2004, s 62(5).

42 [2010] EWHC 535 (Admin), at [20], [118].

> reasons should be given as to why there is to be a departure from the stated policy.[43]

5.72 More recently, the Supreme Court has clarified the status of the NPPF (the principal statement of central Government policy in England), as follows:

> The Framework itself makes clear that as respects the determination of planning applications (by contrast with plan-making in which it has statutory recognition), it is no more than "guidance" and as such a "material consideration" for the purposes of section 70(2) of the 1990 Act: see *R (Cala Homes (South) Ltd v Secretary of State*.[44] It cannot, and does not purport to, displace the primacy given by the statute and policy to the statutory development plan. It must be exercised consistently with, and not so as to displace or distort, the statutory scheme.[45]

5.73 Presumably 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.

Welsh Government policy: possible reform

5.74 Given that, in reality, national policies – that is the policies of the Welsh Government relating to the use and development of land – are of such significance in the day-to-day operation of the planning system, it seems surprising that they are not mentioned on the face of the TCPA 1990 as a consideration to be taken into account. As noted above, the Courts have, on a number of occasions, accepted that Government policy is a material consideration in the determination of planning applications.

5.75 We therefore provisionally consider that, as with the Welsh language (above), the Bill should state explicitly that such policies, so far as relevant, are amongst the matters to which public bodies are to have regard when exercising any functions under the Planning Code. Given that such policies are already a relevant consideration, this proposal does no more than to make that explicit. We therefore do not consider that it would introduce any additional burden on planning authorities or other bodies.

5.76 However, we are mindful of the observations of the Supreme Court in *Hopkins Homes* to the effect that the relevance of Government policy in planning decisions is not to displace the primacy given to the development plan.[46] We therefore consider that Government policy should be mentioned in the Bill as one of the relevant considerations to which consideration should be given, rather than as a freestanding matter alongside the development plan.

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43 *Gransden (E C) Ltd v Secretary of State* (1987) 54 P&CR 86 per Woolf J at p 87.

44 [2011] 1 P&CR 22, per Lindbom J at [50].

45 *Hopkins Homes v Secretary of State*; *Cheshire East BC v Secretary of State* [2017] UKSC 37, PTSR 623, at [21].

46 See **para 5.72**.

Consultation question 5-6.

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

(1) **the relevant considerations, to which a public body must have regard (in accordance with Consultation question 5-4) when exercising any function under the Code, 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; and**

(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.**

Do consultees agree?

THE SUSTAINABLE DEVELOPMENT PRINCIPLE

The existing law

5.77 The enactment of the P(W)A 2015 immediately followed that of the Well-being Act 2015. In order to provide a link between the two statutes, what is now section 2 of P(W)A 2015 was added during the course of the passage of the Bill through the Assembly.

5.78 Section 2 of the P(W)A 2015 provides as follows:

> (1) This section applies to the exercise by the Welsh Ministers, a local planning authority in Wales or any other public body—
>
> (a) of a function under Part 6 of PCPA 2004 in relation to the National Development Framework for Wales, a strategic development plan or a local development plan;
>
> (b) of a function under Part 3 of TCPA 1990 of in relation to an application for planning permission made (or proposed to be made) to the Welsh Ministers or to a local planning authority in Wales.
>
> (2) The function must be exercised, as part of carrying out sustainable development in accordance with the Well-Being Act, for the purpose of ensuring that the development and use of land contribute to improving the economic, social, environmental and cultural well-being of Wales.

(3) In complying with subsection (2), a public body must take into account guidance issued by the Welsh Ministers (including relevant guidance issued under section 14 of the Well-being Act).

(5) Nothing in this section, as it applies in relation to functions under Part 3 of the TCPA 1990, alters—

(a) whether regard is to be had to any particular consideration under subsection (2) of section 70 of that Act (determination of applications for planning permission), or

(b) the weight to be given to any consideration to which regard is had under that subsection.[47]

5.79 Section 2 of the Well-being Act 2015 provides that:

> 'sustainable development' means the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle (see section 5), aimed at achieving the well-being goals (see section 4).

5.80 Section 5(1) provides that:

> any reference to a body acting 'in accordance with the sustainable development principle' means that the body must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs.

Section 5(2) then elaborates this principle in more detail.

5.81 The "well-being goals" are defined in section 4 of the Well-being Act 2015, as follows:

(1) a prosperous Wales;

(2) a resilient Wales;

(3) a healthier Wales;

(4) a more equal Wales;

(5) a Wales of cohesive communities;

(6) a Wales of vibrant culture and thriving Welsh language; and

(7) a globally responsible Wales.

Each of the goals is defined in more detail in Table 1 in section 4.

5.82 Finally, under section 3(1) of the Well-being Act 2015, each public body must "carry out sustainable development". That includes identifying well-being objectives that

[47] Subsections (4) and (6) are definitions and consequential amendments.

are designed to maximise its contribution to achieving each of the well-being goals, and taking all reasonable steps to meet those objectives, but the duty is not limited to such objectives. "Development" in this section clearly is not limited to "development" as defined in the TCPA 1990 (building [etc.] operations and changes of use of land), although it may include it.

5.83 This set of duties under the Well-being Act and the P(W)A 2015 effectively replaces the duty of planning authorities in Wales under section 39 of the PCPA 2004 to contribute to the achieving of sustainable development in preparing national or local development plans, and the more general duty laid upon the Welsh Ministers by section 79 of the Government of Wales Act 2006 (as first enacted) to produce an annual scheme setting out how they propose, in the exercise of their functions, to promote sustainable development.

5.84 Section 79 of the 2006 Act now provides simply that the Welsh Ministers must make appropriate arrangements to promote sustainable development.[48]

5.85 Section 3(1) of the Well-being Act 2015 does not seem to confer upon public bodies a new function; rather, it lays upon such bodies 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.

5.86 Section 2 of the P(W)A 2015 thus seems to have been enacted for the avoidance of doubt, to make it clear that the new duties under the Well-being Act apply to the exercise by any public body of functions under Part 3 of the TCPA 1990 (planning applications and appeals), as well as to development planning under Part 6 of the PCPA 2004, and does not extend the duty under section 3 of the Well-being Act. And it is noteworthy that section 2(5) explicitly 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 below), nor as to the weight to be given to any such matter.

Sustainable development: possible reform

5.87 We have noted that section 2 of the P(W)A 2015 refers specifically to the determination of planning applications and development planning. However, we have also noted that 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.

5.88 We therefore consider that is not particularly helpful for there to be a specific provision linking only some of the provisions in the Codeto the Well-being Act.

5.89 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 do not consider that such a change

[48] Government of Wales Act 2006, s 79(1), substituted by Well-being Act 2015, s 16.

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

5.90 However, we consider below a number of other statutes (for example, those relating to the natural environment) that impose duties on public bodies, in the exercise of any of their functions, to have regard to various matters. On balance, we conclude that is not 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, the existence of those duties should be referred to in guidance. There seems no obvious reason why the duty under section 3 of the Well-being Act (albeit slightly differently phrased) is any different in principle.

5.91 We therefore provisionally consider that there is 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.

Consultation question 5-7.

We provisionally consider 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.

Do consultees agree?

DUTIES UNDER OTHER STATUTORY SCHEMES

5.92 In addition to the duties considered above, which apply directly to the exercise of functions under the planning Acts, there are a number of other statutes that impose duties that are directly relevant to the exercise of those functions.

5.93 We have noted above that there are duties under the Listed Buildings Act 1990 that apply to the exercise of some functions under the planning Acts; and we have provisionally proposed that they be extended to become a general duty, applying to the exercise of any statutory function by any public body.

5.94 We have also noted the general duty of public bodies, under section 3 of the Well-being Act 2015, to carry out sustainable development.

5.95 However, in addition to those duties, there are a number of others, under a wide range of statutes. We mention below some of those that seem to be most relevant to the exercise of planning functions.[49]

[49] The duties under each heading are listed in the order of their original introduction.

Duties relating to the natural environment

5.96 Under section 11 of the Countryside Act 1968, any public body exercising functions relating to land under any enactment is to have regard to the desirability of conserving the natural beauty and amenity of the countryside.

5.97 Under section 11A of the National Parks and Access to the Countryside Act 1949, as inserted by section 62 of the Environment Act 1995, in exercising any function in relation to land in a national park, any relevant authority shall have regard to the purposes of

(1) conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas [suitable for designation as national parks]; and

(2) promoting opportunities for the understanding and enjoyment of the special quality of those areas by the public.[50]

5.98 Under section 85 of the Countryside and Rights of Way Act 2000, in exercising or performing functions in relation to land in an area of outstanding natural beauty (AONB), authorities are to have regard to the purpose of conserving and enhancing the natural beauty of the AONB.

5.99 Finally, under section 6(1) of the Environment (Wales) Act 2016 (biodiversity and resilience of ecosystems duty):

> A public authority must seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions.

5.100 The nature of the duty is elaborated in section 6(2). It replaces the duty that used to apply under section 40 of the Natural Environment and Rural Communities Act 2006, which continues to apply in England.

5.101 These duties are clearly just as relevant to the exercise of planning functions in appropriate cases as are the duties under the Listed Buildings Act 1990, but they have not yet been the subject of any litigation or academic comment.

Duties currently under European directives relating to the environment

5.102 There are a number of EU directives relating to the environment that are relevant to the exercise of functions under planning legislation in certain cases. The most notable of those are as follows.

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[50] National Parks and Access to the Countryside Act 1949, s 5; applied to Wales by s 4A (inserted by Environment Act 1990, Sched 8, para 1). Where there is a conflict between the two specified purposes, priority is to be given to the first (s 11A(2)). A "relevant authority" includes the Welsh Ministers, local authorities, national park authorities, statutory undertakers and those holding a public office (subs (3), (4)).

5.103 Under regulation 9 of the Conservation of Habitats and Species Regulations 2010, any relevant authority, in exercising any of its functions, must have regard to the requirements of the Habitats Directive and the Wild Birds Directive.[51]

5.104 Regulation 18 of the Waste (England and Wales) Regulations 2011 provides that planning authorities, when exercising any of their planning functions in relation to waste must have regard to certain specified provisions of the Waste Framework Directive. Regulation 20 imposes similar requirements in relation to the Landfill Directive and the Mineral Waste Directive.[52]

5.105 The Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 do not contain any duties directly relevant to planning, but the provisions in them relating to the quality of water bodies (lakes, rivers etc) may be relevant in some cases.

5.106 It remains to be seen precisely how these requirements will be transposed into domestic legislation following the UK's withdrawal from the European Union, but it is highly unlikely that the substance of the various duties mentioned above will simply disappear.

Duties under other legislation

5.107 Section 17 of the Crime and Disorder Act 1998 imposes a duty on public authorities to exercise their various functions, under any legislation, with due regard to the need to do all they reasonably can to prevent crime and disorder in the area (including anti-social and other behaviour adversely affecting the local environment), the misuse of drugs, alcohol and other substances, and re-offending.[53] In response to the Scoping Paper, the Four Welsh Police Forces indicated that this needs to be reflected in any future planning laws in Wales.

5.108 By virtue of section 149 of the Equality Act 2010, authorities are also under a duty to exercise their functions with due regard to the need to eliminate discrimination against those with protected characteristics under the Act (including disability) and other conduct prohibited under the Act; and to advance equality between persons sharing a protected characteristic and others.

5.109 Under section 6 on the Human Rights Act 1998, public authorities are forbidden to act in a way which is incompatible with a right under the European Convention of Human Rights.

Duties under other statutory schemes: conclusion

5.110 Given that many of those using planning legislation are unaware of some or all of the duties discussed above, it might at first sight seem appropriate to restate them in the

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51 This replaces the duty under the Conservation of Habitats and Species Regulations 1994, which only related the exercise of functions relating to nature conservation.

52 Council directive 1999/31/EC (Landfill of waste); Directive 2006/21/EC (Management of waste from extractive industries).

53 Crime and Disorder Act 1998, s 17(1).

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.

5.111 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. That would still give rise to most of the above problems.

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

5.113 We therefore consider that it would be more appropriate for consideration to be given to the inclusion of such a list 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. That accords with the suggestion made by PEBA in response to the Scoping Paper.[54]

Consultation question 5-8.

We provisionally propose that a series of signpost provisions 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.

Do consultees agree?

COAL MINING

5.114 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 coal

[54] See **para 5.15** above.

mining, land restoration following mining, and incidental operations must 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.

5.115 That is in line with similar duties in relation to the exercise by other nationalised industries and public bodies of any of their functions.[55] However, the duty under the 1994 Act applies only in relation to the formulation of proposals. Further, when a planning authority is considering a planning application for such mining etc proposals, it is required by s. 53(2) of the 1994 Act to have regard to the desirability of the preservation of the various matters referred to in s.53(3) (natural beauty etc).

5.116 In practice, the authority is in many cases required to do that by other legislation – including the statutory provisions considered in the previous section of this Chapter. 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 will always include the matters mentioned in section 53. 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.

5.117 And if the planning authority is required to take those matters into account when assessing proposals, those formulating the proposals will equally have to take them into account – either avoiding any adverse impacts or mitigating them as far as possible.

5.118 We accordingly consider that section 53 adds nothing, and could be repealed so far as it applies in Wales.

Consultation question 5-9.

We provisionally propose that section 53 of the Coal Industry Act 1994 (environmental duties in connection with planning) should be amended so that it no longer applies in Wales.

Do consultees agree?

A STATUTORY PURPOSE FOR PLANNING

5.119 We noted at the outset of this Chapter that we had suggested in the Scoping Paper that it might be appropriate for the Bill to set out a statutory purpose for the planning system in Wales.[56]

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55 For example, housing authorities, internal drainage boards, water and sewerage undertakers; electricity suppliers; and telecommunications systems operators.

56 See **paras 5.4 to 5.8**.

5.120 If our proposals above are accepted, they would result in the various references to the development plan and other material considerations, currently scattered throughout the TCPA 1990 and elsewhere, being replaced with a single duty (or set of duties), perhaps at the outset of the new Bill, to the effect that:

(1) A public body exercising any function under the Code:

(a) must do so having regard to:

- the development plan, so far as relevant to the exercise of the function in question; and

- all other relevant considerations;

(b) and must exercise the function in question in accordance with the development plan, unless relevant considerations suggest otherwise;

(2) The considerations to which regard must be had (under (1)(a)) include:

(a) the polices of the Welsh Government relating to the use and development of land, so far as they are relevant to the exercise of the function in question; and

(b) the likely effect, if any, of the exercise of that function on the use of the Welsh language.

(3) The consideration of the matters mentioned in (2) is not to affect:

(a) whether regard is to be had to any other consideration when exercising that function, or

(b) the weight to be given to any such consideration in the exercise of that function.

5.121 On reflection, we provisionally consider that such a set of provisions would encapsulate much if not all of the matters that might be included in a statutory provision as to the overall purpose of the planning system. Further, to include a statutory purpose alongside such a set of provisions would possible cause unnecessary and unhelpful duplication and possible conflict. We therefore do not propose the inclusion of such a purpose.

Consultation question 5-10.

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

Do consultees agree?

THE ADMINISTRATION OF THE PLANNING SYSTEM

The Welsh Ministers

5.122 The TCPA 1990 as originally enacted referred to the functions of central Government being exercised by "the Secretary of State". Almost all of those functions were transferred to the National Assembly for Wales by a Transfer of Functions Order in 1999.[57] Those functions were then transferred to the Welsh Ministers by the Government of Wales Act 2006.[58] Other pieces of primary and secondary legislation refer variously to functions being exercised by the Minister, the Secretary of State, the National Assembly for Wales, and the Welsh Ministers.

5.123 Clearly the Planning Code will refer throughout to "the Welsh Ministers"; and that will in itself be a significant clarification for users of the system.

The Planning Inspectorate

5.124 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.

5.125 We note that the equivalent body in Northern Ireland is the subject of relatively brief provisions in section 203 of the Planning Act (Northern Ireland) 2011, describing its continuing governance arrangements, senior structure, impartiality and administration.[59] That derives in part from the different constitutional arrangements in Northern Ireland. Until recently, planning applications were made to the Department of the Environment, which was in effect a single-tier planning authority, so that appeals had to be made to a body distinct from the Department – which then had to be created by statute.

5.126 By contrast, the equivalent body in the Republic of Ireland, An Bord Pleanála, is the subject of much more extensive provisions in Part VI of the Planning and Development Act 2000, going into considerable detail as to its day-to-day operation. Those provisions too were the result of constitutional arrangements unique to the Republic.

5.127 We have also considered whether there should be a brief provision in the Code, perhaps following the Northern Ireland model, recognising the existence and role of the Planning Inspectorate (yr Arolygiaeth Gynllunio). And we have had discussions on this issue with the Inspectorate, which suggested that the legislation does not need

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57 National Assembly for Wales (Transfer of Functions) Order 1999 (SI No 672), art 2, Sch.1.

58 GOWA 2006, s 162(1), Sched. 11, para.30.

59 Northern Ireland Government's Explanatory Notes to the PNIA 2011.

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".

5.128 We have considered whether there is an alternative word, other than "inspector", to make it clear that the person appointed by the Welsh Ministers need not be an employee of the Inspectorate; and may be an employee other than an inspector.[60] "Examiner" would seem to the most appropriate of the possible synonyms. The word "reporter", used in Scotland, would not seem to be suitable, as in the great majority of cases the person in question will actually be making the decision, rather than submitting a report to the Welsh Ministers to enable them to make a decision.

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

5.130 We accordingly agree 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[61], or possibly as "examiners"; but that otherwise no changes should be made.

Consultation question 5-11.

We provisionally consider 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 does not prevent the Welsh Ministers appointing for a particular purpose a person other than an employee of the Planning Inspectorate.

Do consultees agree, and if so which term do consultees think is most appropriate?

Local authorities, national park authorities and joint planning boards

5.131 The TCPA 1990 and associated legislation refer at various places to "local planning authorities" and to "local authorities". The two terms should not be confused.

5.132 The statutory provisions as to the identity of local planning authorities, currently found in Part 1 of the TCPA 1990, are in general very complex. However, as demonstrated in **Table 1-2**, the provisions actually applying in Wales are significantly simpler, not least because Wales has a unitary system of local government – unlike England, which retains a two-tier system at least in some areas.

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60 Some relevant tasks are apparently carried out in practice by administrative support staff.

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

5.133 The basic rule is in section 1(1B) of the TCPA 1990: the "local planning authority" for a county is the county council; the planning authority for a county borough is the county borough council.[62] More detailed provisions relating to specific situations are in Schedule 1A to the TCPA 1990.[63]

5.134 Each of the national parks in Wales is looked after by a national park authority. Each such authority has members drawn from county or county borough councils and from community councils, and some appointed by the Welsh Government. It is thus not in itself a "local authority" (within the meaning of the Local Government Act 1972) – although national park authorities are defined as local authorities for the purposes of certain legislation. And "local authorities" include a variety of bodies other than simply local councils – such as joint boards and committees, with members appointed by councils. Section 4A of the TCPA 1990[64] provides that the local planning authority in a national park is generally the national park authority; and this is indeed the case in respect of each of the three national parks in Wales.[65]

5.135 Under section 2(1B) of the TCPA 1990[66], the Welsh Ministers may by order constitute as a united district all or part of the areas of two or more county or county borough councils outside a national park, and may then constitute a joint planning board as the local planning authority for that united district. Here too, a joint board is not a "local authority" as such, although it may be treated as one if all of its constituent authorities are local authorities.[67] It may be that this arrangement will be used more in future, in light of the suggestions made recently as to the possibility of joint working by neighbouring authorities.[68] And thought may need to be given as to the interrelationship between joint planning boards established under such provisions and strategic planning panels to be established under the new arrangement introduced by the P(W)A 2015.[69]

5.136 By virtue of section 1(4B), every local planning authority – county council, county borough council or national park authority – is also the mineral planning authority.

5.137 There is no reason to change these arrangements; and the omission of provisions that apply only in England will make this part of the Planning Code much simpler than it is at present.

Other types of local planning authority

5.138 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. No enterprise zone has been created under the 1980 Act for over

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62 Inserted by LGWA 1994, s.18.

63 Inserted by LGWA 1994, Sch 4, and amended by P(W)A 2015, Sch 4, para 22.

64 Inserted by EA 1995, s 67 (replacing TCPA 1990, s 4).

65 1995 SI 2803.

66 Inserted by LGWA 1994, s 19.

67 TCPA 1990, s 336.

68 White Paper, *Reforming Local Government: Resilient and Renewed*, Welsh Government, 31 January 2017.

69 See **para 6.19**.

30 years. We accordingly propose in **Chapter 16** that the power to designate enterprise zones is abolished in Wales.[70]

5.139 Whether or not the power to create enterprise zones is abolished, it is noteworthy 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 consider that it is extremely unlikely that the provision enabling an enterprise zone authority to be designated as a planning authority (under section 6 of TCPA 1990) will be used in the future, and we propose that it is not included in the new Code.

5.140 We also consider the position as to urban development corporations and housing action trusts in more detail in **Chapter 16**. In each case, we provisionally propose that the existing statutory code is of no continuing utility, and should not be restated as part of the new Code.

5.141 We note that only one urban development corporation (Cardiff Bay) was ever created in Wales, in 1987, and that it was not designated as the local planning authority. As with enterprise zones, we consider that it is unlikely that the provision (currently in section 7 of TCPA 1990) enabling an urban development corporation to be designated as a planning authority will be used in the future, and we propose that it is not included in the new Code.

5.142 We also note in Chapter 19 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 consider that it is unlikely that the provision enabling a housing action trust to be designated as a planning authority (in section 8 of TCPA 1990) will ever be used in the future, and we propose that it is not included in the new Code.

5.143 We also note that new town development corporations have never been designated as planning authorities within their areas.

5.144 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 needs to be restated in a Planning Code for Wales.

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

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[70] As noted in that Chapter, it may appear that there are currently eight enterprise zones in Wales, but these are zones that have been designated under the Capital Allowances Act 2001, as amended by the Finance Act 2012 (see **para 16.70**).

Consultation question 5-12.

We provisionally consider 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.

Do consultees agree?

Planning authorities: terminology

5.146 As noted, the planning Acts refer both to local planning authorities and to local authorities. As would be expected, 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. 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. In Wales, in any area, there can now be only one planning authority – which may be a local authority or a national park authority or a joint planning board.

5.147 By contrast, "local authorities", as defined in the Local Government Act 1972 and the Local Government (Wales) Act 1994[71] – as opposed to "local planning auth orities" – are referred to in the TCPA 1990 only in very limited contexts, notably:

(1) action by a local authority in response to purchase notice or blight notice;[72]

(2) development carried out by a local authority;[73]

(3) compulsory acquisition of land by a local authority;[74]

(4) local authorities as consenting authorities under other legislation;[75]

(5) notices issued by local authorities;[76] and

(6) works executed by local authorities under the Public Health Act.[77]

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71 And see TCPA 1990, s 336.

72 TCPA 1990, ss 139-141, 143, 147A, 169, 170, 305, 306.

73 TCPA 1990, ss 55, 90, 101, 235, 253, 306.

74 TCPA 1990, ss 226, 227, 229-233, 235, 240-244, 244A, 246, 251, 252, 258, 260, 261, 271, 272, 274-276, 278, 336.

75 TCPA 1990, ss 9, 71, 332.

76 TCPA 1990, ss 329, 330, 333.

77 TCPA 1990, s 178, 190, 207, 219.

5.148 These are all outside the main scheme of the planning Acts – and a number of them will accordingly not be included in the new Code.[78] But these references to local authorities should not simply be translated into references to "local planning authorities" when the provisions in question are incorporated into the Planning Code.

5.149 We note that when a unitary system of local government was introduced in Scotland, in 1974, the term "local planning authority" was replaced by "planning authority".[79] This seems to be a helpful change, as it makes it clearer that a planning authority will not always be a local authority – as well as being a simpler (and shorter) term.

5.150 It is true that a number of statutes other than those directly relating to planning also refer to "local planning authorities".[80] It would be relatively straightforward for those to be amended accordingly.

5.151 And every "local planning authority" is a "minerals planning authority" – so that phrase is not required either.

5.152 Finally, it may be noted that the Welsh Ministers, who are of course given a number of functions under the planning legislation, are never referred to as "planning authorities".[81]

Consultation question 5-13.

We consider 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.

Do consultees agree?

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78 See **Chapter 3**.

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

80 The phrase "local planning authority" thus 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 – 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.

81 The Welsh Ministers are a "planning authority" for the purposes of section 53 of the Coal Industry Act 1994; but we have proposed amending this so that it no longer applies in relation to Wales (see **Proposal 5-9** above).

Chapter 6: Formulation of the development plan

INTRODUCTION

6.1 As noted in the previous Chapter, there are many factors that must be considered by planning authorities and inspectors when making planning decisions. These include Welsh Government policy of various kinds, and a range of considerations whose origin and purpose is not wholly within the planning system. However, preeminent amongst those factors are the national, regional and local policies prepared specifically within a planning context, collectively referred to in the legislation as "the development plan".

6.2 The primary legislation on the formulation of development plans used to be in Part 2 of the Town and Country Planning Act ("TCPA") 1990 itself. That provided that the general pattern was that there should be for each area a structure plan (usually prepared by the county council for a whole county) and a series of local plans (each prepared by the relevant district council, covering all or part of its area).[1] A local plan adopted under those arrangements in 1996 is still in force in Anglesey (Ynys Mon), alongside the Gwynedd Structure Plan as it related to Anglesey, adopted in 1993.[2]

6.3 However, in the metropolitan areas of England, where there was a single-tier system of borough councils, the Act provided for unitary development plans (UDPs), the first part of which was effectively the structure plan and the second the local plan.[3] The UDP system was subsequently adopted in other areas where a single-tier system of local government was introduced, both in various parts of England – under schemes of reorganisation under the Local Government Act 1992 – and throughout Wales, under the Local Government (Wales) Act 1994. UDPs adopted under that system are still in force in Wrexham, Vale of Glamorgan, Swansea, Gwynedd, Powys, and Flintshire[4].

6.4 The Planning and Compulsory Purchase Act ("PCPA") 2004 then introduced for England a complex system of regional spatial strategies and local development documents.[5] For Wales, Part 6 of the 2004 Act introduced a different system:

(1) it introduced – although not as part of the development plan – a new nation-wide Wales Spatial plan, to be prepared by the National Assembly for Wales; and

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1 TCPA 1990, Part 2, Chapter 1; originally introduced by TCPA 1968, to implement the recommendations of the Planning Advisory Group report, *The Future of Development Plans* (HMSO, 1965).

2 http://www.anglesey.gov.uk/planning-and-waste/planning-policy/

3 TCPA 1990, Part 2, Chapter 1; originally introduced by Local Government Act 1985, which abolished the Greater London Council and the metropolitan county councils.

4 Believed to be correct as at April 2017.

5 PCPA 2004, Parts 1 and 2.

(2) it retained the much more straightforward system of unitary development plans, to be known in future as local development plans (LDPs), produced by single-tier planning authorities in light of the Wales Spatial Plan.

LDPs have now been adopted by all of the planning authorities in Wales (including the three national park authorities) other than those mentioned above; they will doubtless be following in the next few years.[6]

6.5 In both England and Wales, the PCPA 2004 did not insert a new Part 2 into the TCPA 1990; instead, the new provisions were simply in the 2004 Act itself, which thus stood alongside those in the 1990 Act.

6.6 More recently, the Planning (Wales) Act ("P(W)A") 2015 amended the PCPA 2004 so as to strengthen the 'plan-led' approach to planning in Wales. It introduced the concept of the National Development Framework for Wales ("NDF"), which will be part of the development plan, to replace the Wales Spatial Plan. It provided for Strategic Plans to be produced where needed.

Inclusion in the Code

6.7 Once the new arrangements have come fully into force, the "development plan", for any land in Wales, will be –

(1) The National Development Framework;

(2) the strategic development plan for any strategic planning area that includes all or part of that land; and

(3) the local development plan for the area that includes that land.[7]

6.8 The status of the development plan has already been dealt with in the previous Chapter of this Consultation Paper.[8] This Chapter briefly considers the statutory framework relating to the formulation of the three constituent elements of the development plan, currently contained in Part 6 of the PCPA 2004, as amended by the PWA 2015.

6.9 There were almost no comments in response to the Scoping Paper in relation to the formulation of planning policy. And we have not become aware in the course of our work of any need for major changes to be made.

6.10 Our proposals in this Chapter accordingly highlight only the few detailed points where we consider that limited technical reform would be appropriate. However, we summarise very briefly the relevant statutory framework, and invite consultees to make proposals for any other changes they may consider desirable.

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6 http://gov.wales/docs/desh/publications/160518development-plan-coverage-en.pdf

7 PCPA 2004, s 38(4), amended by P(W)A 2015, s 9.

8 See **paras 5.16 to 5.27**.

6.11 We also consider towards the end of the Chapter the related statutory code dealing with planning blight arising from the formulation and amendment of the development plan and other policies and proposals.

THE COMPONENTS OF THE DEVELOPMENT PLAN

The National Development Framework

6.12 Section 60 of the PCPA 2004, as originally drafted, provided for a Wales Spatial Plan to be prepared, and revised from time to time. The original Plan was adopted by the Assembly in November 2004; it was most recently updated in 2008, under the title *People, Places, Futures*. It was not part of the development plan, but it was intended to form the basis of local development plans.[9]

6.13 The evidence put forward to support the Planning (Wales) Bill indicated a clear consensus that "despite good initial intentions, the WSP had limited influence on the planning system."[10] The PWA accordingly introduced a new system, requiring the National Development Framework (NDF) to be prepared in place of the Wales Spatial Plan.[11]

6.14 Under the new system, the Welsh Ministers must prepare and publish a development plan known as the National Development Framework, which:

(1) must set out national policies in relation to the development and use of land in Wales and give reasons for those policies; and

(2) may specify that particular categories of development constitute "development of national significance".[12]

6.15 The NDF will be part of the development plan.

6.16 The new provisions came into force from 4 January 2016.[13] A call for evidence and projects to be included ran for three months, closing on 7 March 2017. In the *Statement of Public Participation*, dated November 2016, it was suggested that the final text of the NDF will be published in 2020.

6.17 We do not propose any changes to sections 60 to 60C of the PCPA 2004, as inserted by section 3 of the PWA 2015, and consider that provisions to the same effect should be included in the Code. Appropriate transitional arrangements may be required to deal with section 60 of the PCPA 2004 (relating to the Wales Spatial Plan), in the form in which it is prior to its replacement by section 3 of the PWA 2015, until the

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9 PCPA 2004, s 62(5)(b), as originally enacted.

10 Planning (Wales) Bill, Explanatory Memorandum, para 3.17.

11 The original section 60 will continue to have effect until the NDF is introduced (2015 SI 1987, art 7).

12 PCPA 2004, s 60(1)-(3), inserted by P(W)A 2015, s 3.

13 2015 SI 1987, art 2.

provisions in the new Code equivalent to the new sections 60 to 60C have come into force for all purposes.

6.18 The Wales Spatial Plan and, in due course, the National Development Framework do not of course represent the totality of Welsh Government planning policy at a national level. As noted in the previous Chapter, other national policy documents, including in particular *Planning Policy Wales* and the Technical Advice Notes (TANs), are also much relied on in practice. The status of these within the planning system has been considered in the previous Chapter; but it has not been suggested that the process for their formulation should be incorporated into primary or secondary legislation.

Strategic plans

6.19 The Planning (Wales) Act 2015 provided for the first time a legal framework for the preparation of strategic development plans. Such plans allow for issues of more than local significance, such as housing, to be considered and planned for in a strategic way, by special "strategic planning panels". It is not mandatory for such plans to be produced for all areas. It is anticipated that they will initially be prepared for the A55 Corridor in North Wales, and the areas centred on Cardiff and Swansea.

6.20 Strategic planning is governed by sections 60D to 60J of the PCPA 2004, which were inserted by sections 4 to 6 of the PWA 2015. There were no corresponding provisions under either the TCPA 1990 or the PCPA 2004 – other than the now-defunct arrangements for structure plans, noted earlier. Sections 60D to 60J came into force for most purposes on 5 October 2015; but no strategic planning panels have yet been established.

6.21 We do not suggest that sections 60D to 60J of the PCPA 2004, as inserted by sections 4 to 6 of the PWA 2015, should be amended, and provisionally consider that provisions broadly to the same effect should be included in the Planning Code. This is obviously subject to any amendments arising from the current review of local government in Wales.[14]

Local development plans

6.22 Every planning authority in Wales must keep relevant matters under review, and must from time to time prepare a local development plan within the parameters set by national planning policy.[15] Once published and adopted, that plan acts as the development plan for each county council, county borough council or national park authority.

6.23 The procedures for preparing a local development plan are set out in sections 61 to 72 of the PCPA 2004, as amended by sections 11 to 15 of the PWA 2015. As would be expected, the primary legislation provides only the bare bones of the process; the details are all to be found in subordinate legislation, in particular the TCP (Local

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[14] See the white paper *Reforming Local Government: Resilient and Renewed* (Welsh Government, 31 January 2017), in particular para. 2.3.11, suggesting that the role of strategic planning panels may need to be reviewed in light of emerging arrangements for regional governance.

[15] PCPA 2004, ss 61, 62.

Development Plans) (Wales) Regulations 2005, as amended in 2015.[16] And guidance as to the operation of the procedure in practice is in the *Local Development Plan Manual*.[17]

6.24 The procedures for the formulation and revision of local development plans, in Part 6 of the PCPA 2004, have been in place now for ten years. The Assembly has recently had an opportunity to consider those legislative provisions, in the course of the passage of the Planning (Wales) Bill. And the new provisions need to be allowed time to be used in practice, in light of the new NDF, once it has emerged, and the PPW, which will no doubt continue to be updated.

6.25 Again, therefore, we do not propose any further changes to the statutory scheme, and suggest that sections 61 to 72 of the PCPA 2004, as amended by sections 11 to 15 of the PWA 2015, should be included in the Planning Code.

Policy formulation and sustainable development

6.26 Each part of the development plan must be prepared as part of the requirement to carry out sustainable development in accordance with the Well-being of Future Generations (Wales) Act 2015, so as to ensure that the development and use of land contributes to improving the economic, social, environmental and cultural well-being of Wales.[18] However, we have already proposed that the link between the sustainable development principle and the planning system does not need to be specifically restated in the Bill.[19]

Consultation question 6-1.

We provisionally consider that Part 6 of the PCPA 2004 (development plans), as amended by the PWA 2015, should 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.

Do consultees agree?

DEVELOPMENT PLANS: OTHER PROVISIONS

Content of local plans

6.27 There is surprisingly little legislation as to what is to be included in a local development plan; and the *Local Development Plan Manual* is not prescriptive either. One of the perennial problems of development plans is the extent to which they contain what is essentially a repetition of national policy, in the form of generic non-specific area-wide policies.

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16 2005 SI 2839; 2015 SI 1598.

17 Edition 2, Welsh Government, 2015.

18 P(W)A 2015, s 2; see **para 5.78** above.

19 See **Consultation question 5-7.**

6.28 The *Manual* advocates that area-wide policies should not repeat national policy, but have specific local application; we consider that this principle is not appropriate for inclusion in either primary or secondary legislation, but should rather remain in guidance, as at present. The various powers for Welsh Ministers to direct authorities to modify or withdraw their plans should be sufficient to ensure that inappropriate policies are not included; and a clear intention to use those powers should ensure that there will be less call for them to be used in practice.

6.29 One specific provision as to the content of plans is the Planning and Energy Act 2008, which allows (but does not require) the inclusion in strategic and local development plans of policies imposing reasonable requirements relating to:

(1) development to use energy from local renewable and low carbon sources; and

(2) development to comply with energy efficiency standards exceeding the requirements in building regulations.[20]

6.30 Insofar as the purpose of this Act is to encourage the inclusion in plans of requirements as to energy sources, this would seem to be more appropriately a matter for the *Manual* than for legislation (either primary or secondary). Insofar as it is to encourage development to be in excess of the requirements of national Building Regulations, that would seems to be better achieved by making suitable amendments to the Regulations.

Consultation question 6-2.

We provisionally propose that

(1) **the provisions currently in the Planning and Energy Act 2008 are not restated in the Bill;**

(2) **consideration is given in due course to:**

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

Do consultees agree?

Strategic environmental assessment

6.31 The processes for the formulation of the NDF and strategic and local plans involve an assessment of the sustainability of the document in question.[21] In addition, an environmental assessment of each document must be carried out, under the

[20] Planning and Energy Act 2008, s 1. The 2008 Act was a private member's Bill.

[21] PCPA 2004, ss 60B(1)(b), 60I(7)(a), 62(6)(b).

Environmental Assessment of Plans and Programmes (Wales) Regulations 2004.[22] The latter requirement arose as a result of EU Directive 2001/42/EC on the assessment of certain plans and programmes on the environment. Guidance on the Directive is given in *A Practical Guide to the Strategic Environmental Assessment Directive*, issued in 2005 by the Welsh Assembly jointly with other Government offices.

6.32 Chapter 3 of the *Local Development Plan Manual* considers the relationship between Sustainability Appraisal (SA) under the 2004 Act and Strategic Environmental Assessment (SEA) under the 2004 Regulations. It notes that:

> SA covers social and economic effects of the LDP as well as environmental effects. First and revised / replacement LDPs must be subject to an environmental assessment.[23] The Welsh Government has decided that for development plans the requirement of the SEA Regulations are best incorporated into SA.[24]

6.33 In other words, the SA is a wider review of a plan than simply an environmental assessment.[25] The same would apply to the sustainability appraisal of a strategic development plan and of the NDF. It therefore seems that little is served by retaining a separate, explicit requirement for an environmental assessment to be prepared as well as a sustainability appraisal.

6.34 On the other hand, we note that

(1) the requirements of the SEA Directive are almost entirely transposed into domestic law in the form of secondary legislation (the 2004 Regulations);

(2) those Regulations cover a wide range of plans and programmes, and not just development plans etc; and

(3) a decision to abolish or significantly amend the Regulations might be controversial.

6.35 It was not realistic to consider this issue in the Scoping Paper, in light of the obligations under European law that existed at that time. However, in view of the UK's impending departure from the European Union, it now seems appropriate at least to consider in outline whether the two systems of assessment are both required – although we recognise that the current statutory regime will remain in force at least for the moment.

6.36 We accordingly do not at this stage propose that any change is made, but invite views as to

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22 2004 SI 1656. The Regulations were made under powers in s 2 of the European Communities Act 1972; and will presumably be retained in force under the European Union (Withdrawal) Bill currently before Parliament – see clause 2 of the Bill as introduced.

23 SEA Regulations, regs 5(2), 5(4).

24 *Local Development Plan Manual*, Edn 2, Welsh Government, August 2015, para 3.2.1.

25 It also includes an assessment of the policies in the plan on the use of the Welsh language.

(1) whether the SEA requirement in relation to development plans, over and above the requirement to carry out sustainability appraisal, adds anything to the quality of decision-making, or adds sufficient to justify the time and cost involved;

(2) whether the SEA requirement is justified in relation to other types of plans and programmes.

Consultation question 6-3.

In 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,

(1) **is there 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?**

(2) **are the 2004 Regulations still required in relation to plans and programmes other than the NDF and development plans? or**

(3) **do the 2004 Regulations need amendment or simplification in any way?**

High Court challenges to the NDF and development plans

6.37 A challenge in the High Court to the validity of the NDF and emerging strategic and local development plans now takes place largely but not exclusively under section 113 of the PCPA 2004. This replaced section 284(1)(a) of the TCPA 1990.

6.38 Such a challenge has to be brought within six weeks; but the calculation of that time limits has caused problems (see *Nottingham City Council v Calverton Parish Council*[26]; *Barker v Hambleton DC*[27]). Other problems have arisen in relation to the documents that may be challenged under these procedures (*Manydown v Basingstoke and Deane BC*[28]).

6.39 Later in this Consultation Paper, we provisionally propose the abolition of the special statutory procedures under Part 12 of the TCPA 1990 and Part 9 of the PCPA 2004, in favour of judicial review under Part 54 of the Rules of the Supreme Court.[29] That will not automatically do away entirely with such technicalities, but it will mean that there will be a single procedure to challenge any decision of any public body – without the need for checking whether the decision, the body, or the process by which it has been reached, fall within the scope of section 113.

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26 [2015] EWHC 503 (Admin).

27 [2012] EWCA Civ 610.

28 [2012] EWHC 977 (Admin).

29 See **Consultation question 17-9**.

6.40 Given that proposal, which would lead to the abolition without replacement of section 113 of the PCPA 2004, we see no need for further amendments to the High Court challenge procedures currently under that provision. However, it would be necessary to include in the Planning Bill a provision equivalent to section 113(2), to preclude the making of a challenge to the development other than by way of an application for judicial review within a six-month time limit.[30]

Inquiries

6.41 Section 114 of the PCPA 2004 provides that examinations of local development plans under section 64 of that Act are deemed to be statutory inquiries for the purpose of the Tribunals and Inquiries Act 1992. That renders such inquiries subject to the supervisory jurisdiction of the Council on Tribunals, which was replaced in 2007 by the Administrative Justice and Tribunals Council, which was itself abolished by the Public Bodies Act 2011. In practice rules relating to the procedure at such examinations have always been made by the Welsh Ministers (rather than by the Lord Chancellor)[31]. We therefore see no purpose in retaining this provision.

Consultation question 6-4.

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

Do consultees agree?

PLANNING BLIGHT

Background

6.42 Where a public authority is required to obtain land in private ownership for the purpose of carrying out a project in the relatively near future, it may acquire the land either by agreement or by the use of compulsory purchase powers. However, a development plan or other policy document may put forward a project to be carried out in the more distant future, in circumstances where the relevant authority is not immediately ready to acquire the land, but where the mere inclusion of the proposal in the plan will depress the value of the land or even render it virtually unsaleable, causing unacceptable hardship to its present occupiers. That is the phenomenon known as "planning blight", and is the unfortunate but almost inevitable consequence of plan-making.

6.43 Planning blight was first recognised in the TCPA 1959, which introduced an entitlement for those affected to serve a notice requiring the planning authority to purchase the relevant land, although "blight notices" were only referred to under that name in the TCPA 1968. Successive planning acts – up to and including the PCPA 2004 and PWA 2015 – have adjusted the circumstances in which owners and

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30 See **para 17.6**.

31 SI 2005/2839.

occupiers are entitled to serve a notice, to take account of the emerging pattern of development planning described earlier in this Chapter.

6.44 The Land Compensation Act 1973 also extended the circumstances in which a blight notice can be served, and those were for simplicity incorporated into planning legislation when it was consolidated in 1990.

6.45 The key features of the blight notice regime are set out in

(1) Schedule 13 to the TCPA 1990 (as it applies in Wales) (circumstances in which a blight notice may be served);

(2) sections 149, 150 (service of a notice); and

(3) sections 151(1), 153(1), 154(1), 154(2)(a) and 156 (response to a notice).

6.46 There are, as might be expected, a significant number of more detailed additional provisions, including as to the position arising where only part of an agricultural unit is to be purchased in response to a notice relating to the whole; the treatment of personal representatives, mortgagees, and partnerships; the powers of the Welsh Ministers; the acquisition of part of the land subject to the notice; and relevant definitions.[32]

6.47 The provisions of the TCPA 1990 relating to planning blight are not often activated in practice – not least because authorities are likely to avoid including in their plans proposals that will result in them being liable to purchase the land in question before they are ready to develop it. However, such circumstances may arise, and the statutory provisions relating to blight notices therefore need to be retained in place.

6.48 On the other hand, whilst it is necessary that the principal provisions are contained within the main body of the Code, we consider that it might be more appropriate for the more detailed supplementary provisions to be in a Schedule. Doing that would enable users of the main body of the Code to grasp its overall structure and purpose, whilst not getting lost in detailed provisions that will only very rarely be of immediate relevance.

6.49 More generally, we are not aware of any suggestions that the blight notice provisions are in need of technical reform, although consultees are invited to let us know if they think otherwise.

[32] TCPA 1990, s 151(2)-(8), 152, 153(2)-(8), 154(2)(b),(3)-(6), 156(4), 157, 158-160, 161-164, 164A-167, 168-17, and 308.

Consultation question 6-5.

We consider 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.

Do consultees agree?

Chapter 7: The need for a planning application

INTRODUCTION

7.1 As noted in Chapter 3, the topics identified in the Scoping Paper as "core planning provisions" included:

(1) the purpose of the planning system; how planning is administered;

(2) the plan-making process;

(3) the nature of development; the process of seeking planning permission; remedies; and

(4) enforcement.

7.2 **Chapters 5 and 6** of this Consultation Paper have dealt with the first two topics. Enforcement will be dealt with in **Chapter 12**. The third topic constitutes the heart of the planning process – and is the subject of almost one-third of the Town and Country Planning Act ("TCPA") 1990 as it now stands.[1] It is accordingly dealt with in five Chapters, under a number of headings, as follows:

(1) the need for planning permission (**Chapter 7**);

(2) planning applications made to and determined by planning authorities (**Chapter 8**);

(3) planning applications made to and determined by the Welsh Ministers (mainly in relation to developments of national significance) (**Chapter 9**);

(4) the requirements as to the funding of infrastructure (either by an application-specific planning obligation, or by a payment of a general infrastructure levy) (**Chapter 10**); and

(5) other supplementary provisions (appeals; variation and revocation; discontinuance; purchase notices; highways) (**Chapter 11**);

7.3 The primary legislation relating to these topics is currently to be found in Part 3 of the TCPA 1990, as amended by the Planning (Wales) Act ("P(W)A") 2015. Secondary legislation is to be found in the Town and Country Planning (Development Management Procedure) (Wales) Order ("DMPWO") 2012; and procedural guidance is in the *Development Management Manual*, the second edition of which was issued by the Welsh Government in May 2017.

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[1] TCPA 1990, s 57(1).

THE NEED FOR PLANNING PERMISSION

Introduction

7.4 Whether a planning application needs to be submitted for a particular project is not always entirely straightforward; and the law has become more complex in recent years.

7.5 In principle, planning permission is required for the carrying out of development – in essence, building or other operations (including demolition) and changes of use.[2]

7.6 Where permission is required, it may be granted by a development order that grants permission for certain categories of (generally minor) development – commonly referred to as "permitted development". That mechanism has been used more in recent years, and in most cases the permission thus granted is subject to a number of conditions.[3]

7.7 Where permission is required, but is not granted by a development order, it then has to be sought by means of a planning application, generally (but not always) submitted to the planning authority.

7.8 But the starting point is always to determine whether a particular project is or is not "development". It is for this reason that section 55 of the TCPA 1990, which sets out the definition of "development", is one of the key provisions in the Act, and deserves careful consideration in any codification exercise.

7.9 The basic definition, in section 55(1) – see below – is still precisely the same as the corresponding definition in section 12(1) of the TCPA 1947; but the remaining provisions of section 55 have been slightly modified by Parliament on various occasions over the subsequent 70 years, to include or to exclude certain matters from the definition. They have also been the subject of much litigation over that period.

7.10 The substance of what is currently in section 55 clearly needs to be retained, and should be right at the start of the relevant Part of the new Bill. However, it could usefully be redrafted so as to become significantly clearer, without any change in meaning – possibly by being split into several sections.

7.11 The heading to section 55 is "Meaning of 'development' and 'new development'." The reference to "new development" is otiose, following the repeal of section 55(6) by the Planning and Compensation Act 1991, and can be omitted.

The basic definition of "development"

7.12 The key provision is section 55(1), which provides as follows:

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2 TCPA 1990, s 57(1).

3 In England, an increasing number of permitted development rights have been made subject to conditions that either require the planning authority to be notified (so that it can decide whether it wants an opportunity to approve details) or require certain details to be approved in any event. That approach has not been adopted in Wales.

> Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development" means:
>
> [a] the carrying out of building, engineering, mining or other operations in, on, over or under land; or
>
> [b] the making of any material change in the use of any buildings or other land.
>
> [lettering in square brackets inserted to assist clarity.]

7.13 The wording of section 55(1) is straightforward, and of long standing, and need not be altered in substance, but would benefit from the two limbs of the definition being clearly separated, as the distinction between them runs through the whole of the TCPA 1990. Doing so would also make it clearer that it is the making of a material change in the use of buildings or land that is development, not the new use as such – a point that sometimes seems to escape both legislators and users of the Act.[4]

OPERATIONAL DEVELOPMENT

Demolition

7.14 A definition of the phrase "building operations" (in subsection 55(1A)) was inserted by section 13 of the Planning and Compensation Act 1991, to make it clear that it includes demolition – with power for the Welsh Ministers to exclude certain categories of demolition by making a direction under section 55(2)(g).[5]

7.15 The direction under section 55(2)(g) that is currently in force, issued in 1995[6], originally excluded from the definition of development:

(1) the demolition of a listed building, a building in a conservation area, or a scheduled monument;

(2) the demolition of any building other than a dwellinghouse or a building next to a dwellinghouse;

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

(4) the demolition of a building of volume less than 50 cu m (other than a wall etc in a conservation area).

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4 The purpose of the planning system is thus to control change, rather than the status quo. A use of land, as such, is therefore neither lawful nor unlawful – it may be the result of a change (gradual or sudden) that was lawful or unlawful. And of course some uses of land may have been in existence since before the start of modern planning control (effectively 1 July 1948),

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

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

7.16 The direction as it related to the first two of those categories was quashed by the Court of Appeal.[7] As a result, those categories of demolition – including the demolition of listed buildings and in conservation areas – are development, and therefore do require planning permission (as well as, at present, listed building consent or conservation area consent).[8] The two remaining categories could appropriately be included in the GPDO, which would mean that section 55(2)(g) could simply be omitted. That would lead to a significant simplification of the law in this area.

7.17 The retention of demolition within the scope of development, without the power for the Welsh Ministers to make a direction excluding certain categories of demolition, would also make it clear that planning permission is always required for the demolition of a building that is listed or in a conservation area, which would strengthen the case for not requiring separate consent to be obtained for such works.

Consultation question 7-1.

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

Do consultees agree?

Building operations other than demolition

7.18 Other than in relation to demolition, the basic definition of "building operations", contained in section 55(1A) of the TCPA 1990, does not seem to have caused any problems in practice.

7.19 The Court of Appeal (in *Barvis v Secretary of State for the Environment*) 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. It identified certain factors to be considered in determining whether a particular object is a building – namely, its size, its permanence and the extent of its physical attachment to the ground.[9] Subsequent case-law developed these criteria.[10]

7.20 We noted in the Scoping Paper that the TCPA 1990 includes only a non-exhaustive definition of a "building" – so as to include a structure or erection, and part of a

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7 *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.

8 And see the new direction now applying in England (TCP (Demolition - Description of Buildings) Direction 2014) – there is no corresponding direction in Wales.

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

10 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, paras. 7.25 – 7.28.

building, as so defined[11]. The Scoping Paper considered whether it would be helpful to expand this by including reference the factors identified in *Barvis*. We expressed the preliminary view that it might be better to leave the approach to interpreting the term "building" to case-law. We are still of that view. The case-law sets out an approach rather than a precise definition, which cannot readily be encapsulated in statutory language.

7.21 Section 55(2)(a) generally excludes from the definition of "development":

> the carrying out for the maintenance, improvement or other alteration of any building of works which—
>
> (i) affect only the interior of the building, or
>
> (ii) do not materially affect the external appearance of the building.

7.22 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;[12]

(2) the carrying out of works begun after 5 December 1968 for the alteration of a building by providing additional space in it underground;[13] 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.[14]

7.23 The first of those exceptions is no longer required, and could simply be omitted.

7.24 The second category could be amended by the omission of the commencement date. But it is in fact merely a special example of it the general approach introduced (many years later) by the third. The legislation could therefore 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 will be permitted development.

7.25 The Wales Planning Consultants Forum thought that this review could be an opportunity to 'consider whether there is scope to broaden the range of operations that may be excluded from the definition of development'.

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11 TCPA 1990 s 336(c).

12 Proviso to TCPA 1990, s 55(2)(a) (this originates from TCPA 1947, and relates specifically to damage during the Second World War).

13 Proviso to TCPA 1990, s 55(2)(a) (this originates from TCPA 1968).

14 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).

7.26 We understand that it may seem to be desirable to exclude certain categories of operation – and indeed changes of use – from the need for planning permission, but we tend to the view that this is better achieved by their inclusion within the categories of permitted development, in the GPDO, rather than by further amendments to the TCPA 1990. This is partly because it is easier to make changes to secondary legislation on an experimental basis, and also because permitted development rights can be withdrawn in particular cases by the making of an article 4 direction.

7.27 Finally, it may be noted that, where works are carried out to a building that has been listed, the normal definition of development applies as in other cases. However, the carrying out of alterations and extensions to the building in any manner that affects its character as a building of special architectural or historic interest requires "listed building consent", in addition to any planning permission that may be required.[15] This leads to a significant overlap of controls, which is the subject of a later Chapter.[16]

Consultation question 7-2.

We provisionally propose 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 floorspace of a building, whether underground or otherwise, is development.

Do consultees agree?

Engineering operations

7.28 In the Scoping Paper, we noted that 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"[17]; and

(2) in effect, "the placing or assembly of any tank in any part of any inland waters for the purpose of fish farming there".[18]

Additionally, the Courts have suggested (in *Fayrewood Farms v Secretary of State*[19]) that it 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.

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15 Listed Buildings Act 1990, ss 7, 9.

16 See **Chapter 13**.

17 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 7.20.

18 TCPA 1990, s 55(4A), inserted by PCPA 2004.

19 [1984] JPL 267.

7.29 Persimmon Homes West Wales ("Persimmon") agreed that engineering operations could be defined in the new Planning Bill. 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.

7.30 However, National Grid agreed with the statement in our Scoping Paper which said 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. Further, there may be a number of types of works that are at present categorised as "engineering operations" – such as certain types of landscaping works – that would not be generally supervised by an engineer.

Consultation question 7-3.

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:

(1) **the formation or laying out of means of access to a highway; and**

(2) **the placing or assembly of any tank in any part of any inland waters for the purpose of fish farming there.**

We invite the views of consultees.

Mining operations

7.31 We consider in **Chapter 17** of this Consultation Paper the definitions of the various terms used in the TCPA 1990 to refer to mining operations and related activities, concluding that the term "mining operations" should generally be used in place of "the winning and working of minerals".[20] In view of that proposal, no change is needed to the definition of "development" currently in section 55(1); but the definition of "mining operations" in section 55(4) would not need to be retained in the Bill.

Other operations

7.32 There is no definition in the Act of "other operations"; nor can there be, since the phrase is a catch-all to include matters that have escaped categorisation. It was at one time[21] thought that demolition might be included under this heading; but that has been overtaken by the explicit inclusion of demolition within the scope of building operations.

7.33 There are two categories of operations that are excluded from the scope of development (in section 55(2)(b),(c) of the TCPA 1990) – largely works to the

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20 See **Consultation question 18-5.**

21 Prior to the decision of the Court of Appeal in *Cambridge CC v Secretary of State* (1992) 64 P&CR 257, CA (see **para 7.14** above).

highway, which could be categorised either as engineering operations or other operations. These are straightforward.

CHANGES OF USE

General principles

7.34 The second limb of "development" is that it includes the making of any material change in the use of any buildings or other land. In practice, this leads to significantly more uncertainty, and consequentially litigation, than operational development.

7.35 The question as to whether a material change in the use of land has occurred or is proposed depends on a consideration of the extent of the unit of land being considered. This has led to much litigation over many years, resulting in the emergence of what is known as the doctrine of the "planning unit". A number of consultees to the Scoping Paper suggested that this phrase could be defined in the legislation, or the principle codified.

7.36 However, as pointed out in *Burdle v Secretary of State*[22], the assessment of what is the correct unit to consider in any particular case will inevitably be a matter of fact and degree. Although the courts will from time to time provide helpful guidance on how this is to be done, we do not consider that it would be either appropriate or helpful to seek to translate such guidance into a concise statutory formula.

7.37 The same applies to the determination of what are 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.

7.38 So, for example, where some barns and surrounding open land are used for a combination of agricultural, storage, retailing and haulage purposes, with the various elements varying in intensity over many years, there can be no neat statutory formula enabling one to determine what is at any date the correct unit of land to be considered, what are the primary and ancillary uses of that land, and whether any single use has intensified, or altered in character, to the extent that there can be said to have been a material change of use. All is a matter of fact and degree.

7.39 Whilst, therefore, there is a considerable quantity of case law relating to "material change of use", which may provide useful guidance in such situations, it does not seem helpful – or even possible – to seek to encapsulate it within the wording of the Bill.

7.40 More generally, the Act contains no definition of "material change of use", and the nature of the relevant litigation over the last 70 years suggests that no general

[22] [1972] 3 All ER 240, per Bridge J at p 244.

definition is realistically possible.[23] But the Act does specifically include some matters, and exclude others.

Use classes

7.41 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 be involved in relation to changes of use that are likely to be of no consequence in planning terms.[24] Uses that are broadly similar in their impact are thus grouped together in "use classes", with the primary legislation providing that a change from one use within a particular use class to another use in the same class is excluded from the definition of "development".

7.42 This means that a planning authority has no involvement in relation to such a change; and it cannot seek to recover control by the making of an article 4 direction.

7.43 Further, a general or local development order can provide that a change from a use in a specified category to one in another specified category is normally permitted development – although in this case it would be possible for the authority to make a direction to require that a planning application be submitted. So, for example, a change from a restaurant (a use in Class A3) to a shop (Class A1) is permitted development.

7.44 Section 333(4) provides that an order under section 55(2)(f) providing for use classes (as with a development order) is to be a statutory instrument; but section 333(5)(b) omits such an order from the list of those that are to be made by the negative resolution procedure. 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 suggest that the new power refers to use classes regulations, rather than to an order.

Consultation question 7-4.

We provisionally propose that there should be an explicit provision as to the approval of use classes regulations by the negative resolution procedure.

Do consultees agree?

Changes of use relating to "dwellinghouses"

7.45 Section 55(2)(d) provides that

> The use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the

[23] There is a definition in reg. 5 of the Building Regulations 2010; but that would not be appropriate in the present context.

[24] 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.

> dwellinghouse as such shall not be taken for the purposes of this Act to involve development of the land.

7.46 Section 55(3)(a) states that:

> For the avoidance of doubt it is hereby declared that for the purposes of this section, the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used.

7.47 The first question raised by both provisions is what is meant by the term "dwellinghouse". We consider this more fully in **Chapter 17**, in the context of definitions of terms used in the planning Acts generally. We there provisionally propose that the term "dwelling" should be used, in preference to "dwellinghouse", in the provisions in the Bill replacing sections 55(2)(d) and 55(3)(a) and that it should be defined so as to include a house and a flat.[25]

7.48 The second question raised by section 55(2)(d) is the meaning of the word "curtilage". This too is considered in **Chapter 17**, where we provisionally propose that the Bill should include a provision to the effect that 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 and the structure, their ownership (past and present), and their use and function (past and present).[26]

7.49 On a point of detail, whilst a "use" of land for residential purposes may result from a material change of use, the concept of "development" relates solely to the change, not to the resulting use itself. Section 55(2)(d) might be slightly clearer, therefore, if it were to state that the change of use of land within the curtilage of a building occupied as a dwelling to use for any purpose associated with that occupation does not constitute development.

Change of use involving a change in the number of dwellings

7.50 Section 55(3)(a) 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.

7.51 The courts have held that such a change may be material, depending on its planning consequences.[27] 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

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25 See **Consultation question 18-15**.

26 See **Consultation question 18-16**.

27 *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).

of whether permission is required; it thus leads to considerable uncertainty on the part of applicants.

7.52 In any event, if a change in one direction is defined to be material, it must logically follow that an identical change in the opposite change is equally material. It may be, of course, that such a change in any particular case – in either direction – may be highly desirable or highly undesirable in planning terms; or it may be entirely neutral. But that will be a matter for the planning authority to determine, on receipt of an application. We consider that it would remove uncertainty to make it plain that a change in either direction is a material one.

Consultation question 7-5.

We provisionally propose that section 55(3)(a) should 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.

Do consultees agree?

Other changes of use that are not material

7.53 Section 55(2)(e) of the TCPA 1990 provides that a use for agriculture or forestry shall not be taken to involve development. Here too, as with the use of land in the curtilage of a dwelling, the production of the Bill is an opportunity to clarify that the focus of enquiry should be on whether the *change* of use is material, and thus development, rather than on the resulting use itself.

7.54 We received some suggestions as to possible further use classes – for example, for holiday homes (equivalent to the new class for houses in multiple occupation). Clearly at some stage the TCP (Use Classes) Order 1987 and the seven orders amending it[28] will need to be consolidated; and no doubt at that time the classes will be reviewed. Indeed, we understand that the Welsh Government has this work in hand. However, that is outside the scope of this project, which is principally focussing on primary legislation.[29]

[28] See **footnote 24** above.

[29] See **para 4.29**.

Consultation question 7-6.

We provisionally propose that section 55(2)(d) to (f) of the TCPA 1990 should be clarified by providing that the following changes of use should be taken for the purposes of the 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 an order 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 order, of any part of the buildings or the other land, from that use to any other use within the same class.**

Do consultees agree?

WAYS IN WHICH PLANNING PERMISSION MAY BE GRANTED

7.55 It will be clear that "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 that permission can be granted in several ways, so that in many cases no application has to be submitted – thus saving time and money for all concerned.

7.56 Section 58(1) of the TCPA 1990 thus provides that planning permission can be granted:

(1) by a general permission in a development order (usually the GPDO) authorising all development in a particular category, possibly subject to conditions;

(2) by a general permission, in a development order (also usually the GPDO), authorising all development in a particular category, but subject to a condition requiring that the planning authority be given an opportunity to approve the details of a particular development but not the principle);

(3) by a local development order, made by a planning authority, possibly subject to conditions as in (1) or (2);

(4) by the planning authority or the Welsh Ministers, in response to an application to authorise a particular development; or

(5) by the adoption of a simplified planning zone scheme or enterprise zone scheme.

7.57 Alternatively it can be deemed to be granted by section 90 (by development benefitting from government authorisation).[30]

7.58 Section 58 is entirely declaratory, and is indeed somewhat misleading in its present form, as it might appear to a non-lawyer to be an exhaustive list. In fact, as the section acknowledges[31], it is not by any means exhaustive, in that there are many other ways in which planning permission may be granted or deemed to be granted.[32] It does not seem to serve any useful purpose, and we therefore provisionally propose that it is not restated in the new Bill – although we acknowledge that the Bill may include "signpost" provisions summarising other provisions in it.

Consultation question 7-7.

We provisionally propose 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.

Do consultees agree?

PERMISSION GRANTED BY DEVELOPMENT ORDER

General development order

7.59 The first three of the procedures listed above are usually referred to as "permitted development". The first enables developments that are generally unobjectionable to be approved automatically, without any delay. In effect, from the viewpoint of the landowner or prospective applicant, it may seem as though permission is not required at all in such cases – although that is not strictly accurate, as the permission granted by article 3 of the GPDO can in theory be withdrawn by an "article 4 direction" – but such directions are in practice rare.

7.60 There has been a tendency for more and more categories of development to be permitted in this way, with the inevitable result that the boundaries of those categories are becoming ever more nuanced, and correspondingly more complex for non-professional users to comprehend.

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30 TCPA 1990, s 58(2).

31 TCPA 1990, s 58(3) states that "This section is without prejudice to any other provisions of this Act providing for the granting of permission".

32 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 **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.

7.61 The second category above enables development to be approved in principle automatically, but with a chance for the authority to intervene as to details, or to check that it complies with requirements as to matters such as flooding. This used to apply mainly in relation to development for agriculture, forestry, minerals, and works authorised by private legislation[33] – but has latterly been used increasingly often in connection with novel classes of permitted development, such as telecommunications, toll road facilities, and demolition.[34] In England, but not in Wales, it has also been used to permit a variety of changes of use.

7.62 The result has been that in an increasing number of cases, proposed development is permitted in principle, but subject to a requirement that an application for the approval of details be made to the planning authority. From the perspective of the applicant, and often that of the authority, this is in many cases similar to the old regime whereby an application had to be made to the authority for planning permission, which was allowed or refused; the authority still has to be involved, and there is still potential for delay. The distinction is that under the new arrangement the authority has no opportunity (other than by making an article 4 direction) to refuse such development in principle. Again, this approach has been used much less in Wales than in England.

7.63 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.[35]

7.64 Section 61 is no longer required: subsection (1) duplicates sections 333(4B); and subsections (2) and (3), relating to the applicability of pre-1947 legislation, are of no continuing utility.

7.65 It was suggested to us that the various pieces of secondary legislation providing permitted development rights in Wales should be incorporated into one consolidated order – as was done in England in 2015.[36] That would indeed obviously be desirable, and will no doubt be attended to as resources permit; here too, we understand that the Welsh Government has this work in hand. Again, however, we make no proposals, as it is outside the scope of this project.

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33 TCP(GP)O 1995, Sched 2, Parts 5, 6, 11, 19, 20.

34 TCP(GP)O 1995, Sched 2, Parts 24, 30, 31.

35 TCPA 1990, s.60(4) does not seem to be required.

36 SIs 1995 No 418, 1996 No 528, 1997 No 366, 1998 No 462, 1999 No 1661, 2002 No 1878, 2004 No 3156 (Sched 3), 2005 No 2935, 2006 Nos 124, 221, 2007 No 952, 2008 No 502, 2009 No 2193, 2012 Nos 1346, 2318, 2013 No 1776, 2014 Nos 592, 2692, 2693, 2016 No 29.

Consultation question 7-8.

We provisionally propose 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.

Do consultees agree?

Development permitted by local development order

7.66 Local development orders were introduced by section 40 of PCPA 2004, with effect from April 2012. They are therefore of relatively recent origin. They are a way in which a planning authority can grant planning permission on a general basis for developments within a particular category.

7.67 Local development orders have so far have not yet been much used in practice, but they are a live policy tool whose use is being encouraged by the Welsh Government. For example, Newport Council has recently adopted the Newport City Centre Local Development Order, and Rhondda Cynon Taf Council has recently adopted the Treforest Industrial Estate and Parc Nantgarw Local Development Order. *Planning Policy Wales* supports the use of LDOs, with detailed guidance issued in 2012.[37] That all suggests that LDOs may be more successful than the previous similar initiative from central Government, simplified planning zones (see below).

7.68 As with general development orders, the production of the new Bill provides an opportunity for the statutory provisions as to the grant of permission by a local development order – 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.

Neighbourhood development orders

7.69 Another type of special procedure introduced with the aim of facilitating regeneration and renewal was the loosening of the normal requirement for planning permission in certain areas or in relation to certain types of development – in either case, under the supervision of the normal local planning authority, rather than a specially-created executive body. Another example of this was the neighbourhood development order, introduced in the Localism Act 2011, but only in relation to England.

7.70 We note that the opportunity was not taken in the P(W)A 2015 to include similar provisions in Wales, and we make no such proposals.

Works to listed buildings and in conservation areas

7.71 This is considered in **Chapter 13**.[38]

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37 Circular 03/2012 – *Guidance on Using a Local Development Order*.

38 See in particular **para 13.35**.

Compensation for withdrawal of permission in development order

7.72 Where a general development order or local development order is modified or revoked, there may be in some circumstances an entitlement to compensation. This is provided for by section 108 of the TCPA 1990.[39] It might be simpler for users if this provision were to be included alongside the provisions relating to development orders – including the amendment introduced by Schedule 6 to the PCPA 2004, which has not yet been brought into force in Wales.

Subsequent approval of details

7.73 As noted above, in an increasing number of cases, proposed development is permitted by a development order, but subject to a requirement that an application for the approval of details be made to the planning authority. This is dealt with in the subsequent Chapter.

OTHER FORMS OF PLANNING PERMISSION

Enterprise zones

7.74 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 has been created under this procedure in Wales since 1985.[40] If it were to be considered desirable, a similar result could be achieved by the use of a local development order.[41]

7.75 In **Chapter 16**, we provisionally propose the repeal of the provisions under the 1980 Act, and associated provisions under planning and related legislation, insofar as they relate to Wales.[42] 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.[43]

Consultation question 7-9.

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.

Do consultees agree?

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39 Amended by various subsequent pieces of legislation, but in particular by SI 2012 No 210.

40 The eight zones that currently exist in Wales were created under a different procedure, in the Finance Act 2012 (see **paras 16.67 to 16.71**).

41 See **paras 7.66 to 7.69**.

42 See **paras 16.63 to16.66, Consultation question 16-7.**

43 If it seems that the Assembly does not have the necessary legislative competence to abolish EZs, it would still not be necessary to restate TCPA 1990, ss.88,89 in the Bill.

Simplified planning zones

7.76 Simplified planning zones were introduced by Part 2 of and Schedule 6 to the Housing and Planning Act 1986. They were initially viewed as an extension to the Enterprise Zone regime, in that a simplified planning zone scheme granted planning permission for development within the categories specified in it. Section 24A of the TCPA 1971, as inserted by the 1986 Act, required every planning authority to consider, as soon as practicable after the section came into operation, for which part or parts of its area a simplified planning zone scheme would be desirable, thereafter to keep that question under review; and to prepare a scheme for any such part for which it decides that it would be desirable to do so.[44]

7.77 Notwithstanding that strongly-phrased duty, and the existence of Government guidance in Wales[45], it appears that in the 31 years since 1986, only three simplified planning zones have ever been created in England, two in Scotland, and none in Wales.[46] 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).

7.78 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.

7.79 In the Scoping Paper, we suggested that the legislation providing for simplified planning zones should be abolished in Wales. Persimmon Homes West Wales and PEBA agreed. We remain of that view, and consider that sections 82 to 87 of and Schedule 7 to the TCPA 1990 should be repealed insofar as they relate to Wales.

Consultation question 7-10.

We provisionally propose that sections 82 to 87 of and Schedule 7 to the TCPA (simplified planning zones) should not be restated in the new Planning Bill.

Do consultees agree?

Development with Government authorisation

7.80 Section 90 authorises the relevant Secretary of State or government department, or the Welsh Ministers, to direct that planning permission be deemed to be granted for:

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44 See now TCPA 1990, s 83; PCPA 2004, s 45 prospectively repealed s 83, but s 45 has not yet been brought into force.

45 TAN 3, *Simplified Planning Zones*, 1996. There is now no guidance on simplified planning zones in England.

46 It is difficult to be certain as to precise figures.

(1) development by local authorities, national park authorities and statutory undertakers (subsections (1),(4));

(2) electricity generating stations and transmission lines (subsections (2),(2ZA),(5)-(7), inserted by Growth and Infrastructure Act 2016 2013)); and

(3) development authorised by an order under the Transport and Works Act 1992 (subsection (3)).

7.81 Here too, the production of the Code provides an opportunity for these provisions to be included alongside those relating to development orders. We consider the handling of the authorisation in such cases in the next Chapter.[47]

Permission granted in response to an application

7.82 The principal means of planning permission being granted is where a planning authority grants permission in response to an application or where the Welsh Ministers allow an appeal. This is considered in the next Chapter.

APPLICATIONS FOR CERTIFICATE OF LAWFULNESS

7.83 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 individual planning permission (or, under the present system, listed building consent) is required for a particular project.

7.84 However, as was pointed out by Robert Carnwath QC (as he then was) in his 1998 report *Enforcing Planning Control*, "land-owners should have a reasonably accessible means of establishing what can be done lawfully with their property."[48]

7.85 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.

7.86 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. That section provided:

> (1) If any person who proposes to carry out any operations on land, or to make any change in the use of land—

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47 See **paras 8.168 to 8.169.**

48 *Enforcing Planning Control*, HMSO, 1989, para 7.2; and see *James Hay Pension Trustees v First Secretary of State* [2006] EWCA Civ 1387.

(a) wishes to have it determined whether the carrying out of those operations, or the making of that change, would constitute or involve development of the land, and

(b) if so, whether an application for planning permission in respect of it is required under this Part (having regard to the provisions of any development order, enterprise zone scheme or simplified planning zone scheme),

he may apply to the local planning authority to determine that question.

(2) An application under subsection (1) may be made either as part of an application for planning permission or without any such application.

7.87 As a matter of principle, we agree that 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.[49] It is noticeable that the *Development Management Manual* produced by the Welsh Government includes a section on Lawful development certificates in the introductory chapter *What is Development?*

7.88 We provisionally consider that the production of the Planning Code 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 Code dealing with enforcement.

7.89 The Act also includes (in section 171B) provisions about the time after which enforcement action cannot be taken – generally either four years or ten years. These provisions are an important element in determining whether an existing or proposed use of land is lawful, and whether operational development that has taken place or is proposed is lawful. The provisions of the Act relating to time limits (section 171B) are thus closely linked to those relating to certificates, and should be included at the same point as them.

7.90 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.

7.91 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

[49] 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.

unfortunate that this provision was lost in the 1991 amendments. The present exercise provides an opportunity for it to be reintroduced.

Consultation question 7-11.

We provisionally propose 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).

Do consultees agree?

Planning application to include application for certificate

7.92 It sometimes occurs that landowners and others – particularly risk-averse householders and small builders – apply for planning permission for projects that are not development, or that are permitted by a development order.

7.93 In such cases, an alert planning officer should spot the problem, and inform the would-be applicant that permission is not required – although arguably that may result in the planning authority losing the fee that it could have charged for an application for a certificate of lawfulness. In some cases, the application is simply processed, and permission granted – resulting in the applicant having to pay a fee, and possibly amend proposals to obtain approval – with consequential delay. It occasionally occurs that permission is refused, which is wrong in principle.

7.94 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. This used to be the position, as confirmed in *Wells v Ministry of Housing and Local Government*.

> 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.[50]

7.95 It therefore seems appropriate for a provision to be included to the effect that an application for planning permission should be automatically taken to include an application for a certificate as to the lawfulness of the project for which permission is being sought (that is, in effect, a CLOPUD). This would establish a more consistent approach, as between different authorities, in the way in which such cases are dealt

[50] [1967] 1 WLR 1000, CA, per Davies LJ at p 1010; distinguished by the House of Lords in *R (Reprotech (Pebsham) Ltd v East Sussex CC* [2003] 1 WLR 348, HL, at [30].

with. Clearly such a change would need to be thought through in detail, to ensure that it does indeed lead to simplification, and not simply to greater bureaucracy.

7.96 Regulations could no doubt provide that in the event that it is decided that a planning application is not required (either because the project does not constitute development or because it is permitted by a development order) a sum can be refunded that is equal to the difference between the application fee already submitted and the normal fee for a CLOPUD.[51]

7.97 An application for planning permission to retain development already carried out could similarly be deemed to include an application for a CLEUD.

Consultation question 7-12.

We provisionally propose that a provision should be included to the effect that:

(1) **an application for planning permission for an operation or change of use is assumed to include an application for a certificate of lawfulness of proposed use or development (CLOPUD) in relation to the operation or change of use; and**

(2) **an application for planning permission to retain an operation or change of use already carried out without permission is assumed to include an application for a certificate of lawfulness of existing use or development (CLEUD) in relation to the operation or change of use.**

Do consultees agree?

[51] This would no doubt be subject to a minimum amount to be non-refundable, to avoid excessive administrative costs.

Chapter 8: Applications to the planning authority

INTRODUCTION

8.1 Once it has been established that a proposed project constitutes development, and that permission for development of that category is not granted by a local or general development order, an application for permission will be required – usually to the planning authority.[1]

8.2 The term "planning application" is not defined in the TCPA 1990; although a "planning decision" is defined to be "a decision made on an application under Part 3 or section 293A"; and a "planning permission" means "permission under Part 3 or section 293A".[2]

8.3 It is noticeable that, whereas the TCPA 1947 contained only one section relating to "applications to planning authorities for permission" and one containing "supplementary provisions as to the grant of permission"[3], the current legislation contains a wide range of provisions relating to planning applications and permissions, scattered throughout Part 3 of the TCPA 1990 and the Listed Buildings Act 1990.[4] The resulting statutory scheme is neither coherent nor consistent. In particular, the TCPA 1990 is drafted principally by reference to the various types of permission, consent, approval or authorisation, but is curiously reticent as to the types of application that can be made.

8.4 The underlying tension is between the interests of those proposing to carry out development and the concerns of planning authorities and other interested parties. The former, understandably, seek to spend as little time and money as possible on producing detailed supporting material until the principle of a development is agreed; the latter, by contrast, want to see as much information as possible as to the details of a proposal before it is approved in principle. And European directives (particularly as to environmental assessment) have also stressed the importance of providing enough information.

8.5 This has led to the emergence of a variety of ways in which a development proposal can be authorised:

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1 Applications to the Welsh Ministers, for developments of national significance, are considered in **Chapter 9**. This Chapter does not deal with the various other circumstances where planning permission may be granted other than by application – see **paras 7.55 to 7.58**.

2 TCPA 1990, s 336. Section 293A refers to applications for urgently necessary development on Crown land.

3 TCPA 1947, ss 14, 18.

4 Listed building consent is largely dealt with in **Chapter 13**; but provisions relating to listed building consent (LBC) and conservation area consent (CAC) that are identical or very similar to provisions relating to planning permission are noted in footnotes in this Chapter.

(1) the most minor proposals (for example, a small extension to a dwelling) are such that they are likely to have minimal impact, and are therefore permitted by a development order, with no need for any details to be approved;

(2) some categories of proposals are approved in principle by a development order, but subject to a procedure known as "prior approval"

- in some instances (such as proposals for agricultural buildings), each such proposal needs to be notified to the planning authority, to afford the authority an opportunity to decide whether it wishes to have an opportunity to approve certain details[5];

- in others (such as certain pipelines and cables), the general approval is subject to a condition requiring the approval of certain details by the authority in every case[6];

(3) some proposals need to be the subject of a specific application, but can be approved with no need for approval of details – either because (as with some changes of use) there are no details to be approved, or (as with some straightforward building proposals) sufficient details are supplied with the application to enable the planning authority to be satisfied that they are acceptable;

(4) some proposals are submitted in the hope that satisfactory details have been submitted, but are approved in principle subject to a condition requiring the details to be approved subsequently (because the details submitted were unsatisfactory for some reason, or because certain details were omitted);

(5) some proposals (generally for larger schemes) are such that the applicant only wants approval in principle, having not yet worked up the details, and invites the authority to grant permission subject to the reserved matters being approved subsequently – and the authority may itself grant permission subject to a condition requiring the subsequent approval of matters additional to those reserved by the applicant.[7]

8.6 In case (1) approval is granted by a development order; in case (2), approval in principle is granted by a development order; in cases (3), (4) and (5), it is granted by a planning authority or by the Welsh Ministers in response to an application or appeal. In cases (2), (4) and (5) various details are approved in response to a further application.

8.7 Subsequently, once planning permission has been granted, there may be a desire – usually by the applicant, but occasionally by the planning authority – to amend it.

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5 GPDO 1995, Sched 2, Part 6 (agriculture); Part 7 (forestry); Parts 22, 23 (minerals); Part 24 (telecommunications); Part 30 (tolls); Part 31 (demolition).

6 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).

7 There is in England a further species of "permission in principle", introduced by the Housing and Planning Act 2016, but this does not apply in Wales; see **para 8.28** below.

8.8 In the previous Chapter, 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, under the following headings, relating to the successive stages of the procedure:

(1) seeking planning permission;

(2) application procedure;

(3) determining planning applications;

(4) conditions attached to planning permission;

(5) approval of details required by conditions; and

(6) variation of planning permissions.

We then consider briefly a range of supplementary matters – including deemed planning permission, environmental impact assessment, and call-in by the Welsh Ministers.

SEEKING PLANNING PERMISSION

The existing law

8.9 Applications for planning permission to authorise development will normally take the form of an application for full planning permission, under section 62 of the TCPA 1990 containing enough detail (at least in the eyes of the applicant) to enable a permission to be granted with no requirement for anything to be subsequently approved. The detailed requirements are in the TCP (Development Management Procedure) (Wales) Order ("DMP(W)O") 2012. Article 5 of the Order provides that an application must be accompanied by "plans, drawings and information necessary to describe the development".[8]

8.10 In reality, of course, the resulting "full" permission may well be subject to conditions requiring more (or different) details of particular matters – such as materials, or landscaping – to be submitted before development starts.[9]

8.11 The second situation is where development has already been carried out without planning permission (or in breach of permission that has been granted), when no further details need to be supplied, since the development is completed – although the authority may wish to grant permission subject to a condition requiring that a

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8 DMP(W)O 2012, art.5(1)(c)(ii)

9 Equivalent provisions for works at present requiring only LBC are in section 10 of the Listed Buildings Act 1990.

particular detail (for example, the type of roof tile) is amended, or that a missing element of the scheme (such as landscaping) be carried out.[10]

8.12 Section 73A of the TCPA 1990 ("planning permission for development already carried out") governs the permission that may be granted in such cases, and was inserted in substitution for section 63 ("applications in connection with existing buildings and uses").[11] However, it did not include explicit provisions relating to applications for such permission, equivalent to section 63(1), (2).[12] Article 5 of the DMP(W)O 2012 applies equally to such applications.[13]

8.13 There is no specific procedure for an application for planning permission for development that is currently under way; but it is presumably considered as a hybrid between an application under section 62 and an application for permission under section 73A.

8.14 Thirdly, an application for outline planning permission is a variation of the first type of application – an application for permission for proposed development but with details of certain matters kept back for approval as "reserved matters". This procedure, envisaged by section 92 of the TCPA 1990, is used where a developer wishes to obtain permission for the principle of a development before committing resources to working up the detailed design. The five categories of matters that may be reserved in this way are: access, appearance, landscaping, layout, and scale - each of which is defined in more detail in the DMP(W)O.[14]

8.15 Article 5 of the DMP(W)O 2012 also applies to outline applications, which must therefore be accompanied by plans, drawings and information necessary to describe the development.[15] Further, where layout is a reserved matter, the application must still state the approximate location of proposed buildings, routes and open spaces; where scale is reserved, it must state the upper and lower limit for the height, width and length of each building proposed; and where access is reserved, it must state the area or areas where access points will be situated.[16]

8.16 The planning authority may grant outline permission, subject to a condition specifying reserved matters for its subsequent approval. Alternatively, it may (within one month of receiving the application) require further details to be submitted.[17]

8.17 The authority may choose to grant permission subject to a condition requiring the subsequent approval of matters additional to those reserved by the applicant – so,

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10 Equivalent provisions for works to listed buildings that have already been carried out are referred to, but only briefly, in section 8(3) of the Listed Buildings Act.

11 By Planning and Compensation Act 1991, Sched 7, para 11, 16.

12 Hence, perhaps, the change in the title of the section.

13 Except where the application relates to a proposal to retain development already carried out with permission, but without complying with one or more conditions imposed on the permission (s.73A(2)(c)).

14 DMP(W)O 2012, art 2(1).

15 DMP(W)O 2012, art.5(1)(c)(ii)

16 DMP(W)O 2012, art.3(3)-(5).

17 DMP(W)O 2012, art.3(2).

for example, where the landscaping of a site is reserved, but the appearance of a development is not reserved, the authority may still wish to see further details of building materials.

8.18 We noted in the Scoping Paper that the treatment of reserved matters is unsatisfactory[18]; and PEBA and Persimmon agreed that the Planning Code should clarify the definition of reserved matters.

Possible simplification

8.19 Applications in the three situations referred to above are all "applications for planning permission". We see no reason of principle why there should be any distinction between them. An applicant should be entitled to seek authorisation of development whether it is still in the future, or under way, or complete – although of course if it is under way or complete, there is a risk of an application leading not to permission but to enforcement action.

8.20 It is thus not clear what is the distinction in law or policy – or in principle – between:

(1) the grant of "full" permission, followed by the approval of matters required by one or more conditions, and

(2) the grant of "outline" permission, followed by the approval of the reserved matters (and, possibly, any other matters required by conditions).

In either case, the principle of the development is approved by the initial grant of permission, but the development may not lawfully proceed until the details have all been approved.

8.21 In practice, the only difference is the amount of information that is required at the point of submission of the application. Thus, the days of outline applications simply identifying the site ("red line boundary" applications) have long gone. As noted above, the DMP(W)O 2012 sets a minimum standard of information required to be submitted in relation to all applications – for full or outline permission – and even outline applications must provide some details as to layout, scale and access. It is true that in some cases developers may not provide some details, notably as to matters such as landscaping and drainage. These can be the subject of conditions requiring subsequent approval – but only when the authority considers that a viable solution exists should the principle of development be acceptable.

8.22 Nor is there any particular logic as to why five specific matters are capable of being "reserved" by an outline permission[19], but not any others – such as hours of operation, or details of future phases of a larger development. And landscaping, in particular, is regularly the subject of conditions requiring subsequent approval.

8.23 We consider that it would 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 –

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18 Scoping Paper, para 5.12 to 5.19.

19 See **para 8.14**.

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. Those would presumably include (so far as relevant) details of the approximate location of all proposed buildings, routes and open spaces, the upper and lower limit for the height, width and length of each building proposed, and the area or areas where access points will be situated.

8.24 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, although not any of the matters specified in the regulations. And the authority would be able to impose such conditions of its own volition.

8.25 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 currently available only in relation to applications for outline planning permission.[20] We consider below the possible response by an applicant to such a notification.[21]

8.26 Once planning permission has been granted, subject to one or more conditions reserving details for subsequent approval, it will then be necessary to submit an application for the approval of those details. We consider that later in this Chapter.[22]

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20 DMP(W)O 2012, art 3.

21 See **para 8.143**.

22 See **paras 8.137 to 8.145**. We emphasise, for the avoidance of doubt, that the phrase "approval of details" in this Chapter does not refer merely to architectural and design details, but to any more detailed aspects of a proposed development, such as levels of parking provision, landscaping, or hours of operation.

Consultation question 8-1.

We provisionally consider that the law as to planning applications could be simplified, by:

(1) **abolishing outline planning permission;**

(2) **requiring that every application for planning permission for development – whether that development is proposed, or is under way, or has been completed – being accompanied by plans, drawings and information sufficient to describe the proposed development;**

(3) **enabling the items to accompany applications to be prescribed in regulations, so as to include (so far as relevant) details of**

- **the approximate location of all proposed buildings, routes and open spaces,**
- **the upper and lower limit for the height, width and length of each building proposed, and**
- **the area or areas where access points will be situated;**

(4) **enabling an applicant 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) **enabling an authority**

- **to grant permission subject to such conditions (whether or not invited to do so); and**
- **to notify the applicant that it is unable to determine an application without further specified details being supplied.**

Do consultees agree?

Other types of planning application

8.27 There are further categories of application, namely "householder applications" and "minor commercial applications"; but these are terms appearing only in the DMP(W)O, to identify applications for relatively minor development that can be exempted from some of the more demanding requirements as to material to be submitted and procedures to be followed; they are not defined in primary legislation, and we do not propose that they should be. [23]

[23] See DMP(W)O 2012, art 12 (applications); art 26 (appeals).

8.28 There is in England a further procedure known as "permission in principle", introduced by the Housing and Planning Act 2016,[24] but this does not apply in Wales. This enables permission to be granted for housing development, either in a development plan or other such document or in response to an application. There has hitherto been no suggestion that a similar provision should be introduced in Wales, and in view of our provisional proposal as to the simplification of planning applications generally, noted above, we make no such suggestion.

APPLICATION PROCEDURE

Pre-application procedure

8.29 Sections 61Z, 61Z1 and 61Z2 of the TCPA 1990 were inserted by Part 3 of the P(W)A 2015. The first requires applicants to consult with those likely to be affected by proposed development. Sections 61Z1 and 61Z2 require planning authorities to make available "pre-application services", which enable prospective applicants to discuss proposals and iron out potential problems at an early stage in the process.

8.30 In view of the recent introduction of these procedures, there has not yet been a chance to see how they operate in practice. We accordingly make no proposals as to any reforms.

Alternative Dispute Resolution

8.31 In its response to the Scoping Paper, the Town and Country Planning Association thought it was important to highlight the advantages of the use of mediation in plan-making, decision-making and enforcement as a means of building greater trust in the planning system as well as helping to devise more sustainable outcomes. Planning Aid Wales also welcomed our proposal to include a legislative 'signpost' to the possibility of non-statutory remedies such as mediation.

8.32 It was also raised by the Independent Advisory Group report that provided the evidence base to support the P(W)A 2015. The Group's recommendation as to alternative dispute resolution was not taken forward on the basis that changes to legislation focusing on pre-application, and accompanying changes to guidance, were considered to be a better means to identify and seek consensus on points of potential dispute.

8.33 We note that the Civil Procedure Rules explicitly refer to the desirability of encouraging parties to a dispute in the civil courts to use an alternative dispute resolution procedure if the court considers that to be appropriate, as part of the process of active management.[25] Mediation may be appropriate in settling a dispute as to compensation, and possibly in relation to refining some development proposals. And the Barker Review recognised that there was a role for mediation in planning

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[24] See TCPA 1990, s 58A, 59A, introduced by Housing and Planning Act 2016, s 150.

[25] Civil Procedure Rules, rule 1.4(2)(e).

disputes, although it rejected the possibility of requiring mediation to have been tried before the lodging of an appeal.[26]

8.34 On balance, we consider that it would be entirely appropriate for guidance to be issued by the Welsh Government or PINS to draw attention to the possibility of alternative dispute resolution procedures, and to point to other appropriate publications.[27] But we do not propose the introduction of a provision in the Planning Bill equivalent to the reference in the Civil Procedure Rules.

Material to be submitted with applications

8.35 Sections 62 and 65 contain the principal provisions relating to what information must be submitted with an application. Section 62 relates to supporting information generally, including design and access statements; it was replaced by a new version in 2004, subsequently amended on several occasions.[28]

8.36 The law in this area is inevitably a compromise, given the tension already noted between the desire of applicants to produce the minimum necessary until the principle of a development has been approved and that of planning authorities (on behalf of the community, and to enable meaningful consultation to take place with other stakeholders) to see as much as possible before issuing the approval. And some planning authorities have produced extensive lists of the material they wish to see accompanying particular applications or applications in particular categories – including statements as to the impact on the built heritage, biodiversity, traffic and a variety of other issues.

8.37 The majority of the statutory requirements as to what must accompany an application are to be found in subordinate legislation, currently the DMP(W)O 2012, which can be relatively easily updated from time to time, to accord with current practice. And guidance is provided in the *Development Management Manual*, produced by the Welsh Government in 2016.[29]

8.38 The significance of clarifying what has to be submitted with a planning application in order for it to be accepted is partly that the period within which an authority is to make a decision on an application starts at the date on which it is accepted as valid.[30] And that date also determines the date on which an appeal may be made against non-determination.[31]

8.39 The law was significantly changed in 2007, with the coming into force of section 327A of the TCPA 1990 (inserted by the PCPA 2004), which provided that a planning

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26 *Barker Review of Land Use Planning: Final Report*, HM Treasury, 2006, para 6.16.

27 See, for example, *Mediation in Planning: A Short Guide*, National Planning Forum, June 2011. There appears to be no such guidance specifically geared to the position in Wales.

28 Listed Buildings Act 1990, s.10 includes broadly equivalent provisions in relation to applications for listed building consent and conservation area consent.

29 *Development Management Manual*, Section 7, Annex Planning Applications, List of Validation Requirements.

30 DMP(W)O 2012, art 22.

31 DMP(W)O 2012, art 26.

authority "must not entertain" an application if it does not comply with requirements in primary or secondary legislation as to the form or manner in which it must be made and the form or content of supporting material to accompany it.[32] The court has indicated that this means that a planning authority must not deal with an application until it is complete, in light of any requirements imposed by section 62 or by regulations under that section.[33]

8.40 The editor of the *Planning Law Encyclopaedia* comments that section 327A may well have unintended side-effects, as it may open up a new route of challenge by third parties wishing to challenge the validity of a planning permission. We share that concern. However, the note in the *Encyclopaedia* was considered by the Court in *R (O'Brien) v West Lancashire BC*,[34] which held that the approach that should be taken to establishing the validity of a planning permission, even under section 327A, is the same as had applied previously, relying on the judgment of the Court of Appeal in *Main v City of Swansea*.[35]

8.41 The Court in *Main* had declined to accept that the validity of a planning permission should hinge on the distinction between serious or minor irregularities. It laid down a more discretionary test, whereby regard was to be had to all of the circumstances – including not only the nature of the procedural irregularity but also such matters as the identity of the person applying for relief, the lapse of time and the effect on other parties and public. In particular, the Court in *O'Brien* considered that a court retained its discretion as to whether to grant a remedy where an application was found to be invalid.

8.42 We agree that an absolutely rigid rule would be unhelpful. It is inevitable that from time to time there will be material inadvertently omitted from applications; it would not be appropriate for such mistakes to lead in all cases to an application – and possibly any resulting permission – being found to be invalid. But in light of the mandatory language of section 327A, it is by no means certain that the approach of the Court in *O'Brien* would be upheld in the event of any future dispute.[36]

8.43 Respondents to the Scoping Paper suggested that the law be clarified in relation to what constitutes a valid planning application as the requirements of planning authorities are sometimes at variance with those set out in Welsh Government guidance.[37]. It is unlikely that it would be possible to lay down general rules as to what constitutes a valid application partly because the requirements will vary with particular circumstances; and partly because any general requirements are likely to be much more appropriately contained in secondary legislation or in guidance.

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32 Inserted by PCPA 2004, s 42. Section 327A also applies to applications for LBC and CAC (Listed Buildings Act 1990, s 89(1)).

33 *R (Bizzy B Management Ltd) v Stockton-on-Tees BC* [2011] EWHC 2325 (Admin), at para [137].

34 *O'Brien v West Lancashire BC* [2012] EWHC 2376 (Admin), at para 42.

35 (1985) 49 P. & C.R. 26.

36 *O'Brien* is a first-instance decision, and thus not binding.

37 See now *Development Management Manual*, section 7.

8.44 Further, the P(W)A 2015 introduced a new procedure (which does not apply in England) in sections 62ZA to 62ZD of the TCPA 1990. An authority can serve on an applicant a notice that an application fails to comply with a validation requirement – that is, a requirement in or under the Act as to:

(1) the form or manner in which an application must be made; and

(2) the form or content of any document or other matter which must accompany the application.[38]

8.45 An applicant in receipt of such a notice can appeal to the Welsh Ministers.

8.46 In light of the existence of sections 62ZA to 62ZD, we provisionally consider that section 327A – with its mandatory language – has no continuing utility, and may in any event lead to unproductive litigation. We therefore provisionally propose that it is not restated in the Bill.

8.47 Respondents to the Scoping Paper also suggested that requirements as to the material to be submitted with applications (under section 62(3) of the TCPA 1990) should be abolished entirely (rather than merely curtailed, see section 28 of the P(W)A 2015). We are not convinced that this would be appropriate, in light of the existence of a right of appeal against validation requirements; it may be helpful in some cases for an authority to make plain requirements as to material to be submitted either in connection with a particular application or in relation to all applications for a particular category of development.[39]

Consultation question 8-2.

We provisionally propose 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 new Bill.

Do consultees agree?

Ownership certificates

8.48 It is inevitable that in some cases – particularly in connection with land occupied by those other than its owner, and land currently up for sale – there will be applications for development by those other than the owners of the land in question. It follows that it is essential that, where an application is submitted by someone other than the owner of the land, owners of that land are notified of it. But the only way in which a planning authority can know whether landowners have been informed is by applicants asserting either that that they own all of the land that is the subject of the application, or that they have notified everyone who is an owner of any of it.

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38 TCPA 1990, ss 62ZA(7)(a), 327A(1).

39 So, for example, applications relating to development affecting listed buildings or conservation areas should be accompanied by heritage impact statements rather than design and access statements.

8.49 That is the basis of the system, imposed largely by secondary legislation under section 65 of the TCPA 1990, requiring applicants to submit certificates as to ownership of the land, and as to the notification of owners other than the applicant.

8.50 Section 65(5) imposes an absolute bar on planning authorities entertaining applications that are not accompanied by the certificates required by these provisions. For the same reasons as noted above in connection with section 327A, we provisionally consider that the absolute bar imposed by section 65(5) is not helpful; and suggest that it should not be restated in the new Bill.

8.51 Section 65(6) makes it an offence to provide a false certificate as to ownership and notification. It was suggested by respondents to the Scoping Paper that the new Planning Bill should omit this as being unnecessary.[40]

8.52 However, we consider that it is important that an authority is able to rely on ownership certificates being accurate; and we consider that this is best achieved by retaining the criminal penalties for providing false information. It may well be that few if any prosecutions are ever brought in relation to this offence, but that does not mean that it is not operating as a spur to good behaviour.

8.53 We recognise that this offence might in some cases overlap with mainstream dishonesty offences (including false accounting, forgery and fraud) – where there was an element of falsehood, leading to an improper financial gain. Where that could be shown to be the case, particularly if it could be proved to have resulted in an improper grant of planning permission, prosecution on such a charge might remain available as an alternative. However, that would be rare. More often, a false certificate is likely to arise as a result of idleness or ignorance, and the mere possibility of a prosecution operates largely as a spur to encourage applicants to take trouble to supply the necessary information accurately

8.54 We therefore do not propose making any change in this regard.

8.55 We are also aware that some applicants (and planning authorities) are confused by the requirement for agricultural tenants to be notified of planning applications, under section 65(2) and article 10 of the DMP(W)O 2012. We suggest that this requirement is recast as a separate provision, applying only where land is subject to an agricultural tenancy under the Agricultural Holdings Act 1986 or the Agricultural Tenancies Act 1995. A similar approach might also be adopted in relation to the requirement to notify the owner of an interest in minerals in, on or under the land in question. Both requirements are of course irrelevant in the great majority of cases.

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[40] Section 11 of the Listed Buildings Act is broadly to the same effect as TCPA 1990, s.65. It does not contain an absolute bar on an authority entertaining an inaccurate application, equivalent to TCPA 1990, s. 65(5); but it does contain an offence equivalent to s.65(6).

Consultation question 8-3.

We provisionally propose that section 65(5) of the TCPA 1990 – providing that planning authorities must not be entertain applications that are not accompanied by ownership certificates – should not be restated in the new Bill.

Do consultees agree?

Consultation question 8-4.

We provisionally propose that the requirements of section 65(2) of the TCPA 1990 and secondary legislation made under that provision as to

(1) **the notification of planning applications to agricultural tenants and**

(2) **the notification of minerals applications**

should be clarified, to ensure that they are only drawn to the attention of applicants in relevant cases.

Do consultees agree?

Fees

8.56 We consider fees in **Chapter 17**, as they now are potentially payable in a range of circumstances, not just in respect of planning applications.[41]

DETERMINING PLANNING APPLICATIONS

8.57 The primary legislation on this topic is currently to be found in Part 3 of the TCTPA 1990, as amended by the PCPA 2004 and other legislation. Secondary legislation is in the DMP(W)O 2012, also much amended. Relevant guidance is now principally in the *Development Management Manual*, the first edition of which was issued by the Welsh Government in November 2016.

Procedure on receipt of an application

8.58 On receipt of an application for planning permission, the planning authority is required to check whether all required items have been submitted, a process known as "validation". This has been considered earlier in this Chapter.

[41] See **paras 18.74 to 18.79**.

The power to decline to determine applications

8.59 Section 70A of the TCPA 1990, as it was originally inserted (by the Planning and Compensation Act 1991) and still applies in Wales, provides that a planning authority may decline to determine an application for planning permission for the development of any land if within the previous two years the Welsh Ministers have dismissed an appeal against the refusal of a similar application (or refused a similar application made or referred to them), and there has been since the dismissal no significant change in the development plan, or in any other material considerations.

8.60 This provision was designed to prevent an applicant 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.[42]

8.61 Section 43 of the PCPA 2004 inserted a new version of section 70A, which also enables a planning authority to decline to determine a similar application if within the previous two years:

(1) the Secretary of State has refused an application deemed to have been made in response to an enforcement notice; or

(2) the authority has refused two or more similar applications but without there having been an appeal.

8.62 Section 43, and thus the revised version of section 70A of the TCPA 1990, have not yet been brought into force in Wales. It is not entirely clear why not; the revised version of section 70A seems to deal with a practical problem. In Wales, further amendments have been made to the original section 70A, by the P(W)A 2015, to take account of the special DNS regime.

8.63 In England two further amendments have been made to section 70A, by the Planning Act 2008, to include two other situations that might justify an authority in refusing a subsequent application. The first is where there has been an appeal that was subsequently withdrawn. The second is where there has been a deemed application by virtue of a ground (a) appeal against an enforcement notice.[43] These amendments both seem to be sensible, and could with advantage also be adopted in Wales.

8.64 We therefore provisionally consider that the Planning Bill should include section 70A as amended by the PCPA 2004, the Planning Act 2008 and the P(W)A 2015. The drafting will also need to take account of our proposal to remove the existing provision whereby an application is deemed to have been made when a ground (a) enforcement appeal is made.[44]

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42 *R (Harrison) v Richmond-upon-Thames LBC* [2013] EWHC 1677 (Admin).

43 See **para 12.97**.

44 See **Consultation question 12-12**.

Consultation question 8-5.

We provisionally propose that section 70A of the TCPA 1990 (power to decline similar applications) should be restated in the Planning Bill as its stands following amendment by PCPA 2004, the Planning Act 2008 and the P(W)A 2015.

Do consultees agree?

Twin-tracking

8.65 Section 43 of the PCPA 2004 also introduced a new section 70B into the TCPA 1990, giving to a planning authority the power to decline to determine overlapping applications. This was to deal with the practice known as "twin-tracking", whereby two applications were submitted at or around the same time; one proceeded to an appeal against deemed refusal as soon as the relevant time limit for determination has expired, and the other was the subject of continuing negotiations with the authority.

8.66 Section 78A – inserted by section 50 of the P(W)A 2015 – allows an authority, once an appeal has been made, to continue to negotiate on the application for a period of four weeks, without there having to be a second application in existence.[45] There is thus no need for a second application to be submitted, and the authority can simply continue to negotiate with the developer as to the details of the development, for a period of four weeks after an appeal has been submitted, and thus hopefully achieve a better final result. From the developer's perspective, the section 78A procedure allows an appeal to be submitted – thus starting the clock ticking on the appeal process, and gaining some leverage to encourage the authority to speed up the negotiation process. The result is that the process is speeded up, the likelihood of an operative appeal (with consequent cost and uncertainty) is reduced, to everyone's advantage.

8.67 Section 70B is in force in England, but not in Wales; whereas section 78A is now in force in Wales but not in England.[46]

8.68 We provisionally consider that the practice of twin-tracking does not cause any administrative or other problems. If the two applications in question are indeed identical, the second one can continue to be processed, and if necessary amended, without any time limit; and if appropriate two similar but not identical applications can be submitted to test the water. And the fees structure can reflect the fact that in reality there is only one application. We therefore provisionally consider that section 70B of the TCPA 1990 does not need to be restated in the new Bill.[47] On the other hand,

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45 DMP(W)O 2012, art 26A, inserted by 2015 SI 1330.

46 2015 SI 340, art 2. Similar provisions were inserted into the Listed Buildings Act in relation to applications for LBC and CAC 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.

47 The amendments to section 70B made by PCPA 2004, Sched 7 are also therefore redundant.

the ability for a planning authority to continue to determine an application for a limited period after the submission of an appeal may be useful in certain circumstances, and should be retained.

Consultation question 8-6.

We provisionally propose that section 70B of the TCPA (designed to discourage or prevent twin-tracking) should not be restated in the Planning Bill.

Do consultees agree?

Consultation and publicity

8.69 It has already been noted[48] that an applicant for planning permission must notify any (other) owners of the land in question, and accompany the application with a certificate stating that this has been done. However, the combined effect of section 71 of the TCPA 1990 and the DMP(W)O 2012 is that the planning authority must consult various people and bodies. An extensive list of precisely who is to be consulted in particular cases is contained in the DMP(W)O.[49]

8.70 The new Bill will continue to provide the basic requirements as to consultation, and the details will be in regulations.[50]

8.71 As to more general publicity, section 63 of the PCPA 2004 states that a planning authority in Wales may have a "community involvement scheme" setting out its policy as to the involvement of specified people in the exercise of its functions with respect to the development plan. This contrasts with section 18 of the 2004 Act, which states that an English authority must have a policy as to the involvement of the community in the exercise of its functions with respect to the development plan and planning applications. The courts have held that such a statement of policy creates a legitimate expectation as to who (for example, neighbours) will be informed of planning applications.[51]

8.72 We provisionally consider that it might be helpful for authorities in Wales to prepare a statement relating to the involvement of the community in the determination of planning applications.[52] And the power (or duty) to prepare such a document would

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48 See **paras 8.48 to 8.55**.

49 Listed Buildings Act 1990, ss.13, 15 make equivalent provisions as to the notification of applications for LBC and CAC (s.14 relates to London); although in that case most of the details are provided in Ministerial directions, requiring consultation with Cadw and the national amenity societies (Ancient Monuments Society, Council for British Archaeology, Georgian Group, the SPAB, and the Victorian Society (Welsh Ministers Direction (2017 No 26). issued in May 2017.

50 This is in line with trying to avoid the use of directions as far as possible. See **para 4.49**.

51 *R (Majed) v Camden LBC* [2009] EWCA Civ 1029.

52 Such a statement could also relate to community involvement in development planning (as in England), or may be a separate document

presumably be contained alongside those parts of the new Bill dealing with planning applications.

8.73 According to the DMP(W)O 2012, a planning authority is required, when determining an application for planning permission, to take into account any representations made within 21 days beginning with the date when the notice was first displayed.[53] Respondents to the Scoping Paper suggested that the law be clarified in relation to the status of representations made after the end of the 21-day consultation period.

8.74 The *Development Management Manual* indicates that such late representations should be taken into account if the application has not yet been determined. We agree that a statutory clarification of the position could be a useful addition to the DMP(W)O, but need not appear on the face of the Bill.

8.75 One specific requirement as to the giving of publicity for planning applications applies in areas of archaeological importance. We deal with this in **Chapter 13**.[54]

Consultation question 8-7.

We provisionally consider that it would be helpful to include in the Bill a provision 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.

Do consultees agree?

Consultation question 8-8.

We provisionally propose that the DMP(W)O 2012 should 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 the consideration of the application.

Do consultees agree?

The grant of planning permission

8.76 We have proposed above that the statutory provisions as to the making of applications for planning permission be made clearer, by providing for a single type of application. It follows that the range of types of authorisation that can be granted would be correspondingly simplified – there would simply be "planning permission",

53 DMP(W)O 2012, article 21.

54 See **paras 13.191-13.193**.

whether the development authorised has started or not. The grant of such permission would be subject in appropriate cases to the following statutory provisions:

(1) those now in section 75 relating to the effect of permission;[55]

(2) those relating to the imposition of conditions:

(a) conditions as to time limits for starting development;[56]

(b) conditions requiring certain matters to be approved subsequently by the planning authority (whether the matters specified in the application, or others);[57]

(c) any other conditions imposed by the authority;[58] and

(3) where the development has already started, the provisions currently in section 73A.[59]

8.77 The provisions as to the effect of permission (in sections 75 and 73A(3) of the TCPA[60]) apply to any permission granted – whether in response to an application or an appeal or by virtue of a general or local development order.

8.78 Sorting out these provisions into a more coherent pattern would itself be a significant improvement, although we recognise that this may only be possible to a limited extent. But we make no proposal for reform.

Considerations to be taken into account in determining applications

8.79 In our Scoping Paper, we invited consultees to identify additional matters to be defined or clarified in the new Planning Code. In response, it was suggested that it might be helpful to clarify certain specific matters that might be considered by planning authorities when determining applications, notably:

(1) the significance of the "fall-back position";

(2) the assessment of community benefits in relation to proposals for wind farms; and

(3) the significance of the Welsh language.

8.80 The "fall-back position" refers to the practice of applicants encouraging decision-makers to take into account the existing use of the land in question, which could be continued lawfully, or other development for which planning permission already

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55 Listed Buildings Act 1990, s 16(3) is similar.

56 See **paras 8.118 to 8.120.**

57 See **paras 8.102 to 8.105**.

58 See **paras 8.89 to 8.98**.

59 And those in Listed Buildings Act 1990, s 8(3).

60 And ss. 16(3) and 8(3) of the Listed Buildings Act.

exists, as an alternative to the proposed development for which permission is now being sought.

8.81 The first two are examples of particular considerations that may be material in the context of particular planning applications. We have already noted that we consider that it would not be helpful to define the phrase "material [or relevant] considerations", or to specify specific considerations that may be relevant in particular cases.[61] We therefore do not propose any reform specifically in response to these suggestions.

8.82 The third of these has been considered in the context of duties applying to the exercise of any function under the Planning Code.[62]

8.83 More generally, we have already suggested that the duties of authorities to consider various matters[63] when determining applications – in sections 70(2), (3) of the TCPA[64] – should be widened so as to apply to the exercise of any functions under the Code. They therefore do not need to be repeated specifically in relation to decision-making.

Reasons for decisions

8.84 There is a statutory duty on authorities determining planning applications to provide reasons for a refusal of permission and for any conditions attached to a grant of permission. That seems sensible. However, it was noted by the Court of Appeal in 1997 that a duty to give reasons for the grant of permission (not just for any conditions attached to a grant) was "conspicuously absent" from the statute.[65]

8.85 Such a duty was introduced in England in 2003, but was withdrawn in 2013.[66] The local government planning community had suggested that it was both burdensome and unnecessary because it duplicated material documented elsewhere.[67] We provisionally agree that a duty to provide reasons for a grant of permission seems unnecessary.

CONDITIONS AND LIMITATIONS

Distinction between conditions and limitations

8.86 At present, planning permission may be granted in response to an application or an appeal, subject to conditions.[68] And it may be granted by a development order

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61 See **paras 5.28 to 5.40**.

62 See **paras 5.57 to 5.66**.

63 Notably the development plan, national policies, the use of the Welsh language, and other relevant considerations; see **Chapter 5**.

64 and sections 16(2) and 72 of the Listed Buildings Act.

65 *R v Aylesbury Vale DC, ex p Chaplin* [1997] 3 PLR 55, CA.

66 TCP (General Permitted Development) Order 1995, art 31, amended by SIs 2003 No 2047, art 5, and 2013 No 1238, art 7.

67 Explanatory Memorandum to SI 2013/1238, paras 7.17, 7.18)

68 TCPA 1990, s.70(1)(a), 79(4)(a).

subject to conditions or limitations.[69] Failure to comply with either a condition or a limitation is a breach of planning control.[70]

8.87 Permission for a limited time is clearly permission subject to a limitation. But it is far from clear what else would constitute a limitation, as opposed to condition. The only distinction seems to be that where planning permission has been granted by a development order subject to a limitation, permission is not required for the use of land which (apart from the limitation) would be its normal use.[71]

8.88 This seems to be an unnecessary complication. If it were possible for any planning permission to be granted subject to limitations, as well as conditions, there would be no need for any distinction to be made between them. Alternatively, the term "condition" could be defined so as to include a "limitation".

Consultation question 8-9.

We provisionally consider that the distinction between conditions and limitations attached to planning permissions should be minimised, either:

(1) **by defining the term "condition" so as to include "limitation", or**

(2) **by 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.**

Do consultees agree?

General requirements as to conditions

8.89 Every planning permission[72] is subject to one or more conditions, even if only as to the period within which it can be implemented. In practice, most permissions are subject to a large number of other conditions, which may regulate a wide variety of matters, of which the most frequently encountered are:

(1) the matters that still need to be approved;

(2) the manner in which approved works must be carried out;

(3) the identity of the persons who may have the benefit of the permission; and

(4) the operation of the premises following implementation of the permission.

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69 TCPA 1990, ss. 60(1), 61C(1)(b).

70 TCPA 1990, 171A(1)(b).

71 TCPA 1990, s.57(3).

72 And every LBC.

8.90 The general power to impose conditions is found in sections 70(1)(a) and 72 of the TCPA 1990.[73] In particular, section 70(1)(a) gives planning authorities a wide power to impose such conditions "as they think fit". However, this has to be interpreted in light of court decisions and general public law principles. Thus, in *Pyx Granite Co Ltd v Ministry of Housing and Local Government*, Lord Denning said that:

> the law requires that those conditions fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest.[74]

8.91 In *Newbury District Council v Secretary of State for the Environment*, the House of Lords held that, in order to be valid, conditions must comply with the following tests:

(a) they must be imposed for a planning purpose and not for an ulterior one;

(b) they must fairly and reasonably relate to the development permitted; and

(c) they must not be so unreasonable that no reasonable authority could have imposed them.[75]

8.92 The Welsh Government Circular 016/2014 on *The Use of Planning Conditions for Development Management* replaces the previous Circular on *The Use of Conditions in Planning Permission*, which was produced in 1995 and applied in both England and Wales. Chapter 3 of the 2014 Circular suggests six tests for the validity of planning conditions. These tests are similar but not identical to those outlined in *Newbury*, and indicate that conditions should be necessary, relevant to planning, relevant to the development to be permitted, enforceable, precise, and reasonable in all other respects. The Circular also provides a large number of sample conditions that may be appropriate in particular circumstances.

8.93 We were told by those responding to our Scoping Paper that planning authorities sometimes attach additional conditions which do not meet the six tests identified in the Circular – this applies particularly where decisions are made by committees of elected members rather than by officers acting under delegated powers. We were also told that authorities sometimes simply copy sample conditions from the Circular without giving much thought to whether they are necessary and reasonable, enforceable, precise, relevant or suitable.

8.94 Section 100ZA of the TCPA 1990, to be introduced by the Neighbourhood Planning Act 2017 but only in England, empowers the Secretary of State to impose restrictions as to the types of conditions that may be imposed, either generally or in particular circumstances. However, such restrictions may be imposed only if they have the result of ensuring that conditions comply with four requirements, set out in section 100ZA(2), which are similar to those set out in *Newbury* and in Government guidance.

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73 Equivalent provisions are in sections 16(1) and 17 of the Listed Buildings Act 1990.

74 [1958] 1 QB 554.

75 [1981] AC 578 at 607 – 608

8.95 In the Scoping Paper, we suggested that it might be appropriate to clarify the extent of the power of a planning authority to impose conditions, in light of case law and guidance. In response, Monmouthshire County Council, RTPI Cymru and the Planning Officers Society Wales ("POSW") – South West Wales thought that the tests as to the validity of planning conditions should be included on the face of the statute. Persimmon Homes West Wales ("Persimmon") agreed, but suggested that they should be incorporated only once further technical reform had taken place focussing on the drafting, agreeing and discharging of them.

8.96 On reflection, we provisionally consider that it would be appropriate for the requirements as to the validity of conditions, which are of long standing and generally agreed to be helpful, should be incorporated into the Planning Code. We provisionally consider that the procedural approach adopted in the 2017 Act in England is unduly cumbersome, and that all that is required is a provision to the effect that planning authorities, in granting planning permission, may only impose conditions that are:

(a) necessary to make the development acceptable in planning terms,

(b) relevant to the development and to planning considerations generally,

(c) sufficiently precise to make them capable of being complied with and enforced, and

(d) reasonable in all other respects.

8.97 Subject to those considerations, our provisional view is that general advice as to conditions that would be appropriate would best be retained in guidance, as at present, rather than incorporated in the Bill. We accept that such guidance may be ignored or misapplied; but it would be difficult to include it within the statutory Code in such a way as to apply to a very wide range of factual situations; and might in any event give rise to a fertile ground for unmeritorious court challenges.

8.98 However, we consider below a number of specific types of condition that may be appropriately imposed in certain situations, which might usefully be referred to in primary or secondary legislation.

Consultation question 8-10.

We provisionally propose that the provisions in the TCPA 1990 as to the imposition of conditions should be replaced in the Bill with 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.**

Do consultees agree?

Consultation question 8-11.

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 8-11, 8-14 and 8-16.

Do consultees consider that the powers 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 should they be incorporated in Government guidance on the use of conditions?

Conditions requiring subsequent approval of details

8.99 As noted earlier in this Chapter, many "full" planning permissions are granted subject to conditions requiring certain matters to be approved before the development is started. Clearly in such a case it is not open to the planning authority when determining an application for such approval to question the principle of the development, however much it might now wish to.[76]

8.100 This process of obtaining the approval of details under any of the above mechanisms can be time-consuming both for the applicant and for the planning authority. Governments have therefore often sought to discourage their use when not strictly

[76] The power to impose such conditions on a grant of listed building consent is the contained in Listed Buildings Act, s.17(2); there seems to be no equivalent power relating to applications for planning permission.

necessary. Most recently, authorities in England have been required to give reasons explaining why a pre-commencement condition is a pre-commencement condition.[77]

8.101 We have already proposed that the procedure for granting planning permission subject to such conditions be brought together with the current procedure for outline permission and subsequent approval of reserved matters; this is the subject of **consultation question 8-1**. We provisionally consider that any more detailed requirement to justify the imposition of pre-commencement conditions is best dealt with by policy and guidance rather than by law, and therefore do not propose importing into the Planning Bill any requirement similar to the new one introduced in England.

Grampian conditions

8.102 Quite apart from conditions requiring approval of details, conditions are often imposed on planning permissions requiring that works are not to start until some event has occurred – such conditions are usually referred to as *Grampian* conditions, following the decision of the House of Lords in *Grampian Regional Council v City of Aberdeen*.[78] A common example is a condition that an approved development is not to be constructed until a nearby highway has been improved. The House of Lords subsequently confirmed that such a condition would be valid even if the likelihood of the specified event occurring was very low – subject to the test of unreasonableness, referred to above.[79]

8.103 Here too we provisionally consider that policy considerations as to when such conditions would be appropriate would be best included in Government guidance, and not in the Bill.

8.104 A particular category of *Grampian* condition is the type of condition envisaged by section 17(3) of the Listed Buildings Act 1990. This can be attached to a consent for the demolition of a listed building, and requires that the building shall not be demolished before—

(a) a contract for the carrying out of works of redevelopment of the site has been made; and

(b) planning permission has been granted for the redevelopment for which the contract provides.

8.105 A condition along similar lines might be equally useful in other cases (not involving listed buildings) where it is desirable that the project being permitted should only be carried out provided that some other project has been permitted and is actually going ahead.

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77 Town and Country Planning (Development Management Procedure) Order 2015, art 35(1).

78 [1983] 1 WLR 1340, (1984) 47 P&CR 633, HL.

79 *British Railways Board v Secretary of State* [1993] 3 PLR 125, HL.

Consultation question 8-12.

We provisionally propose that the Code should 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.**

Do consultees agree?

Pre-commencement conditions: the *Whitley* principle

8.106 Much litigation has resulted, generally in the context of enforcement proceedings, from the imposition of pre-commencement conditions – that is to say, conditions requiring something to be done before development commences. The problem that arises is where development is said to have commenced without the developer having complied with one or more such conditions – either conditions requiring details to be approved or others. In *Whitley v Secretary of State for Wales*, which concerned a mineral extraction scheme that had been permitted subject to a condition requiring a restoration scheme to be approved before the extraction started, Woolf LJ noted that "permission is controlled by and subject to the conditions" subject to which it is granted.[80] The development (which had been started before a scheme had been approved) therefore amounted to unauthorised development. But an appeal against enforcement action was allowed, because the approval required by the condition had been applied for within the time limit for commencing development, and obtained before the enforcement proceedings began.

8.107 A number of exceptions to the *Whitley* principle have subsequently been identified by the courts.[81] In *R (Hart Aggregates) v Hartlepool BC*, the High Court reviewed the authorities, and held:

> Condition 10 is a "condition precedent" in the sense that it requires something to be done before extraction is commenced, but it is not a "condition precedent" in the sense that it goes to the heart of the planning permission, so that failure to comply with it will mean that the entire development, even if completed and in existence for many years,

[80] (1992) 64 P&CR 296, CA.

[81] For example, by Keen J in *Leisure Great Britain v Isle of Wight PLBCAA 1990* (2000) 80 P&CR 370.

> or in the case of a minerals extraction having continued for 30 years, must be regarded as unlawful.[82]

8.108 The distinction postulated in *Hart* is often far from clear in practice. Thus the Court of Appeal, in *Greyfort Properties v Secretary of State*, approving the decision in *Hart Aggregates*, noted:

> It is clear that condition 10 [in *Hart Aggregates*] was rejected as a condition precedent engaging the *Whitley* principle – not because it used the second form of words rather than the first, but for the deeper reasons explained at length in the judgment.[83]

8.109 In other words, the key issue is not the precise wording of the condition in question, but whether, to use Sullivan J's phrase, it "goes to the heart of the permission". That is a question that can only be determined in light of all the relevant circumstances.

8.110 We consider that the present state of the law is confused, and would benefit from clarification. Further, we consider that this is a problem that does arise reasonably frequently in practice. It becomes critical in the context of enforcement, but it should be resolved much earlier than that, at the time when the permission is first granted. We have therefore considered how the law could best be clarified, to assist both planning authorities and developers.

8.111 We consider first that it might be simpler both for applicants and for authorities if conditions precedent "that go to the heart of the permission" were identified as such from the outset, so that all concerned can be clear as to what must be done, or what must occur (in the case of some *Grampian* conditions), before the approved development can be said to have been lawfully commenced. This could be particularly appropriate, for example, in the case of larger developments. We also note that some authorities, at least in England, now do exactly that, by routinely classifying some conditions as "true conditions precedent" (as opposed to "other pre-commencement conditions"). But such a practice, whilst it may be helpful, does not carry with it any right of appeal against the classification adopted.

8.112 It would be possible to require a planning authority, whenever it grants any permission subject to one or more conditions precedent, to identify all such conditions that go to the heart of the permission ("true conditions precedent"). Alternatively, authorities could be given a discretionary power (but not a duty) to do so in appropriate cases. Thirdly, it would be possible to introduce a right for an applicant to require the authority to do so in a particular case.

8.113 It would be necessary for there to be a right of appeal to the Welsh Ministers against the classification of a condition as a true condition precedent. Such a right of appeal would be in addition to the (existing) right to appeal against the terms of a condition. And it would presumably need to be subject to a restriction (similar to the one in

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82 (2005) 2 P&CR 31, per Sullivan J at [59].

83 [2011] EWCA Civ 908, [2012] JPL 34, at [32]. The two forms of words were (1) words requiring that no development should take place before an approval had been obtained and (2) words requiring the approval to have been obtained before the development commenced. The courts regarded the two formulations as equivalent.

section 73(2) relating to the duties of an authority on determining an application to vary a condition) whereby the Welsh Ministers on determining such an appeal were only able to consider the status of the condition in question as a true condition precedent. And there would then be the usual right to challenge the validity of their decision by way of an application to the High Court.

8.114 We recognise that it might seem that this proposal would effectively enable a planning authority by administrative action to over-ride the decision that would be reached by a court as to the status of a condition, were the matter to result in litigation. However, the existence of a right of appeal to the Welsh Ministers, and on to the High Court, should discourage authorities from inappropriately classifying conditions as true conditions precedent.

8.115 If an authority were to decide that a condition was not a true condition precedent, that would not be subject to a right of appeal by a third party, in the same way that a grant of planning permission is not subject to a right of appeal. But it would be possible for a third party to seek judicial review of such a decision – just as with a grant of permission. We thus provisionally consider that the court would retain ultimate control.

8.116 That may not, however, be a complete solution. In *Hart Aggregates* the Court observed that, taken to its logical conclusion, the *Whitley* principle produced the result that development carried out without prior compliance with a pre-commencement condition attached to a permission did not amount to implementation of the permission. The permission therefore lapsed after five years. Where the development took the form of building operations, it could not be enforced against after the enforcement time limit expired. But other conditions of the permission, such as those regulating the hours of operation of an industrial development, would have lapsed with the permission and could not be enforced either.

8.117 We would therefore welcome the views of consultees on the *Whitley* principle generally. A possible solution to the deeper problem identified in *Hart Aggregates* could be the introduction of qualifications to the rule that any non-compliance with a condition of a permission renders a development unauthorised. The qualifications could cover cases such as those where the terms of a condition require compliance at an earlier point in time than is practically necessary, or those where the damage to planning policy done by non-compliance with a condition could be rectified by enforcement measures falling short of enforcing against the entire development.

Consultation question 8-13.

We consider that it might be helpful:

(1) **for a planning authority to be given a power (but not necessarily a duty) to identify from the outset the pre-commencement 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) **for an applicant to have a 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) **for an applicant to have, in either case, a right to appeal against such identification, without putting in jeopardy the substance of the condition itself.**

Do consultees agree? Is there any other way in which the consequences of non-compliance, or belated compliance with commencement conditions could usefully be clarified?

Conditions as to the period within which development may be started

8.118 Section 91 of the TCPA 1990 provides that every permission is deemed to have been granted subject to a condition that the development in question must be commenced within five years of the grant of permission, unless an explicit condition states otherwise.[84]

8.119 It is common to find that a permission is granted subject to an explicit condition stating that the development must be commenced within five years, with the reason for the condition stated to be "as required by section 91". That represents a misunderstanding of section 91, as the section does not "require" any particular commencement date, and merely provides five years as a back stop if no other period is specified. It is also not entirely clear in some cases how the commencement provisions apply in the case of a development to be carried out in more than one phase.

8.120 We provisionally consider that the position would be clearer if the Bill were to state 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.

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[84] Listed Buildings Act 1990, s 18 is similar.

Consultation question 8-14.

We provisionally propose that the Bill makes plain:

(1) **that development must be commenced by the date specified in any relevant condition;**

(2) **that any phases must be commenced by the date specified in any condition relevant to that phase; and**

(3) **that in the absence of any such condition the development must be commenced within five years of the grant of permission.**

Do consultees agree?

Specific conditions: land under the control of the applicant (section 72(1)(a))

8.121 Certain types of condition are specifically provided for, in section 72(1) of 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.

8.122 Section 72(1)(a) provides that a planning authority may impose conditions:

> for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the planning authority to be expedient for the purposes of or in connection with the development authorised by the permission.

8.123 Such conditions may require works to be carried out on other land that is in the control of the applicant, or the use of such land to be regulated. A common example is where land adjacent to a proposed access to the 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.[85] In order for land to be in the 'control' of the applicant, the applicant does not necessarily have to own an estate or interest in the land.[86] It is for this reason that applicants commonly submit with their application a plan indicating with a red boundary land in their ownership, and with a blue boundary other land in their control.

8.124 In *George Wimpey & Co Ltd v New Forest DC*, it was held that the question whether land is in the applicant's control is a question of fact and degree for the decision-maker, and depends on whether the control was of a degree and kind sufficient to ensure that the condition could be complied with. That test is similar to the test applied by the courts in deciding who is the person liable under the Occupiers'

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85 A visibility splay is the area to either side of an entrance, kept from obstructions to ensure that drivers of vehicles leaving a site can see oncoming traffic on the road they are seeking to enter.

86 [1979] JPL 313.

Liability Acts of 1957 and 1984.[87] It would therefore be possible to insert a provision into the Bill to the effect that land is for these purposes "controlled" by the person who is the occupier of the land for purpose of the Occupiers' Liability Acts. However that would probably confuse as much as it would assist, and we do not therefore propose it.

8.125 However, we provisionally consider that section 72(1)(a) should be retained in the Bill, to ensure that there is no uncertainty as to the powers of a planning authority to impose such a condition in appropriate cases on land not owned by the applicant – and, more particularly, to enforce the requirements of the condition against a person other than the applicant. And it should be accompanied by a restatement of section 72(3) as it applies to such conditions, as time-limited conditions under section 72(1)(a) are one of the few situations where section 72(3) still has relevance.

8.126 Alternatively, it could be argued that it would be sufficient to include such a condition amongst the sample conditions that are the subject of Government guidance.[88]

Consultation question 8-15.

We provisionally propose that the Bill, or regulations under the Bill, should enable the imposition of conditions to the effect that the development or use of land under the control of the applicant (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.

Do consultees agree?

Specific conditions: time-limited permissions (section 72(1)(a))

8.127 According to Section 72(1)(b), planning authorities may impose conditions for the following

> for requiring 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.

Under the existing law, the period must be specified with a sufficient level of precision if it is to be regarded as a condition, rather than a 'limitation' – the distinction being important in that a breach of a limitation is not capable of being enforced against.[89]

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87 *Wheat v E Lacon & Co Ltd* [1966] A.C. 552 at [578].

88 Currently in Welsh Government Circular 016/2014, *The Use of Planning Conditions for Development Management*.

89 *I'm Your Man Ltd v Secretary of State for the Environment* [1999] PLCR 109.

That difficulty would largely disappear if the distinction between limitations and conditions were effectively to be abolished, as proposed above.[90]

8.128 Here too, we provisionally consider that section 72(1)(b) should be retained in the Code, to ensure that there is no uncertainty as to the powers of a planning authority to require restoration works to be carried out – or included in guidance. Again, this may require enforcement against a person other than the original applicant.

8.129 It may be noted that such conditions may be particularly appropriate in the case of permissions granted for mineral operations; we accordingly return to them in that context later in this Consultation Paper.

Consultation question 8-16.

We provisionally propose 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 the buildings or works authorised by the permission be removed, or the authorised use be discontinued at the end of the period, and that works be carried out at that time for the reinstatement of land.

Do consultees agree?

Specific conditions: time-limited permissions (section 72(13))

8.130 We also note that what is now section 72(3) originated as section 41(3) of the Caravan Sites and Control of Development Act 1960, before the TCPA 1968 imposed a time-limit of all planning permissions. There are therefore certain permissions still in existence, issued between 29 August 1960 (when the 1960 Act came into force) and 31 December 1968 (the day before the 1968 Act came into force) to which section 72(3) will therefore still be relevant.

Consultation question 8-17.

We provisionally consider 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) **time-limited permissions issued under what is now section 72(1)(a), and**

(2) **certain time-limed permissions issued between 29 August 1960 and 31 December 1968.**

Do consultees agree?

[90] See **Consultation question 8-9**.

Other conditions requiring to be enforced against those other than the applicant

8.131 In addition to the conditions noted above, referred to in the TCPA 1990, the Listed Buildings Act 1990 also provides for conditions that may require to be enforced against a person other than the original applicant. That Act thus enables listed building consent to be granted subject to conditions with respect to—

(a) the preservation of particular features of the building, either as part of it or after severance from it;

(b) the making good, after the works are completed, of any damage caused to the building by the works;

(c) the reconstruction of the building or any part of it following the execution of any works, with the use of original materials so far as practicable and with such alterations of the interior of the building as may be specified in the conditions.[91]

8.132 Such conditions may be useful in cases other than those involving listed buildings; and if the Code is to contain any explicit provision as to types of condition that may be imposed, these might usefully be imposed.

Consultation question 8-18.

We provisionally propose that the Bill, or regulations under the Bill, should 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.**

Do consultees agree?

Approval by applicants of draft conditions

8.133 Circular 016/2014 states that planning authorities should look favourably on requests from applicants to view draft conditions, as it may be possible for them to submit further information prior to a decision being issued which could potentially remove the need for the condition altogether.[92] Engagement with an applicant prior to the submission of an application and during the application process can reduce the need for conditions, although it is at the authority's discretion as to whether it awaits

[91] Listed Buildings Act 1990, s 17(1).

[92] Circ 016/2014, paras 4.1-4.3.

submission of this additional information prior to issuing a decision. However, this practice is not a statutory requirement.

8.134 In response to our Scoping Paper, we were alerted to a concern that planning authorities can be reluctant to provide applicants with a draft of proposed conditions, preventing discussion prior to the granting of permission or approval of reserved matters – despite the guidance in the Circular.

8.135 In its technical consultation on planning in England, DCLG consulted on whether there should be a new requirement for a planning authority in England to share draft conditions with an applicant for major development before it reaches a decision on the application. There was broad support for such a requirement, which is already a practice in some areas. The Government accepted that sharing draft conditions is in principle desirable but it considered that making such practice compulsory in all cases could reduce flexibility for applicants and planning authorities and, if not done correctly, could slow down decision-making. It accordingly concluded that it would consider the matter further.

8.136 We provisionally agree that the sharing of draft conditions would reduce the number of pre-commencement conditions needing to be imposed, and would reduce the need for applicants to submit an application to vary or delete conditions or appeal against them. However, we share the concern expressed by the Government in England as to the problems that might flow from making such a practice mandatory. We therefore provisionally consider that it should remain a matter of guidance.

APPROVAL OF DETAILS

The existing law

8.137 Where "full permission" (sometimes referred to as "detailed permission") is granted, it may be subject to one or more conditions requiring that certain details are subsequently approved by the planning authority. Authorities have been discouraged from imposing too many conditions of this kind, but the practice is nevertheless widespread. And where outline permission has been granted, the reserved matters must be approved (as well as, possibly, details of matters not reserved).

8.138 In all of the above cases, an application has to be made for the approval of details – whether or not they are formally classified as "reserved matters".

8.139 In the Scoping Paper, we noted that there is considerable ambiguity surrounding the treatment of reserved matters. In response, PEBA and Persimmon agreed that the Planning Code should clarify the definition of reserved matters and how they are to be approved; and Rhondda Cynon Taf CBC suggested that the Code should clarify whether an application under section 73 and 96A of the TCPA 1990 can be submitted for a reserved matters application. We have also been alerted to concerns by the Welsh Government and by the DCLG on this score. The same applies to the approval of matters required by conditions.

8.140 In particular, it appears 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".[93] The P(W)A 2015 has been drafted to take account of such concerns.[94] Nor is it entirely certain that there are powers to make provision by a development order for applications for the approval of reserved matters – although an order may make provision for the grant of outline permission itself.

8.141 We have proposed earlier in this Chapter that the law be simplified by doing away with the current distinction between outline permission and full permission.[95] Whether or not that proposal is accepted, we consider that the production of the Code provides an opportunity to clarify and simplify the legislation in regard to applications for the approval of details, and to ensure that there is a statutory basis for the procedures that are currently operated (including appeals to the Welsh Ministers in relation to such applications).

8.142 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.[96]

8.143 It would also be helpful for there to be a provision whereby an authority in appropriate cases could inform an applicant that it is not willing to determine one set of details without also determining another category of outstanding detail – so as to ensure, for example, that the details of the brickwork of a new house is not approved in isolation from an approval of the roofing materials.

8.144 Given the understandable concern as to the potential for delay occurring at this stage of the procedure, it might at first glance seem attractive for there to be a time-limit within which an authority has to respond to an application for the approval of details. However, whilst some details (for example, the materials to be used for a single house) can be readily approved, others (the layout of a future phase of a large housing scheme) may be the subject of extensive negotiations, taking considerable time.

8.145 Our provisional view is therefore that it would not be appropriate to prescribe a mandatory time-limit, applicable to all applications for approval of details. Instead, we consider the existing position should be retained, whereby there is a period after which applicants can appeal against non-determination, with authorities able to negotiate for extra time in appropriate cases.

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93 In particular, TCPA 1990, s 62.

94 See, for example, TCPA 1990, s 62M(4), inserted by P(W)A 2015, s 23; and TCPA 1990, s 100A, inserted by P(W)A 2015, s 37.

95 See **Consultation question 8-1.**

96 As with section s. 73(2); and see *Thirkell v Secretary of State* [1978] JPL 844.

Consultation question 8-19.

We provisionally consider 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.

Do consultees agree?

Consultation question 8-20.

We provisionally propose that a planning authority should 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.

Do consultees agree?

Notification of development approved in principle by a development order[97]

8.146 Where development in certain categories is permitted by a development order, such permission is subject to the "prior approval procedure". In a few cases, a condition of the permission granted by the order requires that the details of every proposal in the category in question are approved by the planning authority.[98]

8.147 The prior approval procedure has also been used in England in connection with recently introduced permitted development rights for changes of use, but not in Wales. And it remains to be seen what types of conditions, if any, will be attached to permission granted by local development orders; they may well introduce a prior approval procedure in certain cases.

8.148 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.[99] Any adjustments made to that procedure will therefore need to be considered carefully in light of any implications for the prior approval procedure.

8.149 A variation of this is where the condition requires that every such proposal must be notified to the authority, so that it can decide on a case-by-case basis whether it wishes to have an opportunity to approve the details.[100] In such cases, it might be

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97 This is the process sometimes known as "prior approval".

98 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).

99 See **paras 8.137 to 8.145**.

100 GPDO 1995, Sched 2, Part 6 (agriculture); Part 7 (forestry); Parts 22, 23 (minerals); Part 24 (telecommunications); Part 30 (tolls); Part 31 (demolition).

helpful to introduce a time limit within which the authority has to respond to such a notification.

8.150 A suitable model might be the notification to planning authorities of proposed works to trees in a conservation area (to enable the authority to decide whether it wishes to impose a tree preservation order on the trees in question[101]). That confers on the person who has notified the authority a right to proceed with the works if no response has been received from the authority within six weeks. A similar procedure could be introduced whereby anyone who has notified the planning authority of an in intention to carry out development in a relevant category permitted by a development order could proceed without further ado if no response has been received from the authority within a prescribed period.

Consultation question 8-21.

We provisionally propose that the Bill should clarify the existing law and procedures as to the approval of details required by:

(1) **a condition of a permission granted by a development order;**

(2) **a requirement imposed by a planning authority following a notification of proposed works in a relevant category of development permitted by a development order.**

Do consultees agree?

Consultation question 8-22.

We consider that it might be helpful for there to be 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.

Do consultees agree?

[101] TCPA 1990, s 211. See **paras 15.120 to 15.123.**

VARIATION OF PLANNING PERMISSION

Applications to vary a permission

8.151 Once permission has been granted, and details approved where necessary, it may be that the developer now wishes to do something different from what has been permitted.

8.152 There are at present a number of ways in which an authority can approve an amendment to what has been approved.

(1) it may grant permission (under section 96A of the TCPA 1990) to carry out development that is different from the development already permitted, but such that the difference is non-material;

(2) where planning permission has been granted subject to conditions, it may grant permission (under section 73) to carry out the development without complying with some or all of those conditions – or possibly subject to additional conditions; and

(3) where planning permission has been granted for development that has not yet been completed, it may modify the permission (under section 97).[102]

8.153 In each case, the request is not for planning permission for a totally new proposal, but rather for the amendment or extension of a permission that has already been granted.

8.154 A successful application under section 73 results in an additional permission, so that the developer can implement either the original permission (for scheme A) or the varied permission (for Scheme B). By contrast, a successful application under section 96A results in a replacement permission, such that the original permission is no longer capable of being implemented. However, if the authority originally granted permission for a development ("scheme X"), and then allowed a variation of the permission to allow the development to be carried out in a slightly modified form (scheme Y"), it is difficult to see why it would object to a reversion back to scheme X.

8.155 The phrasing of section 96A is helpful, insofar as it allows an land owner (but not anyone else) to invite the planning authority to make a non-material amendment to a permission that has been granted; but it does not deal with an amendment that is material, but still minor.

8.156 Section 73 of the TCPA 1990 is less helpful, in that it applies to "an application for planning permission for the development of land without complying with conditions" rather than an application to vary a permission that has already been granted. Such an application can be submitted by anyone, and not just an owner, and can be used in a variety of ways, including:

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[102] The second and third also apply to the amendment of proposals for which listed building consent has been granted (Listed Buildings Act 1990, ss 19, 23).

(1) an application to extend the time limit of a permission that has not yet expired[103] ("a renewal application");

(2) an application to make minor material amendments to a permission that has been granted;

(3) an application to vary or remove any other condition.

8.157 In particular, section 71ZA (inserted by the P(W)A 2015) requires every permission to specify the plans or other documents describing the approved development, and deems that the permission is subject to a condition requiring that the development is carried out in accordance with those drawings etc.[104] It follows that an applicant can apply under section 73 to amend such a condition by the substitution of one or more different drawings, and thus in effect to modify the development that has been permitted.

8.158 Where a planning permission is about to expire (or has already expired) without the development having been started, an applicant may wish to apply for the permission to be renewed. In many cases this will be a formality. However, where circumstances may have changed – or the development plan updated – the planning authority may wish to revisit the whole principle of the approved development, and consult stakeholders again. Applications for the renewal of planning permission are therefore normally treated as applications for full planning permission.

Possible simplification

8.159 We provisionally consider that it might be preferable for there to be a single procedure whereby an application can be made for the variation of an existing permission that has not yet been implemented (or not fully implemented). That variation might be non-material, minor material or material; and it might relate to one or more of the conditions, or it might relate to the substance of the development.

8.160 In response to such an application, the authority would be able to categorise the proposed change as:

(1) the renewal of a permission that has not yet expired (in which case an authority will normally be able to agree without further ado, unless material considerations have significantly changed);

(2) a non-material change to the development already permitted (in which case an amendment to the permission can quickly be approved without further ado);

(3) a material but still 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

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[103] A permission that has expired cannot be extended by an application under TCPA 1990, s.73, but must be the subject of a new application. See s.73(4).

[104] There appears to be no equivalent provision relation to applications for listed building consent.

(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).

8.161 In other words, from the point of view of the applicant, who may not be able readily to categorised the proposed change as minor or major, material or non-material, there is one type of application. But the planning authority can respond to such an application in whatever way it considers appropriate, depending on the particular circumstances.

8.162 In addition, the authority may in some situations be content to allow the applicant to implement either the original permission or the modified version. Thus, for example, where the permitted drawings originally specified a particular pattern of windows, and the amended permission specified another, the authority may be equally content with either. However, in other cases, where for example new information suggests that the original scheme would be unsatisfactory, the authority may be willing to allow only the modified version.

8.163 We recognise that care would need to be taken to reflect the differences between the procedures under sections 73 and 96A. In particular, it would be necessary to ensure that the procedure neither becomes unnecessarily bureaucratic in relation to minor changes, not provides insufficient scrutiny for major changes.

8.164 We note that the *Development Management Manual* defines a "minor material amendment" as "one whose scale and nature results in a development that is not substantially different from that which has been approved". That is helpful, but does not seem to take the matter a great deal further forward. We do not believe that there should be a definition of non-material or minor included within the new Planning Code as the appropriate procedure to be followed by the planning authority would be best left as a matter for its discretion.

8.165 We also consider there is merit in the suggestion which we received at consultation that section 96A (non-material modifications) should be extended to applications for the approval of details. Thus, for example, when one type of brick has been approved, a similar one could readily be substituted.

Consultation question 8-23.

We provisionally consider 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 light of its assessment of the materiality of the proposed amendment.

We envisage 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.**

Do consultees agree?

Consultation question 8-24.

We provisionally propose that the Planning Code should extend the scope of section 96A (approval of minor amendments) to include approvals of details.

Do consultees agree?

Variation in case of urgency

8.166 A particular problem can arise where planning permission has been granted, and the implementation of the permitted development is imminent – or has indeed already started, with contractors on site – and the developer now wishes to make an amendment to the permitted scheme. This may arise from pre-commencement site investigations, or more detailed design development, or possibly as a result of on-site discovery (particularly in the case of altering an existing building). A developer who proceeds without seeking an amendment to the permission risks receiving an enforcement notice; an application for an amendment (particularly if the authority considers it to be non-material) may lead to unwelcome delay; and to proceed with the scheme as permitted may lead to a result that is unsatisfactory both to the developer and to others.

8.167 In such cases, an application to amend, as outlined under the previous heading, will need to be made; but there should be the possibility of an expedited procedure in appropriate cases – possibly subject to the payment of an enhanced fee.

Consultation question 8-25.

We provisionally propose that an expedited procedure should be available for the determination of an application to vary a permission where the implementation of the permitted development is under way.

Do consultees agree?

DEEMED PLANNING PERMISSION

8.168 Under section 90 of the TCPA 1990, a Government department authorising a project under legislation other than the TCPA 1990 may direct that planning permission is deemed to be granted. However, the duty as to public consultation in relation to such authorisation is not as wide as the corresponding duty in relation to the processing of normal planning applications. Further, it has been held that such an authorisation is not a determination under the TCPA 1990, so that the duties as to matters to be considered (under section 70 of the TCPA 1990 and section 38(6) of the PCPA 2004) do not apply to it.[105]

8.169 In response to our invitation in the Scoping Paper to suggest possible technical reforms, Richard Harwood QC suggested that section 90 should be amended so as to provide for an authorisation process that is just as rigorous (that is, it should be made in accordance with the development plan, so far as material, and other material considerations). We provisionally consider that this would be sensible. However, we consider that the necessary legislative changes would be beyond the scope of the present exercise, as they would extend to matters that are outside the legislative competence of the Assembly, and we therefore make no proposal for amendment.

ENVIRONMENTAL IMPACT ASSESSMENT

8.170 Alongside the normal requirement for planning permission to be obtained for the carrying out of development, there is a further requirement for an environmental impact assessment (EIA) to be produced in connection with any significant project. This was initially a result of an EC Directive in 1985, and the relevant primary legislation was accordingly in section 2 of the European Communities Act 1972. However, the Planning and Compensation Act 1991 introduced a freestanding provision into the TCPA 1990, as section 71A of that Act, which enables the Welsh Ministers by regulations to make provision about the consideration to be given to the likely environmental effects of proposed development.

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[105] *R (Samuel Smith Old Brewery (Tadcaster) Ltd v Secretary of State for Energy and Climate Change* [2012] 2 All ER 849.

8.171 The 1985 Directive was subsequently amended three times, and has now been replaced by Directive 2011/92/EU[106], which has itself been amended by Directive 2014/52/EU. The latter requires the relevant domestic legislation to state that it is implementing the Directive.[107]

8.172 Section 71A explicitly states that regulations under it may make the same or similar provision as would be required under the relevant EU directive, or different provision. The current regulations applying in Wales are the TCP (Environmental Impact Assessment) (Wales) Regulations 2017, which came into force on 16 May 2017.[108] The purpose of the EIA regime generally, and the changes made by the 2017 Regulations, are set out in the Regulatory Impact Assessment produced in connection with the Regulations.

8.173 The number of development proposals for which an EIA is required represents around 0.1% of all planning applications.[109] And by definition they will be the more significant ones.

8.174 Corresponding regulations have been made – generally on an England and Wales basis – in relation to various categories of projects that are outside the scope of "development", or for some other reason do not require planning permission.[110] They are outside the scope of this present exercise.

8.175 As a result of the forthcoming departure of the United Kingdom from the European Union, the requirements of the relevant European directives will in due course no longer apply. However, as a result of the enactment of section 71A, the EIA requirements are already only indirectly related to the requirements of European legislation; and the departure from the EU will therefore have no effect in this regard.

8.176 It is possible that, at some point in the future following the conclusion of the process of exit from the EU, it might be appropriate to review the entire EIA regime, to examine whether it is sensible to retain it as a separate code rather than amalgamating its requirements with those of the mainstream planning process; but this exercise does not seem to be the right time to do so.

8.177 The same point is likely to apply to the assessment of proposed development in light of the Habitats Regulations, which transpose into domestic legislation the requirements of the relevant EU direction. Again, this is not the appropriate time to carry out a thorough review of those Regulations.

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106 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

107 Directive 2014/52/EU, art 2(1) (see also Directive 2011/92/EU, art 13); see TCP (Environmental Impact Assessment) (Wales) Regulations 2017, preamble.

108 The 2017 Regulations continue to apply in limited circumstances, mainly relating to minerals.

109 Explanatory Memorandum to TCP (EIA) Regulations 2017. Those Regulations apply only to England, but there is no reason to suppose that the percentage will be significantly different in Wales.

110 Fish farming, forestry, land drainage, decommissioning of nuclear reactors, offshore petroleum extraction, gas pipelines, harbour works, and other projects related to electricity, pipelines and water resources.

Detailed points

8.178 In the meanwhile, respondents to the Scoping Paper raised some matters of detail relating to environmental assessment. They suggested clarification as to whether, under the EIA regulations then in force, further publicity and public consultation was required where a previously provided environmental statement remained fit for purpose. That point has been dealt with by regulation 17 of the 2017 Regulations.

8.179 And the point made below[111] as to the need for clarification as to the procedural requirements relating to applications for development on land straddling the border between England and Wales could have particular force where the development is likely to have impacts that require assessment under the EIA regulations.

8.180 More generally, it was suggested that the DMP(W)O could be amended to clarify the requirements to consider environmental information both under the under the Order and under the EIA Regulations.

8.181 These seem to be sensible points, but would best be dealt with when the Order and the 2017 Regulations are next amended or replaced.

CALL-IN OF APPLICATIONS BY WELSH MINISTERS

8.182 The Welsh Ministers have the power, under section 77 of the TCPA 1990, to direct that planning applications and other applications are referred to them for their own decision. The Welsh Ministers will normally only call in an application if they think that there are planning issues of more than local importance.[112] Such directions may be given either to a particular authority or to planning authorities generally, and may relate either to a particular application or to applications of a specified class. Over the last three years, an average of two applications were called in each year.[113]

8.183 Generally, we have proposed that requirements as to how particular categories of applications are to be dealt with should be in regulations, to maximise transparency and accountability[114]; but that a requirement relating to a particular case should be in a direction. In line with that approach, we provisionally consider that the Welsh Ministers should have a powers:

(1) to make regulations requiring that particular categories of applications should be referred to them, so that they consider whether to call in any specific application; and

(2) to make a direction requiring a specific application to be referred, so that they can consider whether to call it in.

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111 See **paras 8.193, 8.194.**

112 Planning Policy Wales (Edition 9), para 3.7.3. They have a similar power under Listed Buildings Act 1990, s.12 to call in for their own decision applications for LBC and CAC.

113 Source: Welsh Government.

114 See **para 4.49**.

8.184 In either case, the requirement to refer an application will need to be known by the authority before it reaches a final decision on the application; but the referral itself will occur after the authority has gone through the whole process of notification and consultation, and has reached its own view.

8.185 We emphasise that this proposed regulation-making power is intended as a replacement for the existing power to make a general direction.[115] We anticipate that it would be used where, as a matter of policy, Ministers always or often call in applications in a particular category (for example, buildings of more than a certain size in the green belt). They would thus be able to specify in regulations that such applications should be notified to them, so that developers – and other interested parties – can know in advance that the application will need to be referred, and may be called-in. But the power to make a direction would remain in place, and could be used in relation to specific cases.

8.186 The Scoping Paper made no specific mention of call-in powers, but one consultee noted that the duty to notify the applicant that an application had been called in by the Welsh Ministers should lie with them, and not with the planning authority. We agree that this would bring consistency to the call-in procedure. Such a duty would apply only where an application is actually called in, not merely where the application is initially referred to the Welsh Ministers.

8.187 The power of the Welsh Ministers to determine planning applications is normally exercised in relation to applications for major development; this is the subject of the next Chapter.

Consultation question 8-26.

We provisionally propose that the Welsh Ministers should have powers

(1) **to make regulations requiring applications in a particular category to be notified to them, and**

(2) **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.

Do consultees agree?

[115] Most recently exercised by the issue of the TCP (Notification) (Wales) Direction 2014, as an Annex to Welsh Government Circular 07/12.

Consultation question 8-27.

We provisionally propose 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.

Do consultees agree?

PLANNING APPLICATIONS: MISCELLANEOUS POINTS

Procedural details to be moved from primary to secondary legislation

8.188 We have already noted that it would seem to be generally more suitable for details of procedure to be governed by regulations, rather than by order.[116] There are several such points that have emerged in the course of our work.

8.189 First, Section 71(3) of the TCPA 1990 requires that before a planning authority grants planning permission for the use of land as a caravan site, it shall consult the local authority with power to issue a site licence for that land, unless it has that power itself. We provisionally consider that this level of detail is unnecessary on the face of the Planning Bill. A requirement to consult with a caravan site licence authority can be addressed in the DMP(W)O if necessary.

8.190 Secondly, section 71ZB of the TCPA 1990, s 71ZB (inserted by section 33 of the P(W)A 2015) requires that a person proposing to carry out development that has been approved must notify the planning authority before starting, and must display a copy of the permission whilst the development is proceeding.

8.191 We provisionally consider that this too is a detailed procedural requirement more suitable to be incorporated into secondary legislation than in the Act itself.

8.192 We recognise that these changes may require slight adjustments to the Bills to ensure that there is an appropriate enabling power.

[116] See **para 4.49**.

Consultation question 8-28.

We provisionally consider that the following provisions currently in the TCPA 1990 should not be restated in the Planning Bill, but that equivalent provisions should be included in the DMP(W)O 2012 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).**

Do consultees agree?

New provision in secondary legislation

8.193 Respondents to the Scoping Paper suggested that the law could be clarified as to the treatment of applications for development on land straddling the border between England and Wales. This seems to be no more than a particular example of the problems that may arise where development is proposed on land straddling the border between two local authority areas.

8.194 Insofar as special provisions need to be made, this is a matter that should be dealt with in the relevant subordinate legislation – notably the DMP(W)O 2012 – when it is next updated.

Apparently redundant provisions

8.195 There are a number of apparently redundant provisions within the TCPA 1990, which we provisionally consider need not be restated in the Bill.

The initiation of development

8.196 Section 56(1) of TCPA 1990 related to the "initiation" of development, a term that was only used in Part 5 of the TCPA 1990, relating to compensation. That Part was repealed by the PCA 1991, and section 56(1) should have been repealed with it. It accordingly need not be restated in the new Bill.

Planning applications for private hospitals

8.197 Section 70(3) of the TCPA 1990 provides that the power to grant or refuse planning permission is to be exercised subject to section 15 of the Health Services Act 1976. That provision required Government authorisation for planning applications for private hospitals.[117] It was repealed by section 63 of the National Health Services and Community Care Act 1990; and that Act was in turn largely repealed by the National Health Service (Wales) Act 2006. Neither the 1990 Act nor the 2006 Act contained any provision equivalent to section 15 of the 1976 Act.

[117] See Dept of the Environment, Circ 2/81, Appendix E.

8.198 The reference to the latter in section 70 of the TCPA 1990 is accordingly no longer required, and need not be restated in the Planning Code.

Development not in accordance with the development plan

8.199 Section 74(1)(b) of the TCPA 1990 makes provision for a development order to regulate the grant of planning permission for development not in accordance with the development plan.[118]

8.200 The matters that are to be taken into account by an authority determining a planning application are as set out in section 70 of the TCPA 1990.[119] Whilst the development plan is pre-eminent amongst those, there is nothing in that section that restricts the ability of the planning authority to determine applications in a way which is inconsistent with the development plan, where relevant considerations indicate that this would be appropriate.

8.201 It follows that section 74(1)(b) is unnecessary; and we provisionally consider that it need not be restated in the Code.

Authorities dealing with applications

8.202 Section 74(1A) of the TCPA 1990, inserted by the Planning and Compensation Act 1991, provides that a development order may prescribe "the persons to whom applications are to be sent". This appears to be relate to the situation where there is a two-tier system of local government, so that certain categories of applications can be sent to county or district authorities.

8.203 It follows that section 74(1A) is redundant in relation to Wales, and need not be restated in the Bill.

Facilities for disabled people

8.204 Section 76 of the TCPA 1990 (duty to draw attention to certain provisions for the benefit of disabled people) was to be repealed by Schedule 6 to the PCPA 2004. Schedule 6 has not yet been brought into force; but Schedule 9 to the PCPA 2004 (repeals) has. It is therefore not entirely clear whether, as was clearly intended, Section 76 has in fact been repealed. In any event, section 76 has in effect been overtaken by the provisions of the Equality Act 2010; and we have already proposed that guidance should draw attention to the 2010 Act.

8.205 Insofar as it has not already been repealed, therefore, section 76 does not need to be restated in the Bill.

Applications for other consents

8.206 Section 332 of TCPA 1990 enables regulations to be made by the Welsh Ministers to enable a planning application to also constitute an application under some other

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118 Article 20 of the DMP(W)O 2012, made under this power, currently provides for this.

119 See **para 5.16**.

procedure (for example, building regulations). Broadly similar provisions have been included in every planning Act since 1947.[120]

8.207 It appears that no regulations under this provision or any of its predecessors have ever been made in England and Wales. We provisionally consider that the provision is redundant and should not be restated in the Bill.

Consultation question 8-29.

We provisionally propose 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) (referring to 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) of the TCPA 1990 (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).**

Do consultees agree?

[120] See, for example, TCPA 1947, s.102.

Chapter 9: Applications to the Welsh Ministers

INTRODUCTION

9.1 Planning applications, and applications for the approval of details, are normally made to planning authorities – as described in the previous Chapters. They may, in exceptional cases, be called in by the Welsh Ministers. However, there are several situations where applications may, or must, be made direct to the Welsh Ministers.

9.2 Firstly, the Planning (Wales) Act 2015 (P(W)A 2015) introduced a procedure whereby applications for development could be made directly to the Welsh Ministers in the areas of underperforming planning authorities. The relevant legislation is now in sections 62M to 62O of the TCPA 1990. This is similar, but not identical, to the equivalent procedure in England under sections 62A to 62C.

9.3 Secondly, applications for developments of national significance (DNSs) must be made to the Welsh Ministers, under a new procedure to be found in sections 62D to 62L of the TCPA 1990, also introduced by the P(W)A 2015. There is no equivalent procedure in England.

9.4 We consider each in turn, and also refer briefly to other special procedures for dealing with major infrastructure projects – planning inquiry commissions and major infrastructure inquiries.

9.5 Thirdly, urgent applications for development by the Crown may be made to the Welsh Ministers, under section 293A of the TCPA 1990.[1]

APPLICATIONS IN THE AREAS OF UNDERPERFORMING PLANNING AUTHORITIES

9.6 Section 23 of the P(W)A 2015 inserted an option for applicants in certain circumstances to choose to make applications direct to the Welsh Ministers, rather than to planning authorities.[2] This is quite distinct from the provisions, considered below, as to applications for development of national significance, although the two sets of legislative provisions were introduced by the same Part of the P(W)A 2015.

9.7 The new procedure will apply where a planning authority has been designated as underperforming, in accordance with criteria to be published by the Welsh Ministers under section 62N of the TCPA 1990. In the area of such an authority, an applicant will in some cases have the option to make an application for planning permission, and any connected application for other types of consent (such as listed building

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1 See **para 18.46.**

2 In force from 6 July 2015 for the purpose of making regulations (P(W)A 2015, s 58(2)(b)), but not yet otherwise.

consent) direct to the Welsh Ministers. This avoids the delay that might occur by applying to the authority and then appealing against non-determination.

9.8 The new procedure has not yet been brought fully into effect; and no relevant secondary legislation has been produced. But it is reasonably similar to the corresponding procedure introduced in relation to England by the Growth and Infrastructure Act 2013 and recently amended by the Housing and Planning Act 2016.[3] The procedure in England is regulated in detail by the TCP (Section 62A Applications) (Procedure and Consequential Amendments) Order 2013, which is essentially an appropriately modified version of the TCP (Development Management Procedure) Order 2015. A similar Order will presumably be introduced in Wales when the relevant primary legislation is brought fully into effect.

9.9 The legislation in England initially restricted the availability of the new procedure to major development; but it was subsequently amended so as to apply to any development prescribed by the Secretary of State.[4] Similarly, in Wales, the procedure applies only to development of a description prescribed by Welsh Ministers;[5] although it was expected that it would initially be restricted to "major development" as defined in the DMPWO 2012.[6]

9.10 It appears that the purpose underlying the introduction of the equivalent procedure in England may have been achieved, in that English planning authorities are determining applications for major development more speedily than before.[7] And very few applications have actually been made to the Secretary of State under the procedure.

9.11 We have not identified any scope for technical reform of the law currently contained in sections 62M to 620 of the TCPA 1990, beyond adaptation where appropriate to take account of our proposals in the previous Chapters.

Consultation question 9-1.

We provisionally consider 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.

Do consultees agree?

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3 It is noteworthy that the English provisions explicitly limit the availability of the procedure under section 62A to the area of an authority that is "underperforming" – the Welsh legislation simply refers to meeting published criteria, without stating the basis of such criteria (TCPA 1990, s 62N).

4 TCPA 1990, s 62A, amended by Housing and Planning Act 2016.

5 TCPA 1990, s.62M(3).

6 DMPWO 2012, art 2(1); see Explanatory Note to P(W)A 2015, para 100.

7 HC Hansard, 22 November 2016, Vol 617, Col 28WS.

DEVELOPMENTS OF NATIONAL SIGNIFICANCE

Development consent for nationally significant infrastructure projects

9.12 The Planning Act 2008 introduced a new system by which nationally significant infrastructure projects ("NSIPs") could be approved. Instead of submitting a planning application, those promoting such a project were to submit an application for "development consent" under the 2008 Act, which would be determined by the Infrastructure Planning Commission. The development consent process is not a form of planning permission, but rather an entirely new form of statutory consent authorising the whole of the proposed project. Development consent overrides the need for any other consent or permission which would otherwise be required.[8]

9.13 The Localism Act 2011 subsequently abolished the Commission, and transferred the responsibility for determining applications for development consent to the Secretary of State (not the Welsh Ministers). They are in practice now handled by the Major Infrastructure Planning Unit within the Planning Inspectorate, which appoints an inspector to conduct a hearing and report to the Secretary of State.

9.14 The 2008 Act specifies categories of projects that require development consent.[9] Of those, as at the date of this report, only five relate to development in Wales –

(1) the construction or extension of a electricity generating station

- with capacity of more than 50 MW (onshore) or 100 MW (offshore), or
- that does not generate electricity from wind, whatever its capacity;

(2) the installation of an electric line above ground;

(3) development relating to underground gas storage in natural porous strata by gas transporters,

(4) the construction of a pipeline (other than by gas transporter), and

(5) the construction or alteration of harbour facilities.[10]

Planning permission for developments of national significance in Wales

9.15 For other types of major development projects in Wales, a procedure was introduced – for which there was no equivalent in England – by which planning permission would still be required, but was to be sought by means of an application made direct to the Welsh Ministers.[11] Following amendments made by the Wales Act 2017, to be

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8 Planning Act 2008, s 33.

9 Planning Act 2008, ss 14 to 30A; 2015 SI 949.

10 Planning Act 2008, ss 15, 16, 17, 21 and 24, subject to amendments in the Wales Act 2017. These amendments are not yet in force..

11 TCPA 1990, s 62D, inserted by P(W)A 2015, s 19.

brought into force in 2018, the relevant categories of development ("developments of national significance" or "DNSs") are, in brief, as follows:

(1) the construction, extension or alteration of an electricity generating station, other than an onshore wind generating station, with a capacity between 10 and 50 MW

(2) the construction, extension or alteration of an onshore wind generating stations with a capacity over 10 MW;

(3) development relating to underground gas storage facilities in cavities or in natural porous strata subject to conditions being met;

(4) the construction or alteration of an LNG facility, subject to capacity thresholds;

(5) the construction or alteration of a gas reception facility with a maximum flow rate of at least 4.5 million standard cubic meters per day;

(6) airport-related development, subject to capacity thresholds;

(7) the construction or alteration of a railway longer than 2km;

(8) the construction or alteration of a rail freight interchange;

(9) the construction or alteration of a dam or reservoir holding at least 10 million cubic metres of water;

(10) development relating to the transfer of water resources where the volume of water transferred exceeds 100 million cubic metres per year;

(11) the construction or alteration of a waste water treatment plant or of infrastructure for the transfer or storage of waste water, in both cases subject to capacity thresholds; and

(12) the construction or alteration of a hazardous waste facility, subject to capacity thresholds.[12]

9.16 The new system was introduced by Part 5 of the P(W)A 2015, which inserted sections 62D to 62L into the TCPA 1990, which were brought fully into force on 1 March 2016. As might be expected, they are supplemented by a number of pieces of secondary legislation – in particular the DNSs (Procedure) (Wales) Order 2016 – providing for the procedural details.[13]

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[12] TCPA 1990, s 62D(3); DNSs (Specified Criteria and Prescribed Secondary Consents) (Wales) Regulations 2016 (SI 53), amended by 2016 SI 358. The distinction between the types of electricity generating stations that are NSIPs (and thus require development consent under the Planning Act 2008) and those that will require planning permission (and are DNS) will change following the coming into force of the relevant provisions of the Wales Act 2017.

[13] 2016 SIs 53 – 57 and 358.

9.17 This requires a proposal to be the subject of extensive pre-application publicity and consultation; and that the application contains supporting information to an appropriate level of detail (including a design and access statement and, in most cases, an EIA).[14] An inspector will take account of written material, hold an inquiry (where appropriate), and write a report to the Welsh Ministers with conclusions and the evidence. The Welsh Ministers will then issue a reasoned decision within the prescribed time limits.

9.18 The relevant primary and secondary legislation is thus of very recent origin, and may be amended or replaced in due course, in light of experience gained as the new system is used in practice, and to take account of the legislative changes to be introduced by the Wales Act 2017. Therefore, our proposals are limited to a few detailed points that have emerged.

Outline applications

9.19 An application to the Welsh Ministers under the new DNS procedure must contain enough material to describe the proposed development.[15] This is similar to the requirement relating to planning applications made to the planning authority, noted in the previous Chapter.[16] Further, section 62D(5) of the TCPA 1990 provides that outline permission may not be given under the new DNS procedure. This is to ensure that the community has sufficient certainty as to the nature and impact of what is proposed.

9.20 The restatement of section 62D(5) in the Bill will have to be considered in light of our proposals in the previous Chapter as to the abolition of outline planning permission in favour of the grant of permission subject in appropriate cases to conditions reserving some details for future approval.[17]

Variation of permissions for DNSs

9.21 The combined effect of section 62D(6) and(7) of the TCPA 1990 and regulation 51 of the DNS (Wales) Regulations 2017 is that an application can generally be made to the planning authority (rather than to the Welsh Ministers) to vary the conditions of a planning permission already granted for a DNS. The only exception to this is that an application to vary a time-limit condition, and thus in effect to extend the life of a permission, has to be made to the Welsh Ministers, as if it were for a new proposal.

9.22 We provisionally consider that this is a sensible division, and does not need to be amended in the Bill.

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14 DNSs (Procedure) (Wales) Order 2016, TCP (Environmental Impact Assessment) (Wales) Regulations 2017.

15 DNS (Procedure) (Wales) Order 2016 (SI No 55), art 12(1)(b)(ii).

16 See **paras 8.9, 8.15**.

17 This is purely a drafting point – the prohibition in section 62D(5) on the grant of outline permission, as currently phrased, will cease to have any meaning if outline permission is abolished (see **Consultation question 8-1)**.

Applications for secondary consents

9.23 Section 62F of the TCPA 1990 allows the Welsh Ministers to make decisions on applications for secondary consents which they consider to be connected to an application for a DNS, in place of the normal consenting authority. Such consents may include planning permission for other development (such as highway works) on land away from the main site of the DNS itself. But they would also include listed building consent, scheduled monument consent, hazardous substances consent, and possibly other consents altogether outside the scope of the planning system.[18]

9.24 The P(W)A 2015 introduced (as sections 61Z to 61Z2 of the TCPA 1990) new procedures whereby

(1) applicants must carry out pre-application consultation in relation to certain applications for planning permission; and

(2) pre-application services can be provided by the relevant planning authority or by the Welsh Ministers in connection with certain applications under Part 3 of the TCPA 1990.[19]

9.25 Such pre-application consultation may be particularly appropriate in connection with proposals for DNSs. But it can at present be the subject of requirements in relevant secondary legislation only if it relates to "applications for planning permission".[20] That might not include some connected applications.[21]

9.26 Similarly, pre-application services may also be appropriate in connection with proposals for DNSs, but only if they relate to "applications under or by virtue of Part 3 of the Act".[22] Applications for secondary consents are arguably made "under" section 62F of the TCPA 1990, which is within Part 3; but it is also arguable that applications for certain types of consent are made under another Part of the TCPA 1990 or under the relevant non-planning legislation (for example, relating to scheduled monuments or highways), so that the legal basis for the provision of pre-application services is not entirely clear.

9.27 We provisionally consider that there may be a case for clarifying which applications can be the subject of pre-application consultation and pre-application services, to ensure that there is a sound basis for the procedures relating to the making and determination of applications for planning permission for DNSs and applications for secondary consents.

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18 DNSs (Specified Criteria and Prescribed Secondary Consents) (Wales) Regulations 2016 (SI 53), amended by 2016 SI 358.

19 TCPA 1990, ss 61Z, 61Z1, 61Z2 (introduced by P(W)A 2015, ss 17, 18).

20 TCPA 1990, s 61Z(1)(a), inserted by P(W)A 2015, s 17.

21 TCPA 1990, s 62O(3).

22 TCPA 1990, s 61Z1(4), inserted by P(W)A 2015, s 18; SI 2016 No 61, reg 4.

Consultation question 9-2.

We provisionally consider 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.

Do consultees agree?

Assessors

9.28 Paragraph 14 of Schedule 4D to the TCPA 1990 allows an assessor to be appointed to assist at a hearing or inquiry. But it does not allow an assessor to be appointed to assist with written representations. Given the greater role and focus given to the written representations procedure in the system (especially in scrutinising DNS applications), we provisionally consider that it would be beneficial for the use of assessors to be extended to written representations. Such an amendment would regularise the practice of assessors being appointed to assist with written representations

Consultation question 9-3.

We provisionally propose 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.

Do consultees agree?

Fees

9.29 We consider the topic of fees more generally in **Chapter 18**.[23]

General approach

9.30 The new system of handling planning applications for DNSs is of very recent origin, and it will take time for any procedural or other problems to emerge. It is likely that they will in most cases be capable of resolution by adjustment to the relevant secondary legislation.

9.31 Further, it is likely that once the new provisions relating to energy consenting powers, introduced in the Wales Act 2017, have been brought fully into force, a need for more fundamental reforms will emerge.

[23] See **paras 18.74 to 18.79**.

9.32 In the meantime, we provisionally consider that sections 62D to 62L of the TCPA 1990 are appropriate to be restated in the new Code – possibly subject to adaptation to take account of our proposals in the previous Chapters, and the minor points noted above.

Consultation question 9-4.

We provisionally propose that sections 62D to 62L of the TCPA 1990 should be restated in the new Planning Code, subject to appropriate adjustments to reflect our proposals in Chapters 7 and 8.

Do consultees agree?

OTHER MEANS OF HANDLING PROPOSALS FOR MAJOR DEVELOPMENT

9.33 The special procedures in the TCPA 1990 as to DNSs (and the Planning Act 2008 in relation to NSIPs) are only the latest in a long line of procedures created to enable major proposals to be considered expeditiously whilst ensuring that representations from those likely to be involved are fully taken into account.

Planning inquiry commissions

9.34 An early attempt to grapple with this problem resulted in the introduction, in the TCPA 1968, of the concept of a "planning inquiry commission". The relevant law subsequently became sections 47 to 49 of the TCPA 1971, and is now to be found in section 101 of the TCPA 1990, with the details in Schedule 8 to the Act. The legislation applies in Wales as well as England, and is still in force. There is no relevant secondary legislation in either England or Wales.

9.35 A planning inquiry commission was to comprise three to five members instead of the customary single inspector, to act as a tribunal at special inquiries involving matters of national or regional importance, or those that raise novel technical or scientific considerations. It could deal with applications that had been referred to the Welsh Ministers and with appeals against decisions of planning authorities.

9.36 In the Scoping Paper, we noted some of the criticisms that had been made of the procedure.[24] We also noted that no such commission had ever been set up, either in England or in Wales. The UK Government has accepted that there is no prospect of one.[25] Further, the more recent introduction of the NSIP and DNS procedures to a significant extent sought to deal with the same problems by different means. We

[24] *Scoping Paper*, para 5.53.

[25] Planning Bill 2008, Public Bill Committee, 5 February 2008, col 652.

accordingly expressed a preliminary view that the legislation relating to planning inquiry commissions could be repealed as it applies in Wales.[26]

9.37 In response, Persimmon Homes, PEBA, and Richard Harwood QC agreed; and no respondent expressed disagreement.

Consultation question 9-5.

We provisionally propose that section 101 of and Schedule 8 to the TCPA 1990 (planning inquiry commissions) should not be restated in the new Planning Code.

Do consultees agree?

Major infrastructure inquiries

9.38 For completeness, it should be noted that that another special procedure was introduced (by the PCPA 2004) to enable the Secretary of State to call in any application for development that was of national or regional importance. However, the procedure never applied to development in Wales. Even in England, the relevant procedural rules, made in 2005, were revoked without replacement ten years later. We do not propose introducing any equivalent procedure in the new Code.

[26] *Scoping Paper*, para 5.54.

Chapter 10: The provision of infrastructure and other improvements

INTRODUCTION

Background

10.1 Most development proposals of any size give rise to a need for the provision of infrastructure and other improvements. And developers generally want to see in place the infrastructure necessary to enable the delivery of their development. Those already living in the area affected by proposed development are often concerned that it will place undue pressure on existing, overstretched infrastructure. The construction of new housing, for example, will generate an increased demand for facilities such as play areas, parks, libraries, schools, new or improved highways, police and fire services.

10.2 It is therefore essential that a satisfactory mechanism is in place to secure the provision of infrastructure. Some forms will be provided by the public sector, and the question arises as to how it can best be funded. In practice, the cost will be met partly as an element of general public expenditure; this reflects the fact the new facilities, once provided, will be used by existing residents as well as by those attracted to the area by the new development.

10.3 A linked problem is that some proposed development is only acceptable if certain works are carried out – either by way of improvements necessary as a result of the particular proposal (as with improvements to a nearby road junction) or to mitigate or compensate for harm likely to be caused by it (for example, by providing a substitute open space to replace the loss of an existing one). It may be possible for the planning authority to ensure that this is achieved by imposing a condition on the permission[1], but this is not always the case – particularly where what is required is not the actual carrying out of the necessary works but rather a payment to the authority of money towards the cost of them.

10.4 There will also be in many cases a desire to secure the provision of affordable housing. This can sometimes be provided by the developer within the proposed development, but that may be either inappropriate or impossible, leading to a demand by the planning authority (or an offer by the developer) to pay a commuted sum towards the provision of such housing off-site.

Emerging solutions

10.5 Historically, the emphasis has been on agreements that could be entered into by the planning authority and anyone interested in land in its area, for the purpose of restricting or regulating the development or use of the land. Such agreements could contain such incidental and consequential provisions (including financial ones) as might be necessary or expedient for that purpose. The power to enter into such

[1] This will often be a *Grampian* condition (see **paras 8.102 to 8.105**).

agreements was originally introduced in the TCPA 1947, and survived more or less unaltered for sixty years – most recently under section 106 of the TCPA 1990.[2]

10.6 By the start of the 1990s, such agreements were increasingly being used to encourage developers to make financial provisions towards the costs of services generally within the area; and concern was expressed as to such considerations being given undue weight in the determination of planning applications. Against that background, the Planning and Compensation Act 1991 slightly tightened up the statutory provisions relating to what were now referred to as "planning obligations". Such obligations could in future arise as a result of an agreement; but they could also arise under a unilateral undertaking offered by a developer in the event of permission being granted.[3] The 1991 Act also introduced a procedure enabling obligations to be modified or discharged after five years, with the approval of the authority (or, on appeal, the Welsh Ministers).[4]

10.7 Further changes were to be introduced by the PCPA 2004, which was to repeal sections 106 to 106B,[5] and in their place introduce (in both England and Wales) the concept of a "planning contribution".[6] It was envisaged that the payment of such contributions would be in accordance with a scheme to be included in the relevant development plan.

10.8 Two months before the PCPA 2004 gained Royal Assent, the Barker Review of Housing Supply in March 2004 recommended the introduction of a system of planning-gain supplement.[7] The UK Government accepted that recommendation, and introduced the Planning-gain Supplement (Preparations) Act 2007 to enable the necessary preparatory work to be carried out.

10.9 Neither the system of planning contributions nor the planning-gain supplement was ever implemented. The relevant provisions of the PCPA 2004 were accordingly repealed by the Planning Act 2008, and the 2007 Act will be repealed in due course by an order made by the Treasury.[8]

10.10 Instead, Part 11 of the Planning Act 2008 introduced (in England and Wales) the Community Infrastructure Levy (CIL), a new mechanism whereby planning authorities that wished to could introduce a planning charge "to help deliver infrastructure to support the development of their area".

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2 TCPA 1932, s 34; TCPA 1947, s 25; TCPA 1962, s 37; TCPA 1971, s 52; TCPA 1990, s 106 (as originally enacted). TCPA 1932, s 34 was similar, although without the explicit reference to financial provisions. Almost all agreements still in force were made under TCPA 1971 or TCPA 1971 (hence 'section 52 agreements' and 'section 106 agreements').

3 Both agreements and undertakings are made under TCPA 1990, s 106(1), as substituted by Planning and Compensation act 1991, s 12. Unilateral undertakings are generally, but not always, offered in connection with appeals.

4 TCPA 1990, ss 106A, 106B. The provision are described in more detail in paras 10.36 – 10.39 below.

5 PCPA 2004, Sched 9

6 PCPA 2004, ss 46 to 48.

7 Review of Housing Supply, Final Report - Recommendations, March 2004, Recommendation 26.

8 Planning Act 2008, s 225.

10.11 Planning obligations and CIL exist alongside a number of other infrastructure funding mechanisms, including public sector funds or grants and borrowing and capital receipts.

Inclusion in the Planning Code

10.12 In our Scoping Paper, we mentioned in passing that one significant element of the process of submitting and determining planning applications is the negotiation and execution of a section 106 agreement; but we made no specific suggestions for technical reforms. However, respondents made some suggestions for such reforms.

10.13 We also noted in the Scoping Paper that CIL was not a devolved tax, and for that reason we made little reference to it.[9] However, the Wales Act 2017 as finally enacted does not reserve competence over the levy to the UK Parliament.[10] The Planning Code, as a piece of National Assembly legislation, could therefore include a section on CIL.

10.14 This chapter considers how the new Planning Code could best incorporate the law relating to CIL and planning obligations, including the interaction between them, and whether any technical reforms should be made at this stage.

COMMUNITY INFRASTRUCTURE LEVY (CIL)

Introduction

10.15 The primary legislation providing for the Community Infrastructure Levy (CIL) came into force on 6 April 2010, in Part 11 of the Planning Act 2008. That was amended by the Localism Act 2011. The details were to be provided by secondary legislation; and the CIL Regulations 2010 came into effect on 6 April 2010. They have subsequently been amended on a number of occasions, annually from 2011 to 2015.

10.16 Because CIL is not yet a devolved tax, the Act and the Regulations were drafted solely by reference to the Secretary of State, rather than to the Welsh Ministers. Guidance on the operation of CIL has been provided by the Department for Communities and Local Government as part of its web-based *Planning Policy Guidance*.

10.17 The infrastructure which can be funded by the levy includes transport, flood defences, schools, hospitals, and other health and social care facilities. This allows the levy to be used to fund a very broad range of facilities such as play areas, parks and green spaces, cultural and sports facilities, district heating schemes and police stations and other community safety facilities. This gives local communities flexibility to choose what infrastructure they need to deliver their development plan. However, the Regulations rule out the application of the levy for providing affordable housing.[11]

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9 Scoping Paper, para 4.19.

10 The relevant provisions of the Wales Act 2017 are expected to come into effect in 2018.

11 Planning Act 2008, s 216(2), amended by SI 2010/948, reg 63.

10.18 In making regulations, the Secretary of State must aim to ensure that costs incurred in supporting development of an area can be funded (wholly or partly) by owners or developers of land in a way that does not make development of the area economically unviable.[12]

Charging schedules

10.19 A charge to CIL can arise only if the relevant charging authority – in general, the planning authority – has adopted a charging schedule. The schedule will set the rates or other criteria determining the amount of CIL chargeable in respect of development in its area.[13] In setting the CIL rates, the charging authority must have regard to the actual and expected costs of infrastructure, matters specified by CIL regulations relating to the economic viability of development, and the existing and expected sources of funding for infrastructure.

10.20 Before a charging schedule can be approved, it must first be produced in draft, and then examined by a suitably qualified independent person.[14] The examiner has the power to approve the draft, or make recommendations as to its amendment.[15]

10.21 As at 24 April 2017, three planning authorities in Wales had adopted charging schedules that had been through the examination process.[16] A further three authorities had published preliminary draft charging schedules[17]; two had published draft charging schedules[18], and one had published the report of the examination into the charging schedule.[19] It appears that the three national park authorities have chosen not to produce charging schedules. The remaining 13 authorities have yet to produce charging schedules.

10.22 The nine authorities with charging schedules either adopted or in preparation have charged for residential, retail and commercial development, but not for other forms of development. The rates vary widely as between authorities.

Liability and collection

10.23 CIL will be payable either by the landowner or by others involved in a development project. The liability to pay CIL arises upon the commencement of the project.[20] "Development" for these purposes includes 'anything done by way of or for the purpose of the creation of a new building or anything done to or in respect of an

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12 Planning Act 2008, s 205 (2).

13 Planning Act 2008, s 211.

14 Planning Act 2008, s 212.

15 Planning Act 2008, s 212A.

16 Caerphilly (adopted 10 Jun 2014), Merthyr (23 April 2014), and Rhondda Cynon Taf (10 Dec 2014) (Source: *Planning Resource*).

17 Conwy (14 Dec 2015), Carmarthenshire (7 Sep 2016), and Torfaen (31 October 2016)

18 Monmouthshire (24 March 2016) and Cardiff (8 Sep 16).

19 Newport (3 August 2016).

20 Planning Act 2008, s 208(3); TCPA 1990, s 56(4).

existing building', subject to exceptions set out in regulations[21] – including minor development, and development by charities.[22]

10.24 In areas where CIL is in force, applicants for planning permission should include an additional CIL Form with their application to the planning authority; where permission is granted by the GPDO, the developer or landowner should submit a notice of chargeable development. The authority will then issue a liability notice to the applicant, the developer and whoever has assumed liability. When the development is due to start, the relevant person submits a commencement notice to the authority, which issues a demand for payment.

10.25 An appeal may be made against certain decisions on CIL. The CIL regulations provide for a right of appeal on a question of fact in relation to the application of methods for calculating CIL to a person appointed by HMRC.[23] Any appeal must usually be determined before the development is commenced.[24]

10.26 The CIL regulations also make provision for payment on account or by instalments, repayment in cases of overpayment, enforcement in case of late payment and non-payment, and failure to assume liability.[25]

Application of the sums raised from CIL

10.27 The CIL Regulations require that an authority that charges CIL must apply it to supporting development by funding the provision, improvement, replacement, operation or maintenance of infrastructure.[26] Regulation 123 of the 2010 Regulations provides for charging authorities to set out a list of the types of infrastructure it intends to fund through receipts from charging the levy. This is considered further below.[27]

Application in Wales

10.28 During the passage of the Wales Bill through Parliament in 2016, Baroness Morgan said:

> In Wales, local planning authorities currently have the power to charge a levy. These authorities all prepare local development plans for their areas, which include an assessment of their future infrastructure needs, for which the levy may be collected. The authority can set charges based on the size and type of the new development. It can set different rates for different geographical areas and for different intended types of development. The levy is intended to encourage development by creating a balance between collecting revenue to fund

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21 Planning Act 2008, s 209(1); CIL Regulations 2010, regs 6(1), 9(1).

22 Planning Act 2008, s 210 (1)(b); CIL Regulations 2010, reg 43(1), (2). For the definitions of "charity" and "charitable purposes", see Charities Act 2011, ss 1,2.

23 Planning Act 2008, s 215; CIL Regulations 2010, regs 114 – 119.

24 CIL Regulations 2010, regs 114(4), 116(3), 116A(3), 116B(3).

25 Planning Act 2008, ss 217, 218.

26 Planning Act 2008, ss 216, 216A.

27 See **paras 10.77 to 10.79**.

> infrastructure while ensuring that the rates are not so high that they put development across the area at serious risk. The levy can be used for a variety of infrastructure projects, such as roads and transport, schools and educational facilities, and evenflood-defences, medical facilities and sports and recreation facilities. As long as these have been identified in the authority's local development plan then it can address this issue and appeal to the fact that it can have a CIL.
>
> The Welsh Government argued for the devolution of the CIL in their evidence to the Silk commission in 2013. The issue was not addressed by the commission and thus did not feature in the UK Government's St David's Day document. However, the levy is inextricably linked with the delivery of already devolved responsibilities. The Secretary of State has not, to my mind, made the case for reserving the CIL and we believe that this reservation should be deleted.[28]

10.29 The Government accepted the case for CIL not being reserved to Westminster. Accordingly, once the changes to the Government of Wales Act 2006 to be introduced by the Wales Act 2017 have been fully brought into force – which is expected to occur in 2018 – it will be a devolved matter.

Possible reforms to the Community Infrastructure Levy

10.30 In November 2015, the UK Government established a Review Group (led by Liz Peace, formerly Chief Executive of the British Property Federation), to assess the extent to which CIL does or can provide an effective mechanism for funding infrastructure, and to recommend changes. Its review extended to both England and Wales.[29] The Group submitted its report, *A New Approach to Developer Contributions*, in October 2016; it was published on 7 February 2017.

10.31 The Group made some 34 detailed recommendations. In particular, it recommended that CIL should be replaced with a hybrid system of a broad and low-level local infrastructure tariff (LIT), supplemented with section 106 planning obligations for larger developments.[30]

10.32 The recommendations of the Review Group echoed those that had been made earlier by the Planning Officers Society in England, which had argued for a Development Management Levy (to replace CIL) and Development Management Agreements (to replace section 106 planning obligations).[31]

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28 Hansard House of Lords, 15 November 2016, Vol 776, Col 1397.

29 It took evidence from, amongst many others, the Welsh Government and several Welsh planning authorities.

30 *A New Approach to Developer Contributions: a Report by the CIL Review Group*, February 2016, para 4.3.6. It also recommended that combined authorities should be able to set up an additional Strategic Infrastructure Tariff (SIT), but that related only to England.

31 *Planning for a Better Future: funding infrastructure in a more effective way*, Planning Officers' Society manifesto, August 2015.

Inclusion in the Planning Code

10.33 We concluded in Part One of this Consultation Paper that it would be appropriate for the Planning Bill to include provisions relating to CIL, equivalent to those currently in Part 11 of the Planning Act 2008 as amended by the Localism Act 2011. Clearly the provisions in the Bill relating to CIL in Wales will need to be drafted in light of those in the remainder of the Code relating to the planning system generally, which will in turn reflect some or all of the reforms proposed in the previous chapters of this Consultation Paper.

10.34 It is likely that the Welsh Government will wish to review the operation of CIL in Wales in the next few years – either in parallel with any review of the law in England emerging from the work of the CIL Review Group, or otherwise – and it would seem to be premature for us to pre-empt that review, or to comment on the detailed recommendations of the Review Group (save as to one or two points arising in relation to the link between CIL and planning obligations).

Consultation question 10-1.

We provisionally consider 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 stand into the Planning Code, pending any more thoroughgoing review that may take place in due course.

Do consultees agree?

PLANNING OBLIGATIONS

Entering into an obligation

10.35 As noted above, the current law providing for planning obligations – in sections 106, 106A and 106B of the TCPA 1990 – was introduced by section 12 of the Planning and Compensation Act 1991. Relevant guidance is in Welsh Office Circular 13/97.

10.36 Section 106 makes provision for any person interested in land in the area of a planning authority to enter into an obligation (referred to as "a planning obligation") – either by agreement or as a unilateral undertaking – for any or all of the following four purposes:

(1) restricting the development or use of the land as specified in the obligation;

(2) requiring specified operations or activities to be carried out either on the land or elsewhere;

(3) requiring the land to be used in any specified way; or

(4) requiring a sum or sums to be paid to the authority on a specified date or dates or periodically.

10.37 A planning obligation, which must be executed as a deed, may be unconditional or subject to conditions and impose any restriction or requirement either indefinitely or for such period or periods as may be specified.[32] And it is noteworthy that such an obligation does not have to be attached to a grant of planning permission, although that is the most common example of its use in practice.[33]

10.38 If there is a breach of a requirement in a planning obligation, the authority by which the obligation is enforceable may enter the land in question and carry out the operations and recover from that person any expenses reasonably incurred in doing so.[34]

10.39 Section 106A of the TCPA 1990 provides that any person against whom a planning obligation is enforceable may apply to the planning authority for the obligation to be modified or discharged, although generally only after five years have elapsed since it was first entered into. The authority may agree to the obligation being modified if it would serve its purpose equally well subject to the proposed modifications, and to discharge it if it no longer serves any useful purpose. In the event of an unfavourable decision on such an application, there is a right of appeal to the Welsh Ministers under section 106B.

10.40 As with CIL, it is likely that the Welsh Government will wish to review the working of planning obligations in Wales in the next few years; and here too it would seem to be premature for us to pre-empt such a review.

Proposal 10-2.

We provisionally propose that provisions relating to planning obligations, currently in sections 106 to 106B of the TCPA 1990, should be incorporated broadly as they stand into the Planning Code, pending any more thoroughgoing review that may take place in due course.

Benefits to be achieved by an obligation

10.41 As noted above, planning obligations – by way of either agreements or unilateral obligations – have been sought by planning authorities both to bring about improvements necessary to make a development acceptable and also to obtain from developers payments towards the provision of services more generally – although the two categories sometimes overlap. This practice, known as 'planning gain', led to authorities in some cases making the grant of planning permission conditional upon

32 TCPA 1990, s 106(2), (9); Law of Property (Miscellaneous Provisions) Act 1989, s 1(2).

33 A planning obligation could also be linked to a grant of listed building consent or conservation area consent.

34 TCPA 1990, s 106(6).

developers offering planning obligations that were related to the proposed development only indirectly, or in some cases not at all.

10.42 Case law relating to planning agreements over some years suggested the system of planning gain had uncertain legal boundaries. In *R v Plymouth City Council, ex p Plymouth and South Devon Co-operative Society*, Hoffmann LJ in the Court of Appeal reviewed the case law, and held that the test of validity in relation to a planning obligation was distinct from the test governing planning conditions under section 70(2).[35] The key tests were whether the obligation in question was 'for the purposes of restricting or regulating the development of land' (as per section 106(2) of the TCPA 1990) and whether it was not unreasonable.[36] This applies both to an undertaking as to the funding of infrastructure and to any other undertaking.

10.43 In place of this case law, there is now a statutory test, in regulation 122(2) of the CIL Regulations 2010.[37] That provides that a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is:

(1) necessary to make the development acceptable in planning terms;

(2) directly related to the development; and

(3) fairly and reasonably related in scale and kind to the development.[38]

10.44 These 'requirements, prior to regulation 122, were previously only contained in policy.[39] Bean J (as he then was) noted in *R (on the application of Welcome Break Group Ltd) v Stroud District Council*, 'there is nothing novel in regulation 122 except the fact that it is contained in a statutory instrument'.[40]

10.45 We provisionally consider that the test currently set out in regulation 122 is of sufficient importance that it should be contained in primary legislation.

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35 *Newbury DC v Secretary of State for the Environment* [1981] AC 578; see **para 8.91**.

36 [1993] JPL 881, CA; partially overturning *R v Gillingham BC, ex p Parham Ltd* [1988] JPL 336 (Div Court).

37 CIL Regulations SI 2010/948.

38 CIL Regulations 2010, reg 122(2).

39 Welsh Office Circular 13/97, Annex B, para B2.

40 [2012] EWHC 140 (Admin), para 48.

Consultation question 10-3.

We provisionally consider 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 Bill.

Do consultees agree?

Highways requirements

10.46 In addition to agreements under section 106 of the TCPA 1990, developers are sometimes asked to enter into agreements with the highway authority under section 278 of the Highways Act 1980. Such an agreement will authorise the authority to execute works that will be for the benefit of the public on condition that all or part of the cost of such works is met by another party to the agreement. So for example, a highway authority may agree with a developer to construct at the developer's expense a roundabout at the entrance to its new housing development.

10.47 Where the highways authority is also the planning authority – as will always be the case in Wales other than in national parks – and where an agreement is being entered into under section 106, it may be appropriate for that agreement also to incorporate matters that would otherwise be in a section 278 agreement. That would not always be appropriate, for example where the highways issues were extensive in scope; and negotiations to resolve them should not hold up the issue of planning permission.

10.48 Further, the provisions of section 278 are broadly drafted, and will be applicable in circumstances other than where planning permission is being sought for development.[41] And agreements under section 278 are to be made for the 'benefit of the public', a phrase which does not appear in section 106. We therefore do not consider that there is anything to be gained by bringing together the statutory provisions relating to the two types of agreement.

10.49 However, we provisionally consider that it might be helpful for the Bill to provide that an agreement made under the successor to section 106 may include any provisions that could be included in a section 278 agreement, provided that the relevant highway authority is a party to the agreement. This would mean that only one agreement would be needed, rather than two. But the requirement for the highway authority to be a party means that it would not be possible to include such provisions in a unilateral undertaking.

[41] As are section 106 agreements (see **para 10.37**).

Consultation question 10-4.

We provisionally consider that it might be helpful for a provision to be included in the Bill 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.

Do consultees agree?

Enforcement of planning obligations

10.50 As noted above, we only mentioned planning obligations briefly in the Scoping Paper. Nevertheless, in response to our invitation to suggest other technical reforms, it was suggested by some of those responding to it that the law as to the enforcement of planning obligations could usefully be tightened up.[42]

10.51 The most serious breaches of planning obligations can be prosecuted as fraud. In *SFO v Evans*,[43] the Serious Fraud Office had prosecuted mine owners who, being obliged to restore the land used for mining to countryside and agricultural use once operations had ceased, allegedly transferred the freeholds and accompanying restoration obligations to an offshore company, allowing them to release money set aside for the restoration costs. The court refused to allow the Serious Fraud Office to continue the prosecution on the basis that it had incorrectly stated its case, but the case indicates that there are a number of options under the criminal law that can be used to deal with serious breaches of planning obligations.[44]

10.52 However, such an approach will not often be appropriate. One alternative would be to introduce a system – akin to the enforcement of breaches of planning control – whereby the breach of an obligation (either a failure to observe its detailed requirements, or a failure to comply with it at all) could attract the issue of an enforcement notice by the planning authority. Failure to comply with such a notice (subject to a right of appeal) could lead to prosecution. Rather than introduce a new species of "planning obligation enforcement notice", with associated procedural requirements, it might be more straightforward to extend the definition of "breach of planning control" to include a breach of an obligation.

10.53 There are a number of issues that would need to be thought through and addressed to enable the enforcement provisions of the TCPA 1990 (in Part 7) to operate

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42 As well as the two suggestions noted here, it was also suggested the Bill could make it clear that court proceedings to enforce a planning obligation could be dealt with in the county court. That would facilitate such action, thus making non-compliance less likely. But such proceedings can be brought in the county court anyway; so it would seem that no change is necessary.

43 *Serious Fraud Office v Evans* [2014] EWHC 3803 (QB), [2015] 1 WLR 3526.

44 The Serious Fraud Office at various stages during the proceedings attempted to prosecute the mine owners for conspiracy to defraud at common law, fraud by abuse of position (Fraud Act 2006, s 4), fraud by failing to disclose information (Fraud Act, ss 2-3), defrauding creditors (Insolvency Act 1986, s 423), and breach of statutory duty (Companies Act 2006, s 418).

satisfactorily in the context of breaches of a planning obligation. When should the period for taking enforcement action begin, and how long should it be? Should it be possible to issue planning contravention notices, temporary stop notices, enforcement warning notices, and so on? For what purposes would it be possible to issue an enforcement notice? Would all the existing grounds of appeal against an enforcement notice be relevant, and would any new grounds be needed? Should Ministers be able to modify or discharge a planning obligation when they decide an appeal against an enforcement notice? Should they be able to issue enforcement notices themselves?

10.54 We therefore consider that, at this stage, it would be helpful to discover the views of consultees in principle in relation to this idea. If it seems appropriate in principle, it would then be possible to consider in some of these issues in more detail.

10.55 Secondly, where an obligation provides for the payment of a sum of money – either on a one-off basis or at regular intervals – failure to pay could result in the imposition of a charge on the land, so that the shortfall could be recovered when the land changes hands (as is likely to occur on the completion of a development). The power to impose such a charge is exercisable in accordance with regulations made under section 106(12); but no such regulations appear to have been made. It would be helpful to know whether this is a problem in practice.

10.56 It would also be helpful for the new Code to incorporate the transitional arrangements as to enforcement of pre-1974 obligations currently found in the Local Government (Wales) Act 1994.[45]

Consultation question 10-5.

We provisionally consider that it would be helpful to make the enforcement of a planning obligation under section 106 of the TCPA 1990 more straightforward by including the breach of such an obligation within the definition of a breach of planning control.

We invite the views of consultees, including as to the practicalities of such a proposal.

[45] Local Government (Wales) Act 1994, Sched 17, para 15.

Consultation question 10-6.

Section 106(12) empowers the Welsh Ministers to provide 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.

No such regulations have been made; does their absence cause a problem in practice?

Expedition of negotiations as to planning obligations

10.57 Negotiations in connection with section 106 planning obligations can cause delay in the planning process.[46] In 2015, the UK Government explained that it would introduce further measures on section 106 negotiations to speed up the end-to-end planning process, and sought views on how that could be achieved.[47] As a result it announced that it would make changes to the National Planning Practice Guidance to promote the use of standard clauses, and would promote the greater use of pre-application engagement by all parties.

10.58 The second of these has been addressed by the requirement for a planning authority to specify as part of its pre-application services whether obligations are likely to be required, and as to their scope.[48] The first could usefully be pursued in Welsh Government guidance, as part of the process of introducing the new Code, but does not require additional legislation.

Consultation question 10-7.

We provisionally propose that the use of standard clauses should be promoted in Welsh Government guidance.

Do consultees agree?

Resolution of disputes as to planning obligations

10.59 The Housing and Planning Act 2016 – which of course post-dated the PWA 2015 – made two changes to the operation of section 106 in England. Section 158 of the 2016 Act introduced Schedule 9A into the TCPA 1990, relating to the resolution of disputes about planning obligations. This enables the Secretary of State to make regulations to provide for a procedure to resolve disputes as to the terms of a section 106 agreement. The intention is that either the planning authority or the applicant

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46 National Infrastructure Plan 2014, para 15.23.

47 *Section 106 planning obligations – Speeding up Negotiations*, Department for Communities and Local Government, 20 February 2015. It also sought views on the particular issue of whether the requirement to provide affordable housing contributions acted as a barrier to the provision of dedicated student accommodation.

48 SI 2016/61, reg 8(1).

can refer a case to the Secretary of State, who will appoint a person (presumably, in practice, usually an inspector) to consider the matter and make a binding recommendation. Section 158 has not yet been brought into force.

10.60 We provisionally consider that a dispute resolution procedure of this kind might be useful in Wales, and we would be interested to hear from consultees both as to whether they consider that it would be helpful in principle and as to the procedure that might be introduced.

Consultation question 10-8.

We provisionally consider 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.

Do consultees agree in principle, and what should be the features of such a procedure?

Restriction on the use of planning obligations

10.61 Section 159 of the 2016 Act (also not yet in force) made provision for the Secretary of State to impose restrictions or conditions on the enforceability of planning obligations entered into with regard to the provision of affordable housing. A mechanism of this kind might also be helpful, although the power in primary legislation to make regulations might extend to any categories of benefits to be provided by planning obligations; the precise details could then be worked out in due course when regulations are made.

Consultation question 10-9.

We provisionally consider that 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 to be provided (along the lines of section 106ZB of the TCPA 1990, introduced by section 159 of the 2016 Act with regard to obligations as they relate to the provision of affordable housing) might be useful.

Do consultees agree in principle, and what categories of benefits might most appropriately be subject to such a procedure?

Planning obligations binding authorities in relation to their own land

10.62 It was suggested by some of those responding to the Scoping Paper that it would be helpful for planning authorities to be able to bind their own land with planning obligations. 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 it proposes to dispose of.

10.63 We provisionally consider that it might be helpful for an authority to be able to enter a planning obligation to bind its own land in those circumstances. However, 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.[49]

Consultation question 10-10.

We provisionally propose that planning authorities should be able to enter into planning obligations to bind their own land in appropriate cases.

Do consultees agree?

Planning obligations binding those other than owners of land

10.64 A planning obligation can only be entered into by a "person interested in the land".[50] This may cause practical difficulties where a person who does not yet own a freehold or leasehold interest in the land in question nevertheless owns an interest in it only by virtue of an option to purchase or a contract of sale. Such a person may enter into an obligation, but since it is capable of binding nothing more than that limited interest, it is of little value unless and until the relevant estate is acquired.

10.65 So, for example, a prospective purchaser of land may seek planning permission to develop it; and the planning authority may be willing to grant such permission, but only provided an obligation is entered into. If the present owner of the land is not interested in co-operating, and the prospective owner cannot enter into such an obligation having no interest to be bound, there is no way in which the obligation can be finalised, and thus the planning permission will not be forthcoming.

10.66 We provisionally consider that a person proposing to enter into a contract for the purchase of land should 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.

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[49] And see the Law Commission reports *Easements, Covenants and Profits a Prendre* (2011), Law Com 327; and *Conservation Covenants* (2014), Law Com 349.

[50] TCPA 1990, s 106(1).

Consultation question 10-11.

We provisionally propose that a person proposing to enter into a contract for the purchase of land should 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.

Do consultees agree?

Other points

10.67 As the practice of obtaining 'planning gain' from developers through planning agreements has become more widespread, policies covering such matters have started to be included in development plans. It would be possible to make it a statutory requirement that planning obligations can only be required in circumstances that are envisaged in the relevant development plans.

10.68 Such policies provide a helpful steer to developers as to circumstances in which an obligation may be sought. However, it is likely that no policy could envisage all such circumstances; and there will always be borderline cases. We therefore consider that a statutory requirement would not be helpful.

10.69 The court in *Milebush Properties Ltd v Tameside Metropolitan Borough Council*[51] has indicated that the principles of contractual interpretation that were identified by Lord Hoffmann in the case of *Investors Compensation Scheme Ltd v West Bromwich Building Society*[52] would apply also to the interpretation of planning obligations. These principles include the importance of ascertaining the background knowledge that would have been available to the parties to the contract.

10.70 We have considered whether such principles of interpretation should be included on the face of the new Planning Bill. However, we consider that there is a limit to the use of contractual principles, as a contract is a private matter between two parties, whereas a planning obligation is a public document – in the same way as a planning permission regulates land in the public interest. Whilst therefore there may be some assistance to be gained from the approach outlined in the *Investors Compensation Scheme* case, we consider that it would not be helpful to overemphasise the link by explicitly incorporating into the Code any principles as to the interpretation of planning obligations.

THE RELATIONSHIP BETWEEN CIL AND PLANNING OBLIGATONS

10.71 Both planning obligations and CIL exist to help pay for local infrastructure. However, there are important differences. The CIL provides infrastructure to support

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51 [2010] EWHC 1022 (Ch) [2010] JPL 1303.

52 [1998] 1 WLR 896.

development of an area generally. Planning obligations are used to make individual proposals acceptable. CIL, therefore, severs any direct link between a particular development project and the infrastructure that is funded as a result of the CIL collected. What infrastructure is provided through CIL is a matter for the planning authority to decide.

10.72 Where CIL is in place in an authority's area, it acts as a pooling mechanism for infrastructure levy that can be levied on all developers within the relevant categories, whereas planning obligations affect relatively few developments.[53] CIL has a high set-up cost, which has resulted in low implementation rates, especially amongst smaller planning authorities. Planning obligations, by contrast, involve high transaction costs, such as legal fees and negotiation time. On the other hand, obligations provide a greater degree of flexibility, and allow for the introduction of general mitigation or compensation measures related to a specific project, and the provision of benefits – such as the provision of affordable housing – outside the scope of what can be funded through CIL.

10.73 During a parliamentary debate on CIL, the UK Government spokesman commented on the differences between CIL and planning obligations in the following terms:

> With the levy, developers know up front what they will be charged and when payment will be required. Section 106 agreements, on the other hand, do not offer the kind of transparency that the levy provides, as contributions are determined through often lengthy negotiations between developers and local authorities. The levy enables local authorities to prioritise spending on infrastructure across their area to facilitate local growth and development. Authorities are also able to use levy funds to deliver infrastructure outside their area, by working with other local authorities, so long as it supports development in their area.
>
> Section 106 agreements are site-specific and cannot be used to mitigate wider impacts of development. Individual section 106 agreements may be subject to viability testing, which can cause delays. That is not an issue for the levy, as local economic viability will have been tested at examination prior to adoption of the charging schedule. The levy does not replace section 106 planning obligations, but restricts their use in areas that have adopted the levy to ensure there is no double charging of developers.[54]

10.74 There have been calls for the two regimes to become better integrated. For example, as noted above, the Planning Officers Society has suggested a revised model of infrastructure funding, involving a development management levy and development management agreements.[55] And the CIL Review Team set up by the UK Government recommended that CIL should be replaced with a hybrid system of a broad and low-

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53 As few as 7% of developments contributed to infrastructure through section 106 (*Funding Infrastructure in a more effective way*, Planning Officers Society, August 2015).

54 HC, Hansard, 5 February 2014, vol 575, Col 134WH.

55 *Funding Infrastructure in a more effective way*, Planning Officers Society, August 2015; see **para 10.32**.

level local infrastructure tariff (LIT), supplemented with section 106 planning obligations for larger developments.[56]

10.75 We agree that an integrated approach is preferable, and that any new system should combine the best of both current regimes in an integrated way. But any new system will need to be developed in light of the development needs of Wales. We have already noted that the Welsh Government may be reviewing the operation of CIL, once responsibility has been devolved to it in accordance with the Wales Act 2017, and it will be important that any such review also considers the operation of the planning obligations system and the links between them.

10.76 Here too, therefore, we consider that it would be premature to make any detailed proposals for technical reform other than the limited ones identified earlier in this Chapter. And indeed it may be that some of the reforms to the existing system of planning obligations may be worked out in more detail in the context of a more general review.[57]

10.77 In particular, UK Government guidance on the operation of the two systems emphasises that

> Charging authorities should work proactively with developers to ensure that they are clear about the authorities' infrastructure needs and what developers will be expected to pay for through which route. There should be no actual or perceived "double dipping", with developers paying twice for the same item of infrastructure.[58]

10.78 This is currently sought to be achieved by regulation 123 of the CIL Regulations 2010, which also prohibits planning authorities from 'pooling' together contributions arising from more than five planning post-2010 obligations if they relate to categories of infrastructure capable of being funded by CIL.[59] These two prohibitions together have the combined effect of encouraging the use of CIL.

10.79 The operation of regulation 123 in practice has been criticised,[60] and will no doubt be considered carefully as part of any review of infrastructure funding, but here too we do not propose any change at this stage.

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56 *A New Approach to Developer Contributions: a Report by the CIL Review Group*, February 2016, para 4.3.6.

57 See for example **Consultation questions 10-5, 10-8 to 10-11**.

58 National Planning Policy Guidance, para 096, ref 25-096-20140612.

59 CIL Regulations 2010, reg 123(3).

60 See, for example, *Interpretation of the changes to CIL and section 106 legislation and applying practical solutions to speed up the process and improve outcomes*, Beverley Firth, [JPL] 2016 OP 95-96.

Chapter 11: Appeals and other supplementary provisions

INTRODUCTION

11.1 In **Chapters 8 and 9**, we considered both the process of making an application for planning permission and the determination of the application by the local planning authority and the Welsh Ministers. In **Chapter 10**, we considered the specific issue of funding infrastructure. In this Chapter, we consider a number of supplementary provisions relevant to development management.

11.2 First, where planning permission, is refused, or is granted subject to conditions – or where the application is not determined at all – it is possible for an applicant to appeal to the Welsh Ministers. Similar rights of appeal exists in relation to applications for listed building consent, conservation area consent, express consent for advertising, and consent for works to protected trees (largely dealt with in later Chapters).[1] And it is possible to appeal against some, but not all, types of enforcement action.[2]

11.3 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. Both considerations lead to higher quality decisions.

11.4 The policy basis on which appeal decisions are reached is beyond the scope of the present exercise. In this Chapter we consider the legal and procedural mechanisms underlying the appeals system, focussing particularly on the relevant primary legislation.

11.5 Secondly, there are other supplementary provisions:

(1) a planning authority may wish to revoke or modify a permission or consent that has not yet been fully implemented (or it may be invited to do so) – or it may wish to discontinue an existing use of land, or seek the removal of an existing building;

(2) if land is left without any beneficial use – as a result of the determination of a planning application or appeal or following the revocation or modification of permission or the service of a discontinuance notice – it may be possible for the owner of the land to serve a purchase notice, requiring the planning authority to purchase it; and

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1 As in earlier Chapters, references are made in footnotes to the corresponding provisions relating to listed building consent (LBC) and conservation area consent (CAC); for more details, see **Chapter 13**. Advertisements are dealt with in **Chapter 14**; and trees in **Chapter 15**.

2 See **Chapter 12**.

(3) where permission is granted, there may be certain consequences in relation to highways.

11.6 Most of these provisions will be encountered rarely if at all in normal practice. But each may be of considerable significance on certain occasions, and it is important that the relevant legislation is fit for purpose, just as much as the more commonly encountered provisions discussed in the earlier Chapters.

APPEALS IN CONNECTION WITH PLANNING APPLICATIONS

The submission of an appeal

11.7 The principal provision in primary legislation allowing for a right of appeal to the Welsh Ministers is section 78 of the TCPA 1990. This provides for the making of an appeal in the following circumstances:

(1) a refusal of planning permission by the planning authority, a grant of planning permission subject to adverse conditions;[3]

(2) a refusal by the authority to approve reserved matters following a grant of outline planning permission, or a refusal to approve details as required under a condition of a planning permission;[4]

(3) a refusal by the authority to approve details as required under a condition of a planning permission granted by a general or local development order[5]; and

(4) a failure by the authority in any of the above circumstances to make any decision within the specified time.

11.8 There is of course no right of appeal against a decision made following an application made to the Welsh Ministers or an application made to the planning authority but called in by the Welsh Ministers for their own decision, or against deemed planning permission. Nor is there a right of appeal against a grant of planning permission by a planning authority. In each of these cases, the only right of redress is by way of an application to the High Court.

11.9 Other provisions in the TCPA 1990 contain rights of appeal:

(1) against validation requirements[6]; and

(2) against a refusal of a certificate of lawful use or development, or a failure to give a decision on an application for a certificate.[7]

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3 TCPA 1990, s 78(1)(a), (2).

4 TCPA 1990, s 78(1)(b).

5 TCPA 1990, s 78(1)(c).

6 TCPA 1990, ss 62ZB, inserted by PWA 2015, s 29; see **para 8.45**.

7 TCPA 1990, s 195.

The determination of appeals

11.10 Section 79 of the TCPA 1990 provides the general power for the Welsh Ministers to determine appeals. It is subject to section 319B, which requires the Welsh Ministers, rather than the parties (the appellant and the planning authority), to decide whether an appeal should be determined following an inquiry or hearing, or on the basis of written representations, or by any combination of these.[8]

11.11 An appeal is not a review, confined to considering the lawfulness or reasonableness of the local planning authority's decision. Section 79 of the TCPA 1990 provides that, in determining an appeal, the Welsh Ministers (or in practice the inspector appointed by them) may:

(1) allow or dismiss the appeal; or

(2) reverse or vary any part of the decision of the planning authority (whether the appeal relates to that part of it or not); and

(3) "deal with the application as if it had been made to them in the first instance".[9]

11.12 In particular, sections 70 (duties laid on planning authorities[10]), 72 (conditions), 73 (variation of conditions), and 73A (retrospective applications) apply to the determination of appeals as they do the initial determination of an application.

11.13 In practice, those determining an appeal (whether the Welsh Ministers or an inspector on their behalf) invariably do consider the application afresh, and we provisionally consider that it might be clearer if that was made an explicit duty on the face of the statute.

Consultation question 11-1.

We provisionally propose that the provision, currently 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.

Do consultees agree?

Determination of appeals by inspectors

11.14 The vast majority of appeals are determined by a person appointed by (and usually but not always employed by) the Planning Inspectorate (PINS), which decides appeals on behalf of the Welsh Ministers (and, in England, the Secretary of State).

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8 TCPA 1990, s 319A was inserted in respect of England by Planning Act 2008, s 196, and a variation of that section was inserted as s 319B by TCP (Determination of Procedure) (Wales) Order 2014 (SI 2773); see also TCP (Referred Applications and Appeals Procedure) (Wales) Regulations 2017, reg 14.

9 TCPA 1990, s 79(1).

10 See **paras 5.16 to 5.18.**

We have already considered the position of such persons, and suggested that it might be appropriate for them to be renamed "inspectors" or "examiners".[11]

11.15 Schedule 6 to the TCPA 1990 empowers the Welsh Ministers to prescribe classes of appeal that can be determined by a person (inspector) appointed by them.[12] The powers of inspectors to determine appeals have been gradually widened in scope since they were first introduced in 1968, to the point where they can now determine almost any appeals under the TCPA 1990 – including those relating to listed buildings (of any grade), advertisements and trees, and those against enforcement notices etc.[13] The only exceptions are a handful of types of appeal relating to proposals by statutory undertakers.[14]

11.16 Paragraph 2 of Schedule 6 then provides for the powers and duties of inspectors in relation to appeals transferred to them; and paragraph 3 enables the Welsh Ministers to recover jurisdiction in respect of a particular appeal.

11.17 We provisionally consider that it would be more straightforward if the Act were to provide that all appeals are to be determined by inspectors or examiners[15], save for:

(1) those in categories that have been prescribed for determination by the Welsh Ministers; and

(2) those that they have specifically recovered for their own determination, by means of a case-specific direction.

11.18 And we see no particular need for the Welsh Ministers to determine all appeals relating to proposals by statutory undertakers.

11.19 That would leave the position in substance as it is at present, but would simplify the legislation and bring it in line with current practice. We also note that this approach has been adopted in relation to the most recently introduced category of appeal (against requirements as to the validation of an application), under sections 62ZB to 62ZD of the TCPA 1990.[16]

11.20 On a point of detail, the reference in paragraph 8(2) of Schedule 6 to the TCPA 1990 to the Parliamentary Commissioner Act 1967 should now be to the Public Services Ombudsman (Wales) Act 2005, since the 1967 Act no longer has any application in relation to Wales.[17] More generally, we note that an equivalent provision was not

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11 See **paras 5.125 to 5.131**.

12 TCPA 1990, Sched 6, para 1.

13 TCP (Determination of Appeals by Appointed Persons) (Prescribed Classes) (Wales) Regulations 2015 (SI 1822), reg 3.

14 SI 2015 No 1822, reg 4. Note that appeals under TCPA 190, s 217 are also, at present, to be determined by the Welsh Ministers rather than an inspector (see **paras 16.23 to 16.26**).

15 See **consultation question 5-11**.

16 See in particular TCPA 1990, s 62ZC (appeals under section 62ZB: determination by appointed person) and s 62ZD (determination by Welsh Ministers in place of appointed person).

17 Similar wording in the Listed Buildings Act 1990 was corrected in the Historic Environment (Wales) Act 2016, s 33(2).

included in sections 62ZC to 62ZD of the TCPA 1990. We consider that para 8 (2) of Schedule 6 could simply be omitted from the Bill.

Consultation question 11-2.

We provisionally propose that the Bill 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.

Do consultees agree?

The balance between primary and secondary legislation

11.21 As would be expected, the TCPA 1990 provides that the detailed requirements as to the making of an appeal – including as to the procedure to be followed, material to be submitted with an appeal, and time limits to be adhered to – are to be prescribed in regulations.[18]

11.22 The planning appeals procedure and process in Wales is principally contained in the TCPA (Enforcement Notices and Appeals) (Wales) Regulations 2017 and the TCP (Referred Applications and Appeals Procedure) (Wales) Regulations 2017. These together revoked and replaced 13 pieces of secondary legislation, insofar as they applied in Wales. They (along with other statutory instruments made at the same time) amended a number of other pieces of secondary planning legislation.

11.23 As a result of that updating process, the legislative framework governing the making and determination of appeals – including those relating to listed buildings, conservation areas, hazardous substance, advertisements, trees and enforcement – is significantly more straightforward than the corresponding framework in England.[19]

11.24 In response to our question in the Scoping Paper as to the balance between primary and secondary legislation, Torfaen County Borough Council commented as follows:

> The right to appeal [should be] contained in the main body of legislation, with the rules on proceedings and all associated matters relating to appeals contained in one set of subordinate regulations.

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18 TCPA 1990, s 323A, inserted by PWA 2015, s 50.

19 Related provisions are still to be found in TCP (Validation Appeals Procedure) (Wales) Regulations 2016, TCP (Development Management Procedure) (Wales) Order 2012, Planning (Listed Buildings and Conservation Areas) (Wales) Regulations 2012, and regulations relating to advertisements, trees and hazardous substances.

11.25 That is broadly the position that has now been reached, and we see no need for further adjustment as to the balance between primary and secondary legislation in relation to planning appeals.

Twin tracking

11.26 We have already noted the provisions of section 78A of the TCPA 1990, which allows an authority to continue to negotiate on an application for four weeks after the submission of an appeal.[20]

Excessive supporting information

11.27 There are some authorities that are tempted to seek from applicants an excessive amount of supporting information – further or more detailed drawings and so forth – before they will accept an application as valid. The legitimacy of this practice was considered by the Court of Appeal in *R (Bath and NE Somerset DC) v Secretary of State*.[21] The court held that applicants should provide the appropriate level of detail with an application and co-operate with the planning authority; but also that if applicants are aggrieved by a request for what is perceived to be excessive information, they may appeal to the Secretary of State, who can determine the question of the validity of the application as well as that of the desirability of the proposal.

11.28 It could have been argued that it was unsatisfactory that the type of appeal envisaged in the *Bath* case does not appear on the face of the statute. However, this appears to have been dealt with explicitly, at least in relation to Wales, by section 29 of the PWA 2015, which introduced (as sections 62ZA to 62ZD of the TCPA 1990), a new procedure for appealing against a decision by a planning authority to refuse to accept an application as valid. We therefore make no proposal for any technical reform in this regard.

Fees and costs for appeals

11.29 Section 200 of the Planning Act 2008 inserts into the TCPA 1990 section 303ZA, which is not yet in force in Wales. Section 303ZA makes provision for the Welsh Ministers to make regulations as to the payment of fees for appeals. When, or indeed whether, this section this will be brought into force, and whether any such regulations will be introduced, is clearly a matter for the Welsh Government. However, we consider that the power to charge fees should be restated in the Bill, even if there are at present no plans to introduce any regulations.

11.30 As to the costs of the parties to an appeal, this is dealt with in **Chapter 18**, as the relevant provisions relate to inquiries and other proceedings generally, not just to planning appeals.[22]

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20 See **paras 8.65 to 8.68**.

21 [1999] 2 PLR 120.

22 See **paras 18.90 to 18.92**.

Amendment of appeal scheme

11.31 In response to our Scoping Paper, we received a suggestion that it might be possible to codify the *Wheatcroft* principle – which determines whether an application that has been determined by a planning authority can be varied during the course of an appeal.[23] However, this has now been dealt with by section 47(1) of the PWA 2015, which introduced section 78(4BA) and (4BB), providing that no such amendment could be made to an application other than as authorised by a development order. We therefore make no proposal on this topic.

Assessors

11.32 Paragraph 6 of Schedule 6 to the TCPA 1990 allows the Welsh Ministers to appoint an assessor to sit alongside inspectors at hearings and inquiries and to advise them.[24] And in practice PINS appoint assessors if invited to do so by an inspector. Arguably, however, this is not a function that which can be exercised by an inspector in place of the Welsh Ministers.[25]

11.33 We provisionally consider that, for the avoidance of doubt, this apparent omission should be rectified.

11.34 Further, paragraph 6 of Schedule 6 does not allow an assessor to be appointed to assist an inspector appointed to determine an appeal on the basis of written representations. Given the increasing use of the written representations procedure in the appeals system, we provisionally consider that it would be beneficial for the use of assessors to be extended to such cases. Such an amendment would regularise the present practice of assessors being appointed to assist in written representations cases.

Consultation question 11-3.

We provisionally propose that the power to appoint assessors to assist inspectors to determine appeals 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 applications determined on the basis of written representations.

Do consultees agree?

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23 *Bernard Wheatcroft Ltd v Secretary of State* [1982] JPL 37, upheld in *Wessex Regional Health Authority v SSE* [1984] JPL 344, *Wadehurst Properties v Secretary of State* [1990] JPL 740, and *Breckland DC v Secretary of State* [1992] 3 PLR 89; and see PINS Good Practice Note 9.

24 Similar powers are in Sched 3 to the Listed Buildings Act 1990 in relation to LBC and CAC appeals.

25 TCPA 1990, Sched 6, paras 2(1),(9).

Inquiries and other proceedings: further provisions

11.35 We note in **Chapter 17** the general provisions relating to inquiries, hearings and other proceedings in Wales – including those noted above as to the determination of procedure, as well as others relating to expert evidence and the recovery of costs.[26]

11.36 Although those provisions apply to proceedings held for a variety of purposes under the TCPA 1990, they are used in practice primarily in the context of planning appeals under section 78. Whilst we consider that they should remain in the part of the Bill dealing with miscellaneous and supplementary provisions, a signpost to this more general material alongside the provisions directly relating to planning appeals would be of assistance to users of the Code.

OTHER TYPES OF APPEAL

11.37 Enforcement generally is the subject of the following Chapter. But it may be noted that there is a right of appeal against an enforcement notice.[27]

11.38 There are also rights of appeal, similar to those relating to applications for planning permission, in relation to applications for listed building consent or conservation area consent,[28] express consent for the display of advertisements[29] and consent for the carrying out of works to protected trees.[30] In each case, there is a right to appeal against:

(1) the refusal of consent,

(2) the grant of such consent subject to adverse conditions, or

(3) the failure to make any decision on an application for consent within a specified time.

11.39 Again, these are dealt with in later Chapters, along with appeals against listed building and conservation area enforcement notices[31], advertisements discontinuance notices[32], tree replacement notices[33], and notices relating to unsightly land.[34]

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26 See **paras 18.83 to 18.92**.

27 See **paras 12.96 to 12.108**.

28 Listed Buildings Act 1990, s 20; see **Chapter 13**.

29 TCPA 1990, s 220; see **Chapter 14**.

30 TCPA 1990, ss 78, 198(3)(c); see **Chapter 15**.

31 See **paras 13.178 to 13.180**.

32 See **paras 14.32 to 14.39**.

33 See **para 15.92 to 15.94**.

34 See **paras 16.13 to 16.26**.

11.40 The discussion above relating to general planning appeals, and in particular **consultation questions 11-1 to 11-3**, would in principle apply equally to in relation to each of these specialised types of appeal.

Consultation question 11-4.

We provisionally propose that the changes proposed in consultation questions 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.

Do consultees agree?

MODIFICATION AND REVOCATION OF PERMISSION

11.41 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.[35] The same is true of listed building consent and conservation area consent.[36]

11.42 As noted, a person may seek to amend the permission or consent – either by amending the conditions attached to it or otherwise. And we have provisionally proposed that the law relating to applications for such amendments should be simplified.[37]

11.43 In addition, a planning authority may itself occasionally wish to vary a permission, or to revoke it altogether. There is a suite of provisions, currently in sections 97 to 99 of the TCPA 1990, enabling an authority to make an order modifying or revoking a permission, at any time until the approved operations have been completed or the approved change of use has taken place. Such an order must be confirmed by the Welsh Ministers (if necessary following an inquiry) unless it is unopposed; and the Welsh Ministers themselves have a default power to make an order.

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35 TCPA 1990, s 91, amended by PWA 2015, s 35; see **paras 8.118 to 8.120**.

36 Listed Buildings Act 1990, s 18.

37 See paras 8.146 to 8.159.

11.44 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.[38] For that reason, it is rarely used in practice. But it does provide a procedure that may be required following the grant of permission for other development on the same land (in which case the compensation payable may be minimal or nil). And it may be considered expedient in other cases, in light of changing circumstances.

11.45 These provisions appear not to require any technical reforms; nor were any suggested to us by respondents to the Scoping Paper.[39]

DISCONTINUANCE NOTICES

11.46 Where 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. And many buildings exist that were erected since before the start of modern planning control, which a planning authority may now wish to see removed; and there are many activities that have been in existence since then which the authority may now wish to bring to an end.

11.47 In such situations, the planning authority may serve a discontinuance order – which may also grant planning permission for some other development on the land in question. Such an order will require the confirmation of the Welsh Ministers; or the Welsh Ministers may themselves make an order. The relevant statutory provisions are in sections 102 to 104 of the TCPA 1990.

11.48 As with the power to modify or revoke a permission, the service of a discontinuance order will usually require the payment of compensation.[40] For that reason, this procedure too is rarely used in practice, but provides a procedure that may be useful where circumstances have changed.

11.49 These provisions do not appear to require any technical reforms; nor were any suggested to us by respondents to the Scoping Paper.

PURCHASE NOTICES

11.50 Occasionally, a failure to obtain planning permission (or a grant but subject to onerous conditions) results in a plot of land having no reasonably beneficial use. Where this occurs, the owner of the land may require the planning authority to

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38 TCPA 1990, ss 107 to 113; and see *R (Health and Safety Executive) v Wolverhampton CC* [2012] 1 WLR 2264, SC.

39 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 – again, subject to the payment of compensation where appropriate (ss 23 to 26, 28; applied to CAC by s 74(3)).

40 TCPA 1990, s 115.

purchase the land at market value (which may of course be low or even nil), by serving on the authority a "purchase notice". The authority, if it accepts that there is indeed no beneficial use for the land, must then either accept the notice, or pass it on to another public authority that is willing to accept it.

11.51 The same problem may arise where planning permission is revoked or modified; or where a discontinuance notice is served.

11.52 In each case, once a purchase notice has been accepted, the land then changes hands at market value. This means that, even though the price paid for the land may be minimal, the owner is at least rid of the responsibilities (including, for example, occupier's liability) going with ownership. The system thus amounts, in effect, to "compulsory purchase in reverse".

11.53 The relevant statutory provisions are in Chapter 1 of Part 6 (sections 137 to 148) of the TCPA 1990.[41] Guidance is provided in Welsh Office Circular 22/83.[42]

Serving a purchase notice

11.54 The service of a purchase notice must take place within 12 months of the relevant decision by the planning authority or the Welsh Ministers.[43] Where there has been an appeal to the Welsh Ministers, it is not entirely clear whether the 12-month period starts on the date of the authority's decision or that of the Welsh Ministers.

11.55 We provisionally consider that it would be helpful to clarify which is the decision that marks the start of the 12-month period within which a purchase notice be served. It would seem to be more logical if it were to be the decision of the Welsh Ministers, since it is not until then that the applicant knows for certain that permission will not be forthcoming.

11.56 The Court of Appeal in *Herefordshire Council v White* concluded that there was no right to amend a purchase notice, but that where several notices are served in relation to a single piece of land, the later notices are deemed to supersede the earlier ones.[44] That too could usefully be clarified on the face of the statute.

11.57 For a notice to be accepted, it must be shown that the land in question has "no reasonably beneficial use". The meaning of this phrase is explored in paragraphs 12 to 19 of the Circular; and the Court of Appeal in *Colley v Secretary of State*[45] and the High Court in *Stafford BC v Secretary of State*[46] have confirmed that there is nothing erroneous in that guidance. The editor of the *Encyclopaedia of Planning Law* comments that the term "reasonably beneficial use" is not defined in the TCPA 1990,

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41 Equivalent provisions are to be found in sections 32 to 37 of the Listed Buildings Act 1990 relating to LBC (applied to CAC by s 74).

42 Welsh Office 22/83, *Purchase Notices*; this Circular (as Dept of the Environment Circular 13/83) has been cancelled in England, but is still in force in Wales.

43 TCP General Regulations 1992, reg 12.

44 [2008] 1 WLR 954, CA; per Dyson LJ at [28], [33].

45 [1992] JPL 925.

46 [2011] EWHC 936 (Admin).

and that it has prompted litigation ever since it first appeared in the TCPA 1947.[47] It is tempting to seek the inclusion of a definition in the Bill, but the circumstances of each case will be different; and we provisionally consider that a statutory definition would be likely to cause as many problems as it would solve.

11.58 Subject to the above points, the provisions relating to purchase notices appear not to require any technical reforms; nor were any suggested to us by respondents to the Scoping Paper.

Consultation question 11-5.

We provisionally propose that the legislation should state that, in a case where there has been an appeal to the Welsh Ministers, the start of the period within which a purchase notice can be served is the date of the decision of the Welsh Ministers on the appeal.

Do consultees agree?

Consultation question 11-6.

We provisionally propose that the Planning 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.

Do consultees agree?

HIGHWAYS AFFECTED BY DEVELOPMENT

11.59 Part 10 of the TCPA 1990 deals with highways affected by development.

Orders under section 247, 248 and 253 to 257of the TCPA 1990

11.60 By virtue of section 247, the Welsh Ministers have the power to authorise the stopping up or diversion of any highway where that is necessary to enable the carrying out of development for which planning permission has been granted. Section 248 provides a similar procedure to deal with the situation where the development that has been approved is itself a highway, and enables the stopping up or diversion of other highways crossing the route of the newly permitted one. Section 253 deals with draft orders made in anticipation of planning permission being granted; sections 254 and 255 with associated compulsory purchase orders; and section 256 with the effects of orders on electronic code operators.

[47] See, for example, *R v MOHLG, ex parte Chichester RDC* [1960] 1 WLR 587; and *Balco Transport Services and Secretary of State* [1986] JPL 123.

11.61 The powers under section 247, 248 and 253 to 256 of the TCPA 1990 exist alongside the more general power contained in section 116 of the Highways Act 1980 that empowers a magistrates' court to authorise the stopping up or diversion of a highway if it appears to be unnecessary or capable of being diverted "so as to be nearer or more commodious to the public".

11.62 A similar provision, under section 257 of the TCPA 1990, enables a planning authority to stop up a footpath, bridleway or restricted bridleway where that is necessary to enable the carrying out of development for which planning permission has been granted – provided that, in the event of any opposition, the draft order has been confirmed by the Welsh Ministers. That power exists alongside the power of a local highway authority to make a public path extinguishment order under section 118 of the Highways Act 1980 and a public path diversion order under section 119.

11.63 The provisions in the TCPA 1990, although apparently similar to those in the Highways Act 1980, perform substantially different functions; and orders made under the two Acts are confirmed by different procedures, in different forums. It would be possible to amend sections 116 to 118 of the 1980 Act to enable a magistrates' court to stop up or divert a highway or path in Wales where necessary to implement a planning permission. However, there would still need to be an alternative procedure to enable an order to be considered by the Welsh Ministers in appropriate cases alongside a compulsory purchase order (either under section 254 of the TCPA 1990 or otherwise), following a single inquiry.

11.64 We therefore provisionally consider that they should not be brought together into one power. However, we would welcome stakeholder comments as to whether the bringing together of these provisions to authorise generally the stopping up or diversion of a highway would be a useful simplification.

Consultation question 11-7.

We provisionally consider 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.

Do consultees agree?

Orders under section 249 of the TCPA 1990

11.65 Under section 249(1) of the TCPA 1990, the Welsh Ministers have the power, on the application of the planning authority, to extinguish any right which persons may have to use vehicles on a highway that is neither a trunk road nor a principal road, thus permitting the authority to pedestrianise it. This applies where—

(1) the authority by resolution adopts a proposal for improving the amenity of part of its area; and

(2) the proposal involves the public ceasing to have any right of way with vehicles over a highway in that area.[48]

11.66 This power exists alongside section 1 of the Road Traffic Regulation Act 1984, which allows a traffic authority to make an order in respect of any road where it appears to the authority making the order that it is expedient to make it for one of a number of reasons, including:

(1) for preventing the use of the road by vehicular traffic that is unsuitable having regard to the existing character of the road or adjoining property;

(2) for preserving the character of the road in a case where it is specially suitable for use by persons on horseback or on foot; and

(3) for preserving or improving the amenities of the area through which the road runs …[49]

A traffic authority in Wales will be the Welsh Ministers, for strategic highways, and in other cases the relevant local authority.[50]

11.67 As pointed out by the Court of Appeal in *Samuel Smith Old Brewery (Tadcaster) v North Yorkshire CC*, the two provisions significantly overlap.[51]

11.68 There do not appear to be any circumstances in which it would be possible to use the power under the TCPA 1990 that could not also be dealt with under the 1984 Act. And compensation is payable, in principle, under section 250 of the TCPA 1990, for any loss incurred as a result of the making of an order under section 249; but no compensation is payable for the making of an order under section 1 of the 1984 Act.[52] That suggests that an authority is likely to prefer using the 1984 Act if at all possible.

11.69 More positively, section 9 of the Active Travel (Wales) Act 2013 (duty to have regard to the needs of walkers and cyclists) applies to the exercise of powers under the 1984 Act, but not to the exercise of those under the 1990 Act.[53]

11.70 We provisionally consider that there is no need for the power in section 249 of the TCPA 1990, in view of the parallel power under section 1 of the 1984 Act.

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48 TCPA 1990, s 249(1),(2).

49 Road Traffic Regulation Act 1984, s 1(1)(d),(e),(f).

50 Road Traffic Regulation Act 1984, s 121A.

51 2000 WL 1791589 (unreported).

52 TCPA 1990

53 Active Travel (Wales) Act 2013, s 9.

Consultation question 11-8.

We provisionally propose 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.

Do consultees agree?

Other provisions in the TCPA 1990 relating to highways

11.71 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 or appropriated for planning purposes. Given that the Planning Code will not be including the provisions of Part 9 of the TCPA 1990 (dealing with such acquisition and appropriation), it seems appropriate that sections 251 and 258 should not be included within the Planning Code, and should remain in the TCPA 1990 applying to both England and Wales.

11.72 Section 252 deals with the making of orders under sections 247, 248, 249 and 251. If our provisional conclusions above are accepted, an equivalent provision would be required in the Code solely in relation to orders under the equivalent of sections 247 and 248.

11.73 Schedule 14 provides a parallel code for the making of orders in relation to footpaths and bridleways; it is very similar in substance to the code under section 252 (relating to other highways) – subject to minor differences as to the need to notify proposals to those in the vicinity and others[54], the need for statutory undertakers to give consent[55], and the power for inspectors to make decisions.[56] The first reflects the fact that orders relating to footpaths and bridleways are likely to affect fewer people, but to be of more interest to those whom they do affect; the second reflects the fact that footpaths and bridleways may more easily be diverted without statutory undertakers becoming aware.

11.74 We consider that the Bill should retain the different requirements as to the notification of proposals and the consent of statutory undertakers. However, there is no need for the general requirement for the Welsh Ministers to make decisions in every case, given the increasing trend for even major decisions to be made by inspectors – subject to a power, noted above in relation to planning appeals, for the Welsh Ministers to make a direction to recover a particular case for their decision.

11.75 Subject to those minor points, there seems no reason why the two procedural codes could not be conflated into one.

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54 TCPA 1990, Sched 14, para 1(2)(b),(4).

55 TCPA 1990, Sched 14, para 5(1).

56 TCPA 1990, Sched 14, para 4.

Consultation question 11-9.

We provisionally propose that decisions relating to orders under section 252 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.

Do consultees agree?

Chapter 12: Unauthorised development

INTRODUCTION

12.1 There would be little point in having an elaborate system to control and manage the carrying out of development if there were not also in place a procedure whereby the detailed requirements of the system can be readily enforced.

12.2 However, whilst some breaches of planning control are deliberate, it is not surprising – given the complexity of the planning system – that other breaches are the result of ignorance. And in some cases development that has been carried out without the necessary planning permission having first been obtained is in fact perfectly acceptable in policy terms, or can be made acceptable subject to appropriate remedial works being carried out.

12.3 The basic principle underlying the system that has emerged over the last seventy years is that the carrying out of unauthorised development – that is, development that is not permitted either by a development order or by a specific grant of planning permission (or that has been carried out in breach of conditions attached to such permission) – is not a criminal offence, but is a breach of planning control. The planning authority is not required to take enforcement action in response to every breach, but, where it does take action and issues one of various kinds of enforcement notice, non-compliance with the notice may then be an offence.

12.4 Where the relevant planning authority becomes aware that such a breach may be about to occur, or has occurred, or may have occurred, its first action is likely to be to seek further information.

12.5 Where the authority considers that a breach has already occurred, or may have occurred, it may take enforcement action if that seems to be expedient – but it is not required to do so. Such action may take several forms:

(1) where the breach relates to development for which there seems to be a reasonable prospect of permission being granted if applied for, the authority may issue an "enforcement warning notice", notifying recipients that further action may be taken if an application is not received;

(2) where there appears to have been a breach, and the authority is contemplating further action, it may issue a "temporary stop notice", which requires the offending activity to cease immediately; non-compliance with a notice is an offence, but the notice expires after 28 days;

(3) where planning permission has been granted for development, but there appears to have been a breach of a condition attached to that permission, the authority may serve a "breach of condition notice", against which there is no right of appeal; non-compliance with a notice is an offence;

(4) where development appears to have been carried out either without any permission or in breach of a condition, the authority may serve an "enforcement notice", requiring the effect of unauthorised development to be remedied; such a notice may be the subject of an appeal to the Welsh Ministers before it comes into force; once it has come into force, non-compliance is a criminal offence, and the authority may enter the land and carry out the required works;

(5) once an enforcement notice has been issued, the authority may also serve a "stop notice", requiring the offending activity to stop more or less immediately; again, non-compliance with a stop notice is also an offence.

12.6 Finally, where the authority considers that a breach of planning control is likely to occur – or has already occurred, and is likely to continue – it may seek from the courts an injunction to restrain those responsible.

12.7 In this Chapter, we consider each of the above procedures in turn, and then consider the criminal penalties available in the Act generally.

12.8 The relevant law is in Part 7 of the TCPA 1990. This was significantly amended by the Planning and Compensation Act 1991, which largely enacted the recommendations that had been made by Robert Carnwath QC, as he then was, in his report *Enforcing Planning Control*.[1] More recently, as part of the work leading to the P(W)A 2015, the enforcement provisions in the TCPA 1990 were reviewed by the Independent Advisory Group in 2012[2] and by Arup and Fortismere Associates in 2013.[3]

12.9 Welsh Government policy on planning enforcement is set out in section 3.6 of PPW. More detailed guidance was formerly set out in Technical Advice Note TAN 9, *Enforcement of Planning Control*.[4] This has been transferred to the Development Management Manual, which incorporates where appropriate the guidance on changes introduced by the P(W)A 2015, and provides guidance on when enforcement action is appropriate.

Response to the Scoping Paper

12.10 In the Scoping Paper, we noted that enforcement was one of the core planning provisions that we regarded as being within the scope of the codification exercise; although we made relatively few suggestions for technical reforms relating to it. And we received relatively few suggestions for further such reforms from those responding to the Paper. That may be because enforcement is a highly technical area of law, and has been the subject of a number of reviews over the years – not least in the reports, noted above, leading up to the P(W)A 2015.

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1 *Enforcing Planning Control*, Dept of the Environment, London, 1989 ("the Carnwath report"). References in this Act to the TCPA 1990 are to that Act as amended by the 1991 Act.

2 *Towards a Welsh Planning Act: Ensuring the Planning System Delivers*, report to the Welsh Government by the Independent Advisory Group, June 2012.

3 *Research into the Review of the Planning Enforcement System in Wales: Final Report*, Arup and Fortismere Associates, May 2013.

4 Welsh Office, 1997.

PRELIMINARY PROCEDURE

Breach of planning control

12.11 The concept of a breach of planning control underpins all the provisions of the TCPA 1990 relating to enforcement. A breach is currently defined (in section 171A(1)) to be the carrying out of development without the required planning permission, or failing to comply with condition or limitation subject to which permission was granted. We have already proposed that this should be extended to include the breach of a planning obligation.[5]

Seeking information

12.12 In many cases, a planning authority may first become aware of a suspected breach of planning control – either apprehended or under way or complete – through being given information that is or may be partial or inaccurate. And even once it is aware of the factual situation, if it is to take any action it will need to know the names and contact details of all those involved, so that notices can be correctly served. It is therefore essential for there to be an effective procedure available for an authority to gain access to the land, where appropriate, and to obtain information.

12.13 The first step is often to serve a planning contravention notice (PCN), under section 171C of the TCPA 1990. Many such notices are served each year.[6] Alternatively it is possible to issue a notice under section 330 of the TCPA seeking any information that is required to enable an authority to serve a notice under the Act.

12.14 A PCN may be served by a planning authority; a notice under section 330 by the planning authority[7] or by the Welsh Ministers. Either type of notice may be served on the occupier of the land in question. A PCN may be served on the owner of the land (that is, "the person entitled to receive the rack rent"[8]) or a person who has any other interest in it; a notice under section 330 may be served on the person who receives rent. And a PCN may be served on any other person who is carrying out operations on the land or is using it for any purpose.

12.15 Either type of notice may require information as to the interest in the land held by the recipient of the notice and by any other person, about the use of the land and when it began, and about when activities now taking place on the land began. A PCN may

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5 See **Consultation question 10-5**.

6 In the 30 months to September 2012, some 1,106 planning contravention notices were served in Wales – compared to176 breach of condition notices, 603 enforcement notices, and 176 stop notices (source, *Research into the Review of the Planning Enforcement System in Wales: Final Report*, Welsh Government, May 2013). Temporary stop notices were not available in Wales at the time of that research. For comparison, the corresponding figures for England in the year to March 2017 were 4,812 planning contravention notices, 208 temporary stop notices, 698 breach of condition notices, 4,400 enforcement notices, and 141 stop notices (source, PINS statistics).

7 The notice may be served by a local authority (s 330(1)) or by a national park authority (s 330(6)).

8 The rack rent is the full market rent. The principle underlying the definition is that the person who is entitled to let the property at a full market rent (that is, usually, the freeholder or long leaseholder) is the person who should be responsible for the discharge of any liabilities imposed by statute.

also require other information about such activities, and information about any operations on the land and when they began (insofar as operations are distinct from activities). A PCN may also require the recipient to supply:

(1) information as to whether any uses or operations specified in the notice are being or have been carried out on the land;

(2) details as to any person known to be using or have used the land or carried out any operations on it;

(3) information as to any planning permission that may have been granted, any conditions or limitations attached to such a permission; or

(4) any reasons why permission is not required for any particular use or operation.[9]

12.16 A PCN may also request a meeting at which the recipient can discuss the matters referred to in the notice.[10]

12.17 It is an offence, punishable by a fine of Level 3 (£3,000) to fail to provide the information requested by a PCN or a notice under section 330 without reasonable excuse. To provide false information in response to a PCN is an offence punishable on summary conviction by a fine of up to Level 5 (in effect, a fine of any amount).[11] To provide false information in response to a notice under section 330 is punishable on summary conviction by a fine of any amount, and on conviction on indictment to a fine or imprisonment for up to two years.[12]

12.18 We provisionally consider that it is confusing to have two powers to obtain information, significantly overlapping. But we recognise 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) other than where there appears to have been a breach of planning control.

12.19 We therefore provisionally propose that there should be a single power for the Welsh Ministers or the local planning authority to serve a notice (perhaps called a "planning information notice") on the owner and occupier of land or any person who is carrying out operations on the land or is using it for any purpose. Such a notice could in any case require information as to the matters that may at present be the subject of a notice under section 330 (extending to operations as well as activities). Where it is considered that there appears to have been a breach of planning control, the notice could in addition require information as to the matters that can presently be required by a PCN, and can propose a meeting to regularise the position.

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9 TCPA 1990, s 171C(3)(a),(3)(c),(3)(d),(2)(b).

10 TCPA 190, s 171C(4).

11 TCPA 1990, s 171D(6); see **para 12.144.**

12 TCPA 1990, s 330(5); see **para 12.144**.

12.20 We consider later in this chapter the appropriate penalties for failing to supply information required by such a notice and for supplying false information.[13]

Consultation question 12-1.

We provisionally consider that the provisions currently in sections 171C and 330 of the TCPA 1990 could 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 is using it for any purpose, requiring the recipient to supply information as to:

(1) **the interest in the land held by the recipient of the notice and by any other person of whom the recipient is aware;**

(2) **the use or uses of the land and when they began; and**

(3) **the operations and other activities now taking place of the land and when they began.**

Where it appears that there has been a breach of planning control, such a notice may also:

(4) **require the recipient to supply information as to:**

- **whether any uses or operations specified in the notice are being or have been carried out on the land;**
- **any person known to be using or have used the land or carried out any operations on it;**
- **any planning permission that may have been granted, and any conditions or limitations attached to such a permission; or**
- **any reasons why permission is not required for any particular use or operation; and**

(5) **request a meeting at which the recipient can discuss the matters referred to in the notice.**

Do consultees agree?

Entry to property

12.21 There is also a power (under section 196A of the TCPA 1990) for anyone authorised by a planning authority to gain entry to land, subject to appropriate safeguards, to investigate a suspected breach of planning control. Section 196A states that, in the

[13] See **paras 12.142 to 12.147** and **Consultation question 12-24**.

case of a dwellinghouse, this may only be exercised after giving 24 hours' notice. As noted in **Chapter 18**, the term "dwellinghouse" is not defined in the Act[14], but we consider that in this context it should refer to any dwelling, including a flat.

Consultation question 12-2.

We provisionally propose 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.

Do consultees agree?

Concealed breaches of planning control

12.22 We noted in an earlier Chapter that there are time limits after which unauthorised development becomes immune from enforcement action, and thus "lawful".[15] We suggested that the statutory provision as to these time limits, currently in section 171B of the TCPA 1990, should be included, along with those relating to certificates of lawfulness, in the Part of the Bill dealing with the need for planning permission generally, rather than with the provisions relating to enforcement.

12.23 However, in the Scoping Paper, we observed that the apparently unqualified language of section 171B may give rise to a problem where a developer conceals a breach of planning control so that the time limit expires, resulting in the planning authority being no longer able to take enforcement action.[16]

12.24 We noted the decision of the Supreme Court in *Welwyn Hatfield Council v Secretary of State* relating to this matter.[17] In that case, a Mr Beesley had constructed a building that from the outside looked like a barn, but internally was a dwelling. He moved in one month after it was complete, occupying it as a dwelling for more than four years without the knowledge of the planning authority, and then sought a certificate of lawfulness. The Supreme Court held that his conduct, although not identifiably criminal, consisted of positive deception in matters integral to the planning process and was directly intended to undermine the regular operation of that process. He would be profiting directly from that deception if the passing of the normal four-year enforcement period were to entitle him to resist enforcement. The apparently unqualified statutory language could not contemplate or extend to such a case. The certificate was accordingly refused.

12.25 We also noted the statutory provisions that had subsequently been introduced – but only in relation to England – as sections 171BA to 171BC of the TCPA 1990, enabling an authority to apply to a magistrates' court for a "planning enforcement order" (PEO),

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14 See **paras 18.106 to 18.111**.

15 See **para 7.88** and **Consultation question 7-11.**

16 See *Planning Law in Wales: Scoping Paper* (2015) Law Commission Consultation Paper No 228, para 5.40.

17 *Welwyn Hatfield Council v Secretary of State and Beesley* [2010] UKSC 15, [2011] 2 AC 304.

which extends the time limit within which action can be taken. We suggested that improvements might be made by considering the scope and application of each option in relation to concealed breaches of planning control, to discern which, if either, could best be applied in Wales.[18] In response, PEBA agreed that we should consider this. And Persimmon Homes West Wales also thought that the 'statutory language requires further clarification' in relation to section 171B.

12.26 Since the appearance of the Scoping Paper, the Court of Appeal has considered the two procedures, in *Jackson v Secretary of State* which related to two cases where a barn had been converted partially into a dwellinghouse. Richards LJ summarised the position as follows:

> There is an *overlap* between the PEO procedure and the *Welwyn* principle but the overlap is far from complete. On the one hand, the PEO procedure is narrower than the *Welwyn* principle, since it applies only where an apparent breach of planning control has been deliberately concealed, whereas the *Welwyn* principle extends to cases of dishonesty or criminality, such as bribery or coercion, which would not necessarily amount to deliberate concealment. On the other hand, the *Welwyn* principle applies only to particularly serious cases, whereas the PEO procedure applies where an apparent breach of planning control has "to any extent" been deliberately concealed. The appellants' case has to be that in the area of overlap Parliament intended the PEO procedure to be exclusive and to displace reliance on the meaning given to section 171B in *Welwyn*, but that the meaning of the section remains unchanged in so far the *Welwyn* principle is capable of applying outside the area of overlap. One only has to state that proposition to see how strained an interpretation the appellants seek to place on the statute.[19]

12.27 The Court noted that the Supreme Court in *Welwyn* had simply been interpreting the scheme of Part 7 of the TCPA 1990 – prior to the introduction of the PEO regime. It accordingly upheld the decision of Holgate J that the *Welwyn* principle continues to operate in serious cases, and has not overtaken or undermined by the introduction of the new regime (in sections 171BA to 171BC).

12.28 We provisionally consider that it is unhelpful having two procedures, one at common law and one on the face of the statute, that significantly overlap.

12.29 Lord Brown in *Welwyn* emphasised that the principle being applied by the Supreme Court in that case would only apply in 'highly exceptional circumstances', and would not have included, for example, the letting of a granny flat to students in breach of a planning condition (as occurred in *Arun DC v Secretary of State*[20], cited in *Welwyn*).

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18 See *Planning Law in Wales: Scoping Paper* (2015) Law Commission Consultation Paper No 228, para 5.40.

19 *Bonsall v Secretary of State and Rotherham MBC*; *Jackson v Secretary of State, Winchester CC* [2015] EWCA Civ 1246, [2016] QB 811, at [45]. See also Hatfield, *Concealed development: did we really need section 124?* [2013] JPL 19.

20 [2011] 2 AC 304 at [75] – [79], [84].

The facts in the *Welwyn* case itself, in the *Fidler* case[21] referred to in *Welwyn*, and in the two cases considered in *Jackson*, were indeed all highly exceptional.

12.30 The PEO procedure, by contrast, applies where any apparent breach of planning control has "to any extent" been deliberately concealed. This could arguably include all kinds of minor irregularities. Indeed, the very fact that the TCPA 1990 contains procedures allowing enforcement action to be taken some years after a breach has occurred implicitly recognises that there will often be breaches that remain at least to some extent concealed, but which are reckoned to be innocuous if they do not come to light for a long period. Arguably, any such minor concealment would be at risk of being enforced against for a significantly extended period under the PEO procedure, which would undermine the whole point of there being time limits.

12.31 The PEO procedure is problematic in any event, for a number of reasons. First, it provides no eventual time limit for possible enforcement action by the authority, and thus no certainty for future purchasers, lenders and others. Secondly, the certificate issued by the authority as to the date on which the apparent breach came to its attention cannot be challenged. Thirdly, the magistrates are ill-equipped to consider the technicalities of planning law.[22]

12.32 We therefore provisionally consider that it is preferable for planning authorities to rely on the *Welwyn* principle in appropriate cases, recognising that they will only arise in 'highly exceptional circumstances', and for the PEO procedure introduced by the Localism Act 2011 not to be introduced in Wales.

12.33 As to the incorporation in the Bill of the *Welwyn* principle, we consider that the matter has not yet been the subject of sufficient consideration by the Courts to justify being codified; nor is it certain what would be an appropriate categorisation of the circumstances in which it would apply. We therefore provisionally consider that the issue of deliberate breaches of planning control should for the moment remain a matter for the courts, to be dealt with, as hitherto, on a case-by-case basis.

Consultation question 12-3.

We provisionally consider that the law as to concealed breaches of planning control should remain as it is, subject to the common law principles developed *Welwyn Hatfield Council v Secretary of State* [2010] UKSC 15, [2011] 2 AC 304, and in particular that the "planning enforcement order" procedure, introduced by the Localism Act 2011, should not be included in the Bill.

Do consultees agree?

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21 *Fidler v Secretary of State* [2011] EWCA Civ 1159.

22 The right to appeal against a section 217 notice was transferred by the P(W)A 2015 from the magistrates' court to the Welsh Ministers for that reason.

ALTERNATIVES TO ENFORCEMENT ACTION

Enforcement warning notices

12.34 Section 173ZA of the TCPA 1990, introduced by the P(W)A 2015 with effect from 16 March 2016, enables a planning authority to issue an enforcement warning notice. This relates to the situation where development appears to have been carried out without planning permission, but where there is a reasonable prospect that, if an application were to be made, permission would be granted. In such a case, the authority may issue a notice notifying recipients that further enforcement action may be taken if a planning application is not received within a specified period.

12.35 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. However, section 171B(4)(b) provides that it is permissible to take further enforcement action within four years of previous enforcement action – which, by virtue of section 171A(2)(aa), includes serving an enforcement warning notice. That means that an authority can extend the time for other forms of enforcement action simply by serving such a notice.

12.36 We provisionally consider that it might be appropriate not to restate section 171A(2)(aa) in the Bill, so that the service of an enforcement warning notice could take place during the period (of 4 or 10 years) within which other enforcement action is possible, but could not extend that period. Alternatively, s 173ZA(5) could be amended so as to provide 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, and cannot be extended indefinitely through the issuing of further enforcement notices.

12.37 Otherwise, section 173ZA appears to be satisfactorily drafted, and is not in need of the technical reforms proposed later in this Chapter in relation to other forms of enforcement action. The new procedure is in any event of recent origin, and its effectiveness and utility have therefore not yet been tested in practice. We do not make any further recommendations as to technical reforms.

Consultation question 12-4.

We provisionally propose 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.**

Do consultees agree, and if so which option seems more appropriate?

TEMPORARY STOP NOTICES

Introduction

12.38 Where there appears to have 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). The effect of such a notice is to require the offending activity to cease immediately.[23] The notice expires after 28 days, with the expectation being that during that period the authority will have taken some other form of enforcement action; but in the meanwhile non-compliance is an offence, punishable by an unlimited fine.[24]

12.39 The issue of a notice under this procedure will give the planning authority time in which to consider what, if anything, to do next. But it is not without risk, as the authority will be liable to pay compensation if:

(1) it transpires that the activity in question was in fact perfectly lawful (that is, it was the subject of planning permission, and in accordance with all conditions attached to that permission); or

(2) the authority issues a certificate of lawful development in respect of the use; or

(3) it withdraws the notice.

12.40 Although section 171E was introduced in 2004, it was only brought into force in Wales in June 2015, so it remains to be seen how much it will be used in practice. However, it is noteworthy that in England, where section 171E was brought into force in 2005, some 556 TSNs were issued in 2006/07, dropping to 260 in 2011/12, and 208 in 2016/17. This suggests that the use of this procedure is gradually diminishing – possibly due to the potential compensation liability – but that the power is by no means defunct.

12.41 The distinction between temporary stop notices (TSNs) and stop notices is that a TSN is designed for use as a holding measure, as soon as the authority has discovered an apparent problem (such as waste tipping or stock car racing without any planning permission) and while it decides what to do next; that is why it expires after 28 days, and is not subject to a right of appeal. The authority therefore has no time in which to carry out research as to land ownership. And it will not have decided yet whether to take enforcement action, in the sense of issuing an enforcement notice seeking to bring the activity to a permanent halt.

12.42 A stop notice, by contrast, is served along with a copy of an enforcement notice. An enforcement notice will only be issued where the authority has considered what to do, and will be subject to a right of appeal. If the authority wishes the offending activity to stop immediately, it may serve a stop notice as well. The stop notice will fall away if the enforcement notice comes into effect (possibly following an unsuccessful appeal); but if the enforcement notice is withdrawn, or is quashed on appeal on

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[23] TCPA 1990, s 171E(3), inserted by PCPA 2004, s 52.

[24] The maximum fine is £20,000 on summary conviction, unlimited on indictment.

certain grounds, the stop notice will fall with it, and that will give rise to an entitlement to compensation.

Notices affecting residential property

12.43 By virtue of Section 171F, the power to issue a TSN under section 171E is not available to prohibit the use of any building (which would include a part of a building[25]) as a "dwellinghouse".[26] Presumably the policy basis for that restriction would apply equally to the use of a temporary notice in relation to the use of a building or a part of a building as a flat.[27]

12.44 We consider the position as to "dwellings" and "dwellinghouses" in **Chapter 18**.[28] But we provisionally consider that section 171F should be clarified to make plain that a TSN is not to prohibit the use of any building, or part of a building, as a dwelling – not just as a dwellinghouse.

Consultation question 12-5.

We provisionally propose 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 (defined so as to include a house and a flat).

Do consultees agree?

Coming into effect of notice, and associated publicity

12.45 Because the service of a TSN is by its nature a preliminary to other forms of enforcement action, and the notice expires after a relatively short period, the procedures are slightly different from those applying to other forms of enforcement action.

12.46 By virtue of section 171E(5), a planning authority that has issued a TSN must display a copy of it (and a statement as to its effect and as to the penalties for non-compliance) on the land to which it relates. The authority may also serve "the notice" (presumably a copy of it) 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 is the owner of the land, or

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25 TCPA 1990, s 336.

26 TCPA 1990, s 171F(1)(a).

27 There used to be a restriction on the use of temporary stop notices in relation to caravans in England, but this was abolished (TCPA 1990, s 171F(1)(b); and 2005 SI 206, revoked in 2015 by 2013 SI 830). It has not been introduced in Wales.

28 See **paras 18.106 to 18.127**.

(3) the person who it thinks is the occupier of the land.

12.47 This is distinct from procedures relating to other types of notice, which are to be served on those who actually are the owner etc, rather than those who appear to be. And the liability to comply with a TSN attaches, at least in part, to a person who has received a copy of the notice, regardless of whether the authority is correct in its view as to who is the owner or occupier of the land or the identity of those carrying on the activity.

12.48 The requirement as to the display of 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 rural areas, if a notice were to be displayed at a point on the land that was some distance from where the activity is actually taking place. It also seems unsatisfactory for the authority to be required to display on the land a copy of the TSN itself, as the notice may comprise several pages, and may be phrased in technical language. Realistically, those wanting to study the full wording of a notice – and who have access to the internet – could best do so online, provided that they know that the notice exists, and where on the planning authority's website it is to be found. But the most important thing is for the site notice to summarise the effect of the TSN.

12.49 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 a statement of its effect.[29] The notice then has effect 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 that day.[30] 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 date.

12.50 We provisionally consider 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. 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 prior to the start of the date on which the TSN comes into effect, and should include a notice:

(1) stating that a TSN has been issued;

(2) summarising the effect of the notice, including the date on which it comes into effect; and

(3) stating the addresses (both a physical location and, where available, a website) at which full copies of the notice can be inspected.

12.51 The authority could in addition serve copies of the TSN on those who appear to be the owner and occupier of that land and on others as may seem appropriate, bearing

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29 TCPA 1990, s 171E(6).

30 TCPA 1990, s 171E(7).

in mind that it will be easier to secure a conviction for non-compliance if the existence of the notice has been widely publicised.

12.52 Thus, for example, a TSN could be drafted on Monday morning (stating that it comes into effect on the following day), and a copy made available from that time in the Council offices; the relevant site notices could be displayed on Monday afternoon; and copies could be served on various interested parties at various times throughout the week. The TSN would then come into effect on Monday afternoon, once it has been displayed on site. And it would remain in effect until the end of the Monday four weeks later (regardless of any public holidays).

12.53 The date on which the notice comes into effect should thus not be affected by the date or dates on which copies of the TSN are served.

12.54 We do not consider that this slight tightening up of the statutory provisions would have any effect on resources required to issue notices.

Consultation question 12-6.

We provisionally propose 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 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.**

Do consultees agree?

Non-compliance

12.55 Section 171G(1) provides that 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. This means that where a copy of the notice has been served on a person, that person may be prosecuted for non-compliance even if no copy of the notice has been displayed on

the land – so that the notice has not yet come into effect. And different people may be served with copies on different dates. It is a defence to show that the notice was not served on the accused, and that the accused did not know, and could not reasonably be expected to know, of its existence.[31]

12.56 We provisionally consider 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.

Consultation question 12-7.

We provisionally propose that:

(1) **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);**

(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.**

Do consultees agree?

BREACH OF CONDITION NOTICES

Introduction

12.57 It sometimes occurs that planning permission has been granted for development, but there appears to have been a breach of a condition attached to that permission. One possible remedy is for an authority to issue an enforcement notice, requiring the breach to be rectified. However, that may result in an appeal against the notice, which may open up the merits of the condition. An alternative is for the authority to serve a "breach of condition notice", against which there is no right of appeal; and non-compliance with such a notice is an offence. The procedure is the subject of section 187A of the TCPA 1990, which was introduced by section 1 of the Planning and Compensation Act 1991, following a recommendation in the Carnwath report.

12.58 The logic behind the procedure is that when planning permission is granted, there is a right of appeal against any conditions attached to it. If no such appeal is made (or if an appeal is made but fails to result in the conditions being modified), once the owner or developer has taken advantage of the permission, and carried out the development, that brings with it the duty to comply with all of the conditions attached to it. There can be therefore be no reasonable complaint if the authority seeks to

[31] TCPA 1990, s 171G(5).

ensure compliance with the conditions by serving a breach of condition notice – against which there is no right of appeal – and follows that up if necessary by prosecution for non-compliance.

Coming into effect of notice, and associated publicity

12.59 At present, a breach of condition notice is to be served on any person who has carried out or is carrying out the development, or anyone having control of the land. The notices takes effect immediately, but the time for compliance is the end of the period (of at least 28 days), stated in the notice, starting on the date it is served. 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. There is no requirement for a copy of a breach of condition notice to be displayed on or near the land.

12.60 Following the service of a notice, if any of the conditions specified is not complied with, and if any of the steps required by the notice have not been taken (or the activities specified in the notice have not ceased), the person responsible is in breach of the notice and may be prosecuted. Government guidance suggests that it is essential for the planning authority, at the outset, to consider and decide in each case who is properly to be regarded as the person responsible for an alleged breach of a condition; and that a breach of condition notice should have only one recipient.[32]

12.61 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.

12.62 We provisionally consider that it would be helpful to bring the provisions relating to breach of condition notices more into 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.

12.63 Given that there would be duty to serve copies of the notice on those apparently responsible for the breach of the condition, we do not consider that it should be a requirement that a site notice be displayed in every case – although of course that would not prevent an authority from doing so if it considered to be appropriate.

[32] Circ 24/97, Annex 4, para 4.13.

Consultation question 12-8.

We provisionally propose 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).

Do consultees agree?

Notice relating to more than one condition

12.64 A notice may relate to more than one condition attached to a planning permission; but Welsh Government guidance sensibly suggests that where a notice is directed at the contravention of two or more conditions, possibly involving more than one compliance period, it would be sensible to serve one notice for each contravention.[33]

12.65 This approach could be incorporated into a statutory provision whereby each breach of condition notice could only relate to the breach of a single condition. However, we are persuaded that this would not always be appropriate, and might result in multiple notices having to be issued in straightforward cases.

ENFORCEMENT NOTICES

Introduction

12.66 By far the most commonly encountered form of enforcement action is the issue of an enforcement notice. In the 30 months to September 2012, some 603 notices were issued in Wales.[34]

12.67 A planning authority is not required to take any action in connection with every apparent breach of planning control, but it may issue an enforcement notice where it considers that to do so would be expedient – having regard to the development plan and all other relevant considerations. Where it issues a notice, it must serve a copy on the owner and occupier of the land involved, and anyone else likely to be affected.[35] It must also maintain a register of notices, which is to be open to inspection at all reasonable hours.[36]

12.68 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

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33 Circ 24/97, Annex 4, para 4.13.

34 *Research into the Review of the Planning Enforcement System in Wales: Final Report*, Welsh Government, May 2013.

35 TCPA 1990, s 172.

36 TCPA 1990, s 188.

authority requires to be taken, or the activities that it requires to cease. In the classic formulation of Upjohn LJ in *Miller-Mead v Minister of Housing and Local Government*, the test for the validity of a notice is "does it tell [the person on whom a copy is served] what he has done wrong, and what he must do to remedy it?"[37]The recipient of a copy of an enforcement notice is entitled to appeal against it, on a variety of statutory grounds, at any time until the notice comes into force. If no appeal is made, or if an appeal does not result in the notice being quashed, it must be complied with. If it is not complied with, those responsible risk prosecution, and the authority may enter the land and carry out the required works.

12.69 Unfortunately, in the half-century since *Miller-Mead*, the validity of enforcement notices and the niceties of enforcement procedure have been the subject of many statutory refinements and a large body of case-law. However, many of the decisions of the courts in relation to enforcement are based on unusual factual circumstances and are thus of limited general relevance.

Content of an enforcement notice: purposes to be achieved

12.70 In our Scoping Paper, we noted that section 173(3) of the TCPA 1990 provides that an enforcement notice is 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:

(a) 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[38]; and

(b) remedying any injury to amenity which has been caused by the breach.[39]

12.71 We also 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". And there is no requirement for an authority to specify which purpose it is relying on.[40]

12.72 We expressed a preliminary view that the wording of section 173(4) should be clarified in the Planning Code. PEBA also agreed that there was merit in that.

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37 [1963] 2 QB 196, at p 232.

38 TCPA 1990, s 173(3)(a); indents added to improve clarity

39 TCPA 1990, s 173(3)(b).

40 Scoping Paper, paras 5.25 to 5.27.

12.73 We provisionally consider that it would be possible to amend section 173(3) to require that a notice shall 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.

12.74 Further, requirements as to the achievement of either or both of those purposes can be requirements to do one or more of: making the development comply with planning permission, discontinuing a use of land, and restoring land to its previous condition.

12.75 This would make it clear that a notice could relate to either or both of the purposes set out in section 173(4). However, it would not be appropriate to categorise separately the purposes to be achieved by each step or other action to be taken, since they are likely in many cases to overlap.

Consultation question 12-9.

We provisionally propose 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.**

Do consultees agree?

Content of an enforcement notice: steps to be taken

12.76 In our Scoping Paper, we noted that the courts have consistently held (notably in *Murfitt v Secretary of State*[41] and *Somak Travel v Secretary of State*[42]) that an enforcement notice can validly require the removal of any incidental operational development where it forms part of the development being enforced against.[43] For example, where the use of a building is changed, that change may involve internal building works, which would not in themselves require permission; an enforcement notice requiring the change of use to be reversed may require the undoing of the internal building works.[44]

41 (1980) 40 P&CR 254.

42 (1988) 55 P&CR 250

43 Scoping Paper, paras 7.49 to 7.53.

44 *Somak Travel v Secretary of State* (1988) 55 P&CR 250

12.77 We suggested that, given the importance of those decisions and the relative clarity with which the principle underlying them has been expressed, there would be scope for it being incorporated in the Planning Code. One consultee, Persimmon Homes West Wales, agreed with that suggestion.

12.78 The issue has also been reviewed more recently in *Bowring v Secretary of State*[45] and *Makanjuola v Secretary of State*.[46] In *Bowring*, it was expressed as follows:

> where an enforcement notice is served alleging the making of a material change of use of land, and the notice requires that certain works be removed [in addition to the cessation of the unauthorised use], those works must have been integral to or part and parcel of the making of the material change of use.[47]

12.79 We provisionally consider that the codification of that principle would be useful.

12.80 A further point that has occurred in a number of cases is what has become known as "the *Mansi* rule". This is the principle that 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.

12.81 For example, in the *Mansi* case itself, an enforcement notice referred to part of a larger site, used for agriculture. The land subject to the notice had been used as a farm shop, in which was sold agricultural produce that had been grown elsewhere on the site; but the shop now offered for sale, in addition, produce and other items that had been brought in from elsewhere. The notice required the cessation of all retail sales; and the court held that it should be amended so as to safeguard the appellant's established right, as found by the Minister, to carry on retail trade in the manner and to the extent that it had previously been carried on. Further, the notice should not restrict existing rights to intensify that use, provided that such intensification did not amount to a material change of use.[48]

12.82 The principle in *Mansi* has subsequently been followed by the courts (and by planning inspectors deciding appeals) in many cases over the succeeding years.[49]

12.83 It would be possible for a notice to state explicitly:

(1) that it does not restrict the rights to carry out without a planning application any development that could have been so carried out immediately prior to the issue of the notice, and

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45 (2013) EWHC 1115 (Admin).

46 [2013] EWHC 3528 (Admin), [2014] JPL 439.

47 (2013) EWHC 1115 (Admin), per Clive Lewis QC, sitting as Deputy High Court Judge, at para 16.

48 *Mansi v Elstree RDC* (1964) 16 P&CR 153, per Widgery J at p 161.

49 See, for example, *R v Harfield* [1993] 2 PLR 23, JPL 914; *Duguid v Secretary of State* (2001) 82 P&CR 6, [2000] 4 PLR 107; [2001] JPL 323; *Challinor v Staffordshire CC* [2007] EWCA Civ 864, [2008] P&CR 10, JPL 392.

(2) that any provision of the notice that suggested otherwise should simply be ignored.

12.84 Such a statement would not change the law, but would be of assistance to those receiving copies of a notice. It would probably best be included in the explanatory note to accompany the enforcement notice, envisaged by section 173(10), rather than in the notice itself.[50]

Consultation question 12-10.

We provisionally propose 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.

Do consultees agree?

Consultation question 12-11.

We provisionally propose 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.

Do consultees agree?

Content of an enforcement notice: statement as to the lawful use of the land

12.85 The Planning and Environment Bar Association suggested that it would also be helpful to consider whether the prescribed contents of an enforcement notice should include a statement by the issuing planning authority of its assessment of the lawful use of the land. This would presumably be particularly relevant where the notice relates to an unauthorised change of use, rather than operational development.[51]

12.86 We can see that such a statement – including the authority's opinion either as to the legal status of the existing uses of the land in question, or as to the possible range of uses that could be lawfully implemented there – would be helpful to the recipients of a notice, as it would help them in reaching a decision as to whether to make an

[50] See **para 12.92** below.

[51] Although it might still be relevant in the case of operational development, as the availability of a permitted development right, for example, might depend on the use of a building.

appeal. It is also might seem to be in line with our proposal that every planning application should be deemed to include an application for a certificate of lawfulness.[52]

12.87 However, an application for a certificate of lawfulness necessarily relates to a particular existing or proposed use. The production of a statement such as being envisaged in this suggestion, by contrast, might require the authority to consider a hypothetical range of uses and factual scenarios, which might in some cases amount to a significant burden. Further, if it were to be binding (as with a certificate of lawfulness), it would need to be accompanied by a right of appeal as to its correctness, which itself might be problematic.

12.88 There is of course nothing to prevent the recipient of an enforcement notice (whether it relates to a change of use or to operational development) submitting one or more applications for certificates of lawfulness – either as to the existing use of the land or as to possible future development schemes. And if such an application is submitted promptly, and does not result in the issue of a certificate, any resulting appeal can be considered at the same time as any appeal against the enforcement notice.

12.89 We therefore do not recommend any change in this regard.

Content of an enforcement notice: general requirements

12.90 Section 173(1) currently requires that an enforcement notice must state:

(1) the matters that appear to constitute the breach of planning control; and

(2) whether that breach is a failure to obtain planning permission or a failure to comply with a condition or limitation attached to a permission.

12.91 Section 173(10) then provides that the Welsh Ministers may prescribe further matters that must be specified in a notice; and the current regulations provide that the notice must specify

(1) the reasons why the authority is serving the notice;

(2) the relevant provisions of the development plan; and

(3) the boundary of the land to which the notice relates.[53]

12.92 Section 173(10) also enables the Welsh Ministers to prescribe matters that must be include in an explanatory note relating to rights of appeal.[54]

12.93 It would seem to be more straightforward for all the five items noted above that must be included in an enforcement notice to be included within a single provision – either in primary or secondary legislation. Further, given that they are all fundamental to

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52 See **Consultation question 7-12.**

53 SI 2017 No 530, reg 6.

54 See SI 2017 No 530, reg 7.

the effectiveness of the notice, we consider that it would be more appropriate for them to be included in one place within the Bill.

12.94 However, section 173(10), enabling further matters to be prescribed – either in the enforcement notice itself or in an explanatory note to accompany the notice – should be retained, as the constantly evolving nature of case law relating to enforcement suggests that it may in the future seem appropriate to require further matters to be included in an enforcement notice or explanatory note. Indeed, our proposal relating to the *Mansi* rule is just such a matter.

Appeal to the Welsh Ministers against enforcement notice: ground (a) (permission should be granted)

12.95 The recipient of a copy of an enforcement notice may appeal to the Welsh Ministers against the notice on a number of grounds, specified in section 174(2) of the TCPA 1990. One of the more significant of these in practice is ground (a), which is "that, in respect of any breach of planning control which may be constituted by the 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". This seems to envisage that a ground (a) appeal may in effect claim that permission ought to be granted for ***a*** breach referred to in the notice, and not necessarily for all such breaches. So, for example, where a notice relates to the unlawful construction of Buildings A, B and C, the appellant may argue that permission should be granted for Buildings B and C.

12.96 Section 177(5) provides that where an appeal relies on ground (a), possibility amongst other grounds, 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." That seems to imply an application for permission for ***all*** such matters – all three buildings (A, B and C) in the example above. Section 177(1)(a) then provides that, on determination of an appeal, the Welsh Ministers may grant planning permission in respect of the matters stated in the notice as constituting a breach. And section 177(6) states that any permission granted under subsection (1) shall be treated as granted on the application deemed to have been made – although section 177 is silent as to what happens if the deemed application is refused.

12.97 We provisionally consider that there is no need for the mechanism of a deemed application. It would be more straightforward to omit section 177(5) and (6), and to amend section 177(1)(a) to provide that the Welsh Ministers in determining an appeal including ground (a) may grant planning permission for any or all of the matters referred to in the notice of appeal insofar as it relies on that ground, possibly along with others. So, for example, where the enforcement notice relates to the unlawful construction of Buildings A, B and C, the appellant may appeal (on ground (a)) that permission should be granted for Buildings B and C, and the Welsh Ministers may grant planning permission just for Building C.

12.98 The same would apply, in principle, to sections 177(1)(b) and 177(1)(c).

Consultation question 12-12.

We provisionally propose 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 including ground (a) may do all or any of the following:**

- **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.**

Do consultees agree?

Appeal to the Welsh Ministers against an enforcement notice: ground (e) (irregular service)

12.99 Ground (e) on which an appeal may be made against an enforcement notice is that copies of the notice were not served as required by section 172. Section 172 provides as follows:

> (2) A copy of an enforcement notice shall be served—
>
> (a) on the owner and on the occupier of the land to which it relates; and
>
> (b) on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.
>
> (3) The service of the notice shall take place—
>
> (a) not more than 28 days after its date of issue; and
>
> (b) not less than 28 days before the date specified in it as the date on which it is to take effect.

12.100 Section 285(1) provides that the validity of an enforcement notice may not, except by way of an appeal to the Welsh Ministers under Part 7 of the TCPA 1990, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought. Those grounds would include ground (e), as to the service of the notice.

12.101 The effect of this provision was considered in *R (Stern) v Horsham DC*, which concerned an enforcement notice that had accidentally been served late.[55] An appeal was lodged, one day out of time, on the ground that the notice had also been late. The Inspectorate rejected the appeal. The court accepted that it should be possible to apply to the court to quash a notice that had been served out of time. If it were otherwise, a copy of notice could be served on the day before the day on which it came into effect, leaving the recipient with only hours in which to lodge an appeal.

12.102 In the course of argument, it was pointed out that the TCPA 1971 (prior to the amendments made following the Carnwath report) had included as ground (e) on which an appeal could be brought that the notice had not been served as required by section 87(4) of that Act. Section 87(4) was in the same terms as section 172(2) of the TCPA 1990, but not section 172(3). The problem that arose in *Stern* would not have arisen if the wording of the present-day day ground (e) had referred to copies of the notice not having been served as required by section 172(2), rather than simply as required by section 172.

12.103 We consider that the equivalent of section 174 in the Bill (providing for the grounds of appeal against a notice) should be worded in line with the corresponding provision in the TCPA 1971.

Consultation question 12-13.

We provisionally consider 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 having not 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 the time limits for service).

Do consultees agree?

Appeal procedure

12.104 The detailed procedural rules as to the making and determination of enforcement appeals are, as would be expected, largely in secondary legislation.

12.105 Section 174(4) of the TCPA 1990 provides that a person appealing against an enforcement notice is to submit a statement

(a) specifying the grounds of appeal that are being relied on; and

(b) giving such further information as may be prescribed by regulations.

[55] [2013] EWHC 1460 (Admin), [2013] PTSR 1502.

12.106 The relevant regulations then provide that the statement should specify the grounds of appeal being relied on, and the facts relied on and the case being put forward in relation to each ground.[56]

12.107 We provisionally consider that, given the requirements of the regulations, section 174(4)(a) is otiose. All that is needed in the primary legislation is a requirement that a person making an appeal must provide information and details as may be prescribed.

Consultation question 12-14.

We provisionally consider 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.

Do consultees agree?

Interlinking of enforcement appeals and planning applications

12.108 Sections 32 of the P(W)A 2015 introduced into Wales section 70C of the TCPA 1990.[57] Its purpose is to prevent the abuse of the system by a person who has carried out unauthorised development, and who has unsuccessfully appealed against an enforcement notice on ground (a), then applying for planning permission to retain the offending development, possibly subject to some very minor amendment. A planning authority may decline to determine such an application.

12.109 Section 46 of the P(W)A 2015 inserted sections 174(2D) to (2F) of the TCPA 1990, to prevent an appeal being made against an enforcement notice on ground (a), where the notice relates to unauthorised development that has already been the subject of an unsuccessful appeal to the Welsh Ministers under section 78.

12.110 These provisions have only been in force since March 2016, and it remains to be seen how they will operate in practice. We make no proposals as to reforms.[58]

Appeals to the High Court

12.111 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.[59] It is also possible to challenge any decision of the Welsh Ministers on such an appeal by way of an application under section 289. In the final Chapter of this Consultation Paper, we propose that the

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56 2017 SI 530, reg 8(1)(a).

57 Section 70C was inserted into the TCPA 1990 by Localism 2011, s 123, but only so as to apply in England.

58 These provisions are similar but not identical to those inserted in relation to England by the Localism Act 2011, which have been in force since April 2012.

59 TCPA 1990, ss 284(3)(e), 288(1), (4).

statutory procedure under sections 288 and 289 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.[60]

12.112 However, the Bill will need to include a provision equivalent to section 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.[61] We provisionally consider that such a provision be included in the part of the Bill dealing with enforcement. This would continue to prevent challenges either to the policy basis for a notice or as to its validity being used as a way of deflecting prosecution for non-compliance.

Consultation question 12-15.

We provisionally propose that there should 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.

STOP NOTICES

Introduction

12.113 An enforcement notice will not come into effect immediately, and its coming into effect may be delayed by the lodging of an appeal. Even when it does come into effect, the notice will allow time for compliance. In some cases, therefore, the notice will not bite for some while after it is issued.

12.114 This may have unfortunate results in certain cases, where it seems clearly desirable that an unauthorised activity should cease more or less immediately. Once it has issued an enforcement notice (or at the same time as issuing an enforcement notice), a planning authority may therefore also serve a "stop notice", requiring the offending activity to stop without further ado. There is no right of appeal against a stop notice, but only against the enforcement notice to which it relates; and non-compliance with a stop notice is a criminal offence. The stop notice procedure was heavily amended by the 1991 reforms.

12.115 There has been a general decline in the use of stop notices.[62] And it is noteworthy that in the 30 months to September 2012, only 5 stop notices were issued in Wales, as compared with 603 enforcement notices – which is much less than the

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60 See **Consultation question 17-1.**

61 TCPA 1990, s 285(1), (2); and see *Challinor v Staffordshire CC* (above, **footnote 49**).

62 283 stop notices were served in England in 1993/94, 247 in 1994/95, 210 in 2005/06, 158 in 2010/11, and 141 in 2016/17 (PINS statistics).

corresponding figures for England.[63] However, there has been no suggestion – either in response to our Scoping Paper or otherwise – that the availability of the stop notice procedure should be discontinued.

Coming into effect of stop notice, and associated publicity

12.116 First, 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.[64] 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.

12.117 Secondly, 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 there is no requirement for the authority to display a site notice, although it may do so – in which case the site notice must state that a stop notice has been served, and the date on which it takes effect, and must "indicate" its effect.[65] The power to display a site notice refers only to "the land" on which the offending activity is occurring, which could cause problems in the case of a large area of land, for example in rural areas, if a notice were to be displayed at a point on the land that was some distance to where the activity is actually taking place.

12.118 Section 187(1) provides that it is an offence for a person to contravene a stop notice that has been served on him or her, or that has been displayed on the land. But section 184(2) provides that an offence cannot occur before the date (stated in the notice) on which it will come into effect. It is a statutory defence (under section 187(3)) to show that the notice was not served on the accused, and that there was no way in which the accused could have known of its existence.[66]

12.119 As with a breach of condition notice, we provisionally consider 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.

12.120 The offence under section 187(1) would then 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.

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63 In the year to March 2017, 141 stop notices were issued in England, as opposed to 4,812 enforcement notices. (source, PINS statistics).

64 TCPA 1990, s 183(4). See **paras 12.43, 12.44.**

65 TCPA 1990, s 184(6).

66 TCPA 1990, s 171G(5).

Consultation question 12-16.

We provisionally propose 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.

Do consultees agree?

Consultation question 12-17.

We provisionally propose 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).

Do consultees agree?

Consultation question 12-18.

We provisionally propose:

(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.**

Do consultees agree?

Cessation of effect

12.121 By virtue of 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. It will also cease to have effect where the planning authority notifies those who were served with the original stop notice that it has withdrawn that notice. Where several people were notified of the original notice, they must all be notified of its withdrawal, and the notice will cease to have effect

when the first of those people receives the notice of withdrawal. If a site notice was displayed publicising the initial service of the stop notice, the authority must also publicise its withdrawal, under section 183(7). But it is noteworthy that the notice only ceases to have effect when the first such notice is received, which may be some while after the authority's decision that it should be withdrawn.

12.122 We provisionally consider that it would be more satisfactory for a stop notice to cease to have effect when the authority makes a decision to that effect; and that the decision should then be communicated as soon as possible on site and to those who were notified of the original notice.

Consultation question 12-19.

We provisionally propose that:

(1) **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.**

Do consultees agree?

Service of stop notice by the Welsh Ministers

12.123 Compensation will be payable if the relevant enforcement notice is subsequently quashed (as a result of an appeal) or if either the stop notice or the enforcement notice is withdrawn.

12.124 Where the Welsh Ministers issue a stop notice, the authority is liable to pay compensation under section 187 if the notice is quashed.[67] This seems surprising; and we provisionally consider that it would be more appropriate for compensation to be payable by the Welsh Ministers in such cases – which we imagine will be very rare.

Consultation question 12-20.

We provisionally consider that where a stop notice is served by the Welsh Ministers under section 185, and subsequently quashed, any liability to compensation arising under section 186 should be payable by them and not by the planning authority.

Do consultees agree?

[67] TCPA 1990, s 186(3).

CONSEQUENCES OF ENFORCEMENT ACTION

Prosecution for non-compliance

12.125 In principle, non-compliance with an enforcement notice that has come into effect is an offence, under section 197(2) of the TCPA 1990. Where a notice requires an activity to cease, subsequent resumption of that activity is also an offence, under section 179(5).

12.126 Section 179(7) states that where a person charged with an offence under section 179 has not been served with a copy of the enforcement notice, and the notice is not contained in the register under section 188, it is a defence for that person to show that he or she was not aware of the existence of the notice.

12.127 The burden is generally on the defendant in a prosecution to prove (on the balance of probability) the existence of whatever is necessary to establish a statutory defence to a criminal charge. In this case, it seems unduly onerous for a prospective defendant to prove that a notice was not contained in the relevant register at the date of the alleged offence, and that he or she had not been served with a copy of it.

12.128 We provisionally consider that it would be more helpful for the offence under section 179(2) to 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.

12.129 The separate offence under section 179(5) (subsequent resumption of prohibited activity) could be framed along similar lines.

12.130 All three of those elements of each offence would have to be proved by the prosecution on the criminal standard – rather than disproved by the defence.

Consultation question 12-21.

We provisionally propose 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.**

Do consultees agree?

Assurance as to non-prosecution

12.131 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. 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 –
>
> (a) explaining that, once the enforcement notice had been issued, the authority was required to serve the notice on the person…

12.132 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.

12.133 Secondly, section 172A(1) states that the notice has to be in the form of a letter. This seems to rule out the possibility of an authority giving the notice in the form of an email, which might be more practical. If it were simply to refer to notice being given, that would automatically include notice by email (by virtue of sections 329 and 336 of the TCPA 1990).

Consultation question 12-22.

We provisionally propose that section 172A of the TCPA (assurances as to non-prosecution for breach of an enforcement notice) should be amended so as

(1) **to enable an authority to give such an assurance simply by "giving notice" to the relevant person, rather than necessarily doing so by a letter; and**

(2) **to enable the authority 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.**

Do consultees agree?

Effect of subsequent planning permission

12.134 By virtue of section 180(1) of the TCPA 1990, where planning permission is granted following the service of a copy of an enforcement notice or a breach of condition notice, the notice is of no effect so far as it is inconsistent with that permission. The intention is clearly that, in effect, a grant of planning permission quashes any earlier enforcement notice that is inconsistent with it.

12.135 At present, this applies only where the development for which permission is granted has already been carried out. It is not clear why section 180 is limited in this way. If permission is granted prospectively for development that in some way overlaps with or relates to the unauthorised development that is the subject of the enforcement notice, the same principle would apply.

12.136 Because of the way section 180(1) is drafted, where planning permission is granted immediately after the issue of an enforcement notice, but before a copy of it has been served, the notice remains fully in effect. This will not often occur, but it is nevertheless unfortunate. We provisionally propose that section 180(1) should be amended so as to refer to the grant of planning permission following the issue of an enforcement notice or breach of condition notice.

Consultation question 12-23.

We provisionally propose 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.**

Do consultees agree?

INJUNCTIONS

12.137 Where a planning authority considers that a breach of planning control is likely to occur – or has already occurred, and is likely to continue – it may seek from the courts an injunction to restrain those responsible. The explicit powers now within the TCPA 1990 (in section 187B) were introduced by the Planning and Compensation Act 1991, following the Carnwath report.[68]

[68] Similar powers are available in relation to listed buildings and conservation areas, advertisements and protected trees.

12.138 Injunctions are not sought frequently – fewer than 100 a year in England and Wales – but the power for a planning authority to do so remains a valuable weapon in its armoury of enforcement powers.

12.139 We are not aware of any need for technical reform to section 187B.

CRIMINAL PENALTIES

12.140 There are a number of provisions in the TCPA 1990 that create criminal offences. They have been introduced onto the statute book over many years, and as a result the procedural and sentencing provisions are now not entirely consistent.

Responses to requests for information

12.141 There are, firstly, offences relating to the supply of information in response to a request by the planning authority. These usually occur against the background of a concern by the authority that a breach of planning control is imminent or has already occurred. A failure to supply such information (in response to either a planning contravention notice (PCN) or a request under section 330 of the TCPA 1990) is an offence that, on summary conviction, may result in a fine of up to Level 3 on the standard scale (currently £2,500). The relatively modest penalty no doubt reflects the fact that the authority is aware that it has received no information, and may still be able to make enquiries elsewhere.

12.142 But the position is different where information is supplied that is false. This can undermine the whole basis of planning control, and of enforcement action in particular.

12.143 Supplying false information to procure a certificate of lawful development is an offence under section 194(1) of the TCPA 1990, attracts on summary conviction a fine of any amount; and on conviction on indictment (in the Crown Court) a fine of any amount, or imprisonment for up to two years, or both. Making a false statement in response to a request under section 330 attracts the same penalties. However, making a false statement in response to a PCN – which essentially amounts to more or less the same thing as a request under section 330 – is an offence, under section 171D(5), that can only lead to a summary conviction, attracting a fine of any amount.[69]

12.144 Supplying a false certificate as to the ownership of land, and as to the extent to which the owners of land have been informed of a planning application for development on their land, which is an offence under section 65(6) of the TCPA 1990, also attracts a fine of any amount on summary conviction.

12.145 We provisionally consider that the offences under sections 65(6), 171D(5), 194(1) and 330(5) are all essentially comparable.[70] They may be committed by a

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[69] The Act still refers to a fine of up to Level 5, but that is now in effect a fine of any amount (in relation to offences committed on or after 12 March 2015 (by virtue of Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 85(1)).

[70] And we have proposed earlier in this Chapter that the provisions relating to PCNs and notices under s 330 be conflated (see **Consultation question 12-1**).

householder making a minor mistake, of no particular significance, for which it would probably be inappropriate to institute any criminal proceedings. At the other extreme, they may be committed entirely cynically by a landowner or other developer seeking to conceal from the planning authority a serious breach of planning control. We thus consider that in each case the maximum penalty on summary conviction should be a fine of any amount – either on summary conviction or on conviction on indictment.

12.146 At present, a Crown Court has power to impose a prison sentence for some of these offences.[71] We suspect that such a sentence has never, or only very rarely, been imposed in practice; and the practice in other recent statutes has been simply to impose a fine.[72] We therefore provisionally consider that a power to impose a fine of any amount is a sufficient deterrent.

Consultation question 12-24.

We provisionally propose 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.

Do consultees agree?

Breach of enforcement notices etc

12.147 As noted earlier in this Chapter, the carrying out of unauthorised development is not in itself a criminal offence. However, where the planning authority choses to take enforcement action, and issues one or more of the various notices described briefly above, non-compliance with the notices is a criminal offence under the TCPA 1990.

12.148 It is thus an offence:

(1) to contravene a temporary stop notice[73];

(2) to breach an enforcement notice[74];

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71 Making a false statement to procure a certificate of lawful development (s 194(1) or in response to a request for information (s 330(5), but not s 171D(5)); and disclosing information discovered in the course of investigations (ss 196C(5), 325(3)).

72 See for example Red Meat Industry (Wales) Measure 2010, s 8; Children and Families (Wales) Measure 2010, s 46; Mobile Homes (Wales) Act 2013, s 34; Housing (Wales) Act 2014, s 39; Public Health (Wales) Act 2017, s 82.

73 TCPA 1990, s 171G(1).

74 TCPA 1990, s 179(2), (5). Note that this includes the resumption at a later date of a use that was required by the enforcement notice to be discontinued (s 181(2)).

(3) to reinstate or restore buildings etc following compliance with an enforcement notice[75];

(4) to contravene a stop notice[76];

(5) to fail to comply with a breach of condition notice[77]; and

(6) to fail to comply with a discontinuance notice.[78]

12.149 In most cases the offence may be tried either summarily or on indictment, and is punishable in either case by a fine of any amount.[79] However, there are two exceptions.

12.150 Conviction for an offence (under section 181(5) of the TCPA 1990) of reinstating or restoring buildings or works following compliance with an enforcement notice is only triable summarily, and attracts a penalty of a fine of any amount.[80] This seems surprising, as the result of such activity will be broadly the same as the failure to comply with an enforcement notice in the first place, possibly coupled with an element of defiance.

12.151 Conviction for an offence (under section 187A(9) of the TCPA 1990) of failing to comply with a breach of condition notice is also only triable summarily, and attracts a penalty of a fine of up to Level 4 in England, and up to Level 3 in Wales.[81] This too seems surprising, as the result of such activity will be broadly the same as the failure to comply with an enforcement notice relating to a breach of condition.[82]

12.152 We provisionally consider that these two offences should both 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.

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75 TCPA 1990, s 181(5).

76 TCPA 1990, s 187(1).

77 TCPA 1990, s 187A(9).

78 TCPA 1990, s 189(1), (2).

79 Summary conviction for the contravention of a discontinuance notice attracts a fine of "up to the statutory maximum", but the result is the same.

80 TCPA 1990, s 181(5).

81 TCPA 1990, s 181(5).

82 The difference may reflect the fact that there is no right of appeal against a breach of condition notice.

Consultation question 12-25.

We provisionally propose that the offences of

(1) **reinstating or restoring buildings or works following compliance with an enforcement notice (under section 181(5) of the TCPA 1990); and**

(2) **failing to comply with a breach of condition notice (under section 187A(9) of the TCPA 1990)**

should all 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.

Do consultees agree?

Obstructing an authority

12.153 It is an offence to obstruct a planning authority in the course of:

(1) carrying out works required by a planning obligation (under section 106) or an enforcement notice[83],

(2) carrying out investigation prior to taking enforcement action[84]; or

(3) entering land for other purposes under the TCPA 1990.[85]

12.154 In each case, the offence is punishable on summary conviction by a fine of up to Level 3. We provisionally consider that this seems correct for a single breach, bearing in mind that each subsequent obstruction is a separate breach, and can be charged accordingly.

Unauthorised disclosure

12.155 The Act also penalises the disclosure of information discovered by a planning authority or its employees, either in the course of investigations carried out in connection with possible enforcement action (under sections 196A and 196B of the TCPA 1990) or in the exercise of its general powers of entry onto land (under section 324).

12.156 In each case the offence attracts on summary conviction a fine of any amount; and on conviction on indictment a fine of any amount, or imprisonment for up to two years, or both.[86] Again, we provisionally consider that this seems correct.

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83 TCPA 1990, ss 106(8), 178(6).

84 TCPA 1990, ss 196C(2), 214D(3).

85 TCPA 1990, s 325(2).

86 TCPA 1990, ss 196C(7), 325(5).

Other offences

12.157 The Listed Buildings Act 1990 and the TCPA 1990 also penalise:

(1) the carrying out of unauthorised works to listed buildings and demolition in a conservation area[87];

(2) the display of advertisements without consent[88];

(3) the carrying out of works to protected trees without consent[89]; and

(4) non-compliance with an unsightly land notice.[90]

12.158 These are discussed in later Chapters.[91]

HISTORIC BREACHES OF PLANNING CONTROL

12.159 Section 57(7) of and Schedule 4 to TCPA 1990 make provision as to the need for planning permission for the resumption prior to 6 December 1968 of a use of land carried out at some date before 1 July 1948.

12.160 Section 302 of and Schedule 15 to that Act make provision for the taking of enforcement action against unauthorised development on Crown land that took place during the Second World War.

12.161 Both sets of provisions would seem to be redundant, and need not be restated in the Code.

Consultation question 12-26.

We provisionally propose 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.

Do consultees agree?

87 Listed Buildings Act 1990, ss 9(1), 74(3).

88 TCPA 1990, s 224 (3).

89 TCPA 1990, ss 210(1), (4), 211(2).

90 TCPA 1990, s 216(2).

91 See **paras 13.175 to 13.177** (listed buildings and conservation areas), **paras 14.85 to 14.95** (advertisements), **paras 15.100 to 15.119** (trees), and **para 16.8** (unsightly land notices).

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 However, as explained below, there has grown up over the last fifty years an increasing awareness of the importance of the historic environment. This has led to changes to the planning system, designed to ensure that there is adequate control over works affecting buildings and areas that may be particularly sensitive to even relatively minor changes.

13.3 As a result, there are now three relevant types of authorisation for building works in Wales:

(1) planning permission (under the Town and Country Planning Act ("TCPA") 1990;

(2) listed building consent (under the Planning (Listed Buildings and Conservation Areas) Act ("Listed Buildings Act") 1990; and

(3) conservation area consent (also under the Listed Buildings Act 1990).

13.4 In the first section of this Chapter, we consider in turn each of these three consent systems, and look at how they overlap. We also outline the policy basis underlying each system.

Possible reform

13.5 We have considered earlier in this Consultation Paper[1] the general desirability of making of technical changes to the law, to bring about a simpler planning code, easier to use in practice. We also noted the responses of stakeholders to suggestions made in the Scoping Paper for possible changes of that kind.

13.6 In our Scoping Paper, we described one possible change – unifying overlapping consent regimes – which might streamline procedure and amend discrepancies in the law.[2] However, we recognised that this might be on the border between technical reform and reform that amounts to a change in policy. We accordingly explored the

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1 See **Chapter 4**.

2 *Planning Law in Wales: Scoping Paper* , Law Commission Consultation Paper No 228, 2015, Chapter 6, *Unifying Consent Regimes*.

relevant issues in more detail, and sought stakeholders' views. This issue provoked more responses than any other specific reform proposal, and we therefore consider it again in more detail in this Chapter, in light of the points made by respondents.

13.7 It may also be helpful if, at the start of this Chapter, we reiterate the principles we set out in our Scoping Paper. First, drawing together or merging certain separate consent regimes should result in efficiency savings and improvements to procedures. Secondly, the simplification of the legislative framework should improve the clarity, accessibility and coherence of the planning system. Thirdly, any reform of the consent regime must achieve five aims:

(1) it must maintain at least the current level of protection;

(2) it must operate effectively alongside existing management systems;

(3) it must make the system more accessible;

(4) it must reduce bureaucracy, and make the system more efficient; and

(5) it must simplify the legislative framework.[3]

13.8 In the Scoping Paper, we considered the possibility of unifying consents primarily in the context of works affecting listed buildings and conservation areas, and in this Chapter we consider further such works. We also briefly touched upon consent for outdoor advertising; we return to that in the following Chapter.[4]

13.9 After our analysis of the existing law as to the need for various forms of authorisation, and the policy basis underlying each statutory regime, we then consider the arguments for and against possible change, and outline various options for possible reform. We finally deal with a number of more detailed points.

13.10 But we emphasise that we are not seeking in any way to dilute the level of protection afforded by the existing arrangements, but rather to achieve the most appropriate legal framework within which to carry out the balancing exercise between the need for new development against the desire to protect historic buildings and areas; and to remove unnecessary complexity or inconvenience for those who have to use it.

WORKS AFFECTING LISTED BUILDINGS AND CONSERVATION AREAS: THE EXISTING LAW

Planning permission

13.11 As noted in **Chapter 7**, 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:

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3 *Planning Law in Wales: Scoping Paper*, 2015, paras 6.61 – 6.65.

4 See **paras 14.50 to 14.56**

(1) demolition of buildings;

(2) rebuilding;

(3) structural alterations of or additions to buildings; and

(4) other operations normally undertaken by a person carrying on business as a builder.[5]

13.12 This applies to buildings that are listed or in a conservation area just as to any others.

13.13 But planning permission is not required for the carrying out of works for the maintenance, improvement or other alteration of any building which:

(1) affect only the interior of the building, or

(2) do not materially affect its external appearance.[6]

13.14 This means, in particular, that works affecting only the interior of a building do not require planning permission.[7]

13.15 As for what materially affects the external appearance of a building, this will depend to some extent on whether it is listed or in a conservation area.[8]

13.16 It was generally considered until 1991 that demolition was outside the scope of development. However, the Court of Appeal, in *Cambridge CC v Secretary of State*, held that demolition was included.[9] The TCPA 1990 was accordingly amended to make that explicit, but at the same time a procedure was introduced whereby the Secretary of State could make a direction exempting certain categories of development from the need for planning permission.[10]

13.17 Exercising his powers under that provision, the Secretary of State in 1992 issued a direction exempting from the need for planning permission the demolition of a listed building, any building in a conservation area or a scheduled monument. The rationale was that all of these required consent under one of the other regimes. The fact that the complexity of the statutory scheme led to four directions being issued in four years is indicative of the unsatisfactory state of this statutory scheme.[11]

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5 TCPA, s 55(1), (1A), as amended by Planning and Compensation Act 1991, s 13.

6 Town and Country Planning Act 1990, s 55(2)(a).

7 With the possible exception of works to create additional space underground.

8 *Burroughs Day v Bristol City Council* [1996] 1 PLR 78.

9 (1992) 64 P&CR 257, CA.

10 TCPA 1990, s 55(2)(g), inserted by Planning and Compensation Act 1991, s 13.

11 TCP (Demolition – Description of Buildings) Direction 1992, replaced by TCP (Demolition – Description of Buildings) (No 2) Direction 1992, and in due course TCP (Demolition – Description of Buildings) Direction 1994, replaced in turn by TCP (Demolition – Description of Buildings) Direction 1995, issued as Appendix A to Welsh Office Circular 31/95.

13.18 The most recent of those directions was largely quashed by the Court of Appeal in 2011.[12] The result is that almost all demolition – including the demolition of a listed building or of an unlisted building in a conservation area – now requires planning permission. However, permission is automatically granted by the TCP (General Permitted Development) Order 1995, subject to a condition that the planning authority be given an opportunity to control the method of demolition and the restoration of the site.[13]

13.19 Planning permission is also granted by article 3 of the 1995 Order for many other categories of minor building operations, usually known as "permitted development". In many cases, permitted development rights that would otherwise apply are modified or removed altogether in relation to operations within the curtilage of a listed building or in a conservation area. So, for example, the construction of a garden building in the curtilage of a dwellinghouse, which would normally be permitted by article 3 of the GPDO,[14] is not permitted where the dwellinghouse is listed, and there are restrictions on the extent of such structures that can be erected under permitted development rights in a conservation area.[15]

13.20 In some cases, the permission under the Order for particular categories of works can be withdrawn by the planning authority making a direction under article 4 of the Order in respect of particular properties. And that is sometimes done in conservation areas.

13.21 In other cases, planning permission has to be sought from the planning authority (or, on appeal, from the Welsh Ministers).

Listed building consent

13.22 As noted above, at the time that historic buildings were first protected – by "preservation orders" under the TCPA 1932 (later the TCPA 1947 and 1962) – it was generally believed that "demolition" was outside the scope of "development", for which planning permission would be required. And internal works were always outside the scope of development. It was therefore necessary to introduce a requirement for consent to be obtained under the order for the demolition of a protected building, and for the carrying out of works that would "seriously affect the character of the building".[16]

13.23 That requirement was formalised by the TCPA 1968, which introduced for the first time the concept of a "listed building", and required that "listed building consent" must be obtained for the carrying out of any works for

(1) the demolition of a listed building (including a pre-1948 structure in its curtilage); or

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12 *Save Britain's Heritage v Secretary of State for Communities and Local Government* [2011] EWCA Civ 334; for details, see *Dear Chief Planning Officer* letter issued by Welsh Government on 18 April 2011.

13 GPDO 1995, art 3, and Sch 2, Part 31.

14 Under TCP (General Permitted Development) Order 1995, art 3; and Sched 2, Part 1, Class A.

15 TCP (GPD)O 1995, Sched 2, Part 1, paras E.1(i), E.2

16 A phrase that first appeared in TCPA 1944, s 29(3).

(2) 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.[17]

13.24 That formulation is still in place today. A failure to obtain listed building consent for such works is a strict liability criminal offence.[18]

13.25 It was on this basis that the Government sought in 1992 to exempt the demolition of a listed building from the need for planning permission – since it already required listed building consent. However, as noted above, the direction intended to achieve that was recently quashed.

13.26 It will also be possible for listed building consent to be granted in Wales by a heritage partnership agreement, under section 26L of the Listed Buildings Act, inserted by section 28 of the Historic Environment (Wales) Act 2016[19], for specific categories of works specified in the agreement.[20]

13.27 As for alterations and extensions to the exterior of a listed building, it is not entirely clear what the difference is between those that "materially affect the external appearance of the building" (which generally require planning permission[21]) and those that "affect its character as a building of special architectural or historic interest" (which require listed building consent[22]) – but they in most cases likely to be very similar.

13.28 It is sometimes wrongly supposed that listed building consent is required for the erection of a freestanding structure within the curtilage of a listed building.[23] It is not; but planning permission normally will be. Indeed, that is why many of the classes of permitted development do not apply in relation to works in the curtilage of a listed building, to ensure that such works can still be controlled by the planning authority.

Conservation area consent

13.29 Following the introduction of conservation areas in 1967, a requirement was introduced whereby consent was required for the demolition of an unlisted building in a conservation area (the demolition of a listed one would of course require listed building consent). That consent was initially still referred to, confusingly, as "listed building consent"; in the 1990 consolidation of planning legislation, the opportunity was taken to introduce the term "conservation area consent".[24] Failure to obtain such consent, under whatever name, was a strict liability criminal offence.

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17 TCPA, s 40.

18 Listed Buildings Act 1990, ss7, 9.

19 Not yet fully in force

20 In England, listed building consent can also be granted by a listed building consent order (similar in effect to a permitted development order) – but not in Wales.

21 See **para 13.13**

22 See **para 13.23.**

23 *Cotswold DC v Secretary of State* [1985] JPL 407.

24 This term was originally introduced in the TCPA 1984, in relation to Crown land.

13.30 The House of Lords has clarified that "demolition" in this context only extends to "the removal of the whole building, [or] works to a … building which will produce a site for redevelopment."[25]

13.31 Because conservation area consent is required only for demolition, and not for alteration, the number of applications is modest. And there is considerable confusion as to when consent is required The Vale of Glamorgan CBC, for example, noted that over a five-year period, it had received 53 applications for conservation area consent, of which 14 were for works for which consent was not required.

13.32 In England, the requirement to obtain conservation area consent 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.[26] The automatic planning permission for demolition granted by the GPDO specifically excludes demolition within a conservation area in England.[27]

13.33 In Wales, conservation area consent is still required for the demolition of an unlisted building in a conservation area in Wales; and failure to obtain consent is an offence.[28]

13.34 Conservation area consent 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.[29]

The overlap between the various forms of authorisation

13.35 The result of this complex set of provisions is that the authorisation that is required for various categories of works in Wales is generally as follows:

(1) planning permission (only) is required for a material change of use of any building;

(2) planning permission (only) is required for the erection of a new building, including one in the curtilage of a listed building;

(3) listed building consent (only) may be required for works to the interior of a listed building, but only if they would affect its character as a building of special architectural or historic interest;

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25 *Shimizu (UK) Ltd v Westminster CC* [1997] 1 WLR 168, at p 183.

26 TCPA 1990, s 196D, inserted by Enterprise and Regulatory Reform Act 2013, Sched 17.

27 GPDO 2015, Sched 2, Part 11, para B.1(b).

28 Listed Buildings Act 1990, s 74.

29 The current direction is that issued by the Secretary of State for Wales in para 20 of Circular 1/98. It is likely that this will soon be replaced, following the update of legislation (in the Historic Environment (Wales) Act 2016) and associated policy; but the principle will remain unchanged. 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.

(4) both planning permission and listed building consent are required for the demolition of a listed building, but planning permission is granted by the GPDO, (so that an application only has to be made for listed building consent);

(5) neither planning permission nor listed building consent is required for external works to a listed building that do not materially affect its appearance;

(6) minor works to the exterior of a listed building that are permitted by the GPDO do not require the submission of an application for planning permission, but will usually require listed building consent;

(7) both planning permission and listed building consent are required for almost any other building works affecting a listed building,

(8) both planning permission and listed building consent are required for works (external or internal) to a building in the curtilage of a building in the list, where

- the building is deemed to form part of that building by virtue of section 1(5) of the Listed Buildings Act and

- where the works affect the special character of that building

(9) planning permission but not listed building consent is required for works (external or internal) to a building in the curtilage of a building in the list in other circumstances;

(10) both conservation area consent 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

(11) 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).

13.36 From this, it follows that the only categories of operation that need an application for listed building consent but not a planning application are

(1) works to the interior of a listed building that would affect its character as a building of special interest; and

(2) works to the exterior of a listed building that are development permitted by the GPDO.

13.37 There is no category of works that requires conservation area consent but not planning permission.

13.38 Where two types of consent are required, notably for the extension of a listed building or for other building works affecting its exterior, both must be obtained before works can lawfully be carried out. In practice, if the application is submitted on paper, this results in two applications (usually relying on two sets of the same drawings); if it is

submitted online, there will be a single application, for "planning permission plus listed building consent".[30] As explained in the *Development Management Manual*,

> use of the [standard application form] for multiple applications which come under different consent regimes is intended to streamline the application process. However it does not alter the fact that these applications are legally distinct and their validity and determination should be treated as such by the planning authority.[31]

13.39 Whether the application is made in hard copy or online, there will often be two committee reports, and two decision notices, containing two sets of overlapping conditions or two sets of reasons for refusal.

13.40 Indeed, the *Development Management Manual* states that "it is preferable if related applications for planning permission and for listed building consent are considered concurrently".[32]

13.41 It appears that around one half of all applications for listed building consent are accompanied by planning applications relating to the same works. This is corroborated by figures supplied by the Vale of Glamorgan CBC, which had received 249 applications for listed building consent over the five years 2011–16, of which 112 (45%) were accompanied by applications for planning permission. The proportion of applications for conservation area consent accompanied by planning applications seems to be much higher – of the 39 valid applications in the Vale of Glamorgan in the same period, 36 were accompanied by an application for planning permission.[33]

13.42 However, it seems that where applications are received for two types of consent, they are generally dealt with together, resulting in both types of authorisation being granted, or both withheld. In a survey carried out in 2000 in England, 84% of the participating planning authorities (31 of the 37 answering the question) stated that all applications are dealt with concurrently by the same officer or committee.[34] It would be theoretically possible for only one to be granted (for example, where an acceptable change to the use of a listed building is accompanied by undesirable works for its alteration, or where works are proposed to both the interior and the exterior), but this was "rare".

Procedures

13.43 As well as the principal provisions requiring authorisation to be obtained, there are also significant collections of supplementary provisions in the TCPA 1990 (relating to

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30 Most if not all authorities have a combined form accessible via the Planning Portal website.

31 *Development Management Manual*, November 2016, para 7.2.6. As to the status of the *Manual*, see **paras 7.3, 8.37**.

32 *Development Management Manual*, November 2016, para 20.2.3.

33 Newport BC told us that it had received 39 combined applications (one for planning permission accompanied by one for LBC, CAC or advertisements consent) in a two-year period, and Cardiff Council had received 76 in 2014, 86 in 2015, and 76 in 2016 up to October. Unfortunately there were no figures for the total number of applications for each of the non-planning consents.

34 Dissertation by Simon Williams in 2000 at the Department of Real Estate Management, Oxford Brookes University, based on responses to questionnaires sent out to 50 planning authorities, of whom 37 responded.

planning permission) and in the Listed Buildings Act 1990 (relating to listed building consent and conservation area consent).

13.44 Thus, where both types of authorisation are refused, that may result in two appeals, leading again to two decisions and (if the appeal is allowed) two sets of conditions – although in practice the Inspectorate always deal with the two appeals together and issue a single decision letter.

13.45 If works are carried out in the absence of authorisation, a planning authority wishing to remedy the position may have to issue two enforcement notices, again possibly resulting in two appeals, and two decisions (albeit issued together). A failure to obtain listed building consent or conservation area consent (but not the failure to obtain planning permission) will normally be a criminal offence.

13.46 As a result, the Listed Buildings Act 1990 contains many statutory provisions relating to listed building consent – providing for appeals, revocation of consent, compensation, purchase notices, enforcement (including injunctions), and statutory challenges[35] – that are very similar to the corresponding provisions relating to planning permission in the TCPA 1990. And some of those listed building consent provisions are then applied (in Wales only) to conservation area consent.[36]

The policy basis for decision making

13.47 Section 70 of the TCPA 1990 provides that in dealing with applications for planning permission, planning authorities are to have regard to the development plan, so far as material, to considerations relating to the use of the Welsh language, and to any other material considerations.[37] The same applies, by extension, to planning inspectors determining appeals against the refusal of permission. Further, such decisions are to be made in accordance with the plan unless material considerations indicate otherwise.[38]

13.48 Development plan policies must have regard to current national policies,[39] which will include those relating to the historic environment.[40] And in practice most development plans do include policies and proposals relating to the historic environment. Decisions on planning applications and appeals are thus to be taken in light of policies relating to the historic environment just as much as those relating to other issues.

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35 Listed Buildings Act 1990, ss 7 – 26, 26H-26K, 28, 30 – 46, 60 – 65. And see **footnote 83** below.

36 Listed Buildings Act 1990, ss 74, 75.

37 See **para 5.16**

38 Planning and Compulsory Purchase Act 2004, s38(6).

39 Planning and Compulsory Purchase Act 2004, s 38(6).

40 PPW, para 6.4.1.

13.49 In practice, although at present not explicitly mentioned in the Act, a major "material consideration" in the determination of planning applications is the policy of the Welsh Ministers.[41] That has always included a raft of policies on the historic environment.[42]

13.50 Further, section 66 of the Listed Buildings Act 1990 provides that a planning authority or planning inspector, in dealing with an application for planning permission for development that affects a listed building or its setting is to 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. And the courts have confirmed the importance of the duties under the Listed Buildings Act, as a factor of "considerable importance and weight", when making decisions on planning applications.[43] It follows that the duty to preserve the historic environment is not a secondary issue in relation to the determination of planning applications; it is a very important one.

13.51 As for applications for listed building consent, section 16 of the Listed Buildings Act 1990 provides that a planning authority or planning inspector, in dealing with an application, is to have special regard to the desirability of preserving the listed building in question or its setting or any features of special architectural or historic interest that it possesses. That is identical to the test that applies to dealing with applications for planning permission. Indeed, there was originally only one duty, which explicitly applied to both types of authorisation.[44]

13.52 Section 72 of the Listed Buildings Act 1990 provides that, in exercising any functions under the planning Acts with respect to any buildings or land in a conservation area, special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area. Those functions would include, amongst other things, dealing with applications for planning permission, listed building consent or conservation area consent. The importance of this duty, too, has been emphasised by the courts.[45]

13.53 The policies of the Welsh Government, as set out in *Planning Policy Wales*, apply to the determination of applications for either planning permission or listed building consent or conservation area consent.[46] So too do the policies of Cadw in *Conservation Principles*.[47]

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41 See **para 5.67 to 5.73.**

42 Currently in PPW, Chapter 6, and TAN 24.

43 *East Northamptonshire DC v Secretary of State* [2014] EWCA Civ 137, [2015] 1 WLR, CA, per Sullivan LJ at [29], approved in *Mordue v Secretary of State* [2015] EWCA Civ 1243, [2016] 1 WLR 2682, CA. See **para 5.46**.

44 TCPA 1968, s 41(3), which became TCPA 1971, s 56(3). That is still the position in Northern Ireland; see Planning (Northern Ireland) Act 2011, s 91(2).

45 *Bath Society v Secretary of State* [1991] 2 PLR 51, CA, at p 64H.

46 Planning Policy Wales, edition 9, November 2016, paragraphs 4.11.3, 6.1.4, 6.5.13.

47 Conservation Principles, paras 34, 51.

13.54 Although there is no explicit duty for authorities determining applications for listed building consent to consider the development plan, the policy matrix governing the determination of the different types of application is thus in practice very similar.

13.55 Further, a range of other statutory duties apply to authorities carrying out any functions under *any* Act, which would include dealing with applications for planning permission, listed building consent or conservation area consent. They include duties relating to a wide range of topics, considered earlier.[48]

13.56 The duty to carry out sustainable development, under section 3 of the Well-being of Future Generations (Wales) Act 2015, is laid on every public body.[49] Section 2 of the PWA 2015 provides that this duty applies specifically to the preparation of development plans, and the determination of applications for planning permission and appeals. It does not explicitly apply to other functions under the TCPA 1990, nor to those under the Listed Buildings Act 1990; but the broad duty under section 3 of the Well-being Act 2015 is in general terms, and would seem to include such functions.

13.57 It is thus not the case, as has been suggested by some respondents to the Scoping Paper, that applications for listed building consent and conservation area consent are to be determined solely in light of the impact of the proposed works on the historic asset in question.[50] That may be the position in practice, but it does not reflect what the law requires. And the determination of each such application will inevitably be a balancing exercise, taking account of all relevant considerations, to see whether the proposed works are desirable or necessary.[51].

POSSIBLE SIMPLIFICATION OF THE LAW

Previous reviews

13.58 The House of Commons ODPM Housing, Planning, Local Government and the Regions Committee, in its 2004 report on *The Role of Historic Buildings in Urban Regeneration*, noted that

> too many consents and permissions are required before a historic building can be altered or adapted.[52]

13.59 The *Barker Review of Land Use Planning*, commissioned by HM Treasury in 2006, recommended that:

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48 See **Paras 5.92 to 5.113.**

49 See **para 5.82**

50 See the comments of Wales Heritage Group, noted at **para 13.77**, and those of the AMS at **para 13.111.**

51 See, for example, *Planning Policy Wales*, para 6.5.13.

52 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.

> the Government should formally commit to the gradual unification of the various consent regimes following the proposed unification of scheduled monuments and listed building consents, and should set out proposals in 2007. One option would be to bring together the heritage and planning consents.[53]

13.60 The Planning Act 2008, which introduced a new system of "development consent" for major infrastructure projects[54], provided that such consent, once granted, would avoid the need for planning permission, and (in relation to a project in England) scheduled monument consent, listed building consent and conservation area consent.[55]

13.61 The Penfold *Review of Non-planning Consents*, commissioned by the Department of Business, Innovation and Skills in 2009, concluded that unification remained a potentially attractive long-term goal, but was too complex a change to make at a time when resources were severely constrained.[56]

13.62 The above reviews applied to both England and Wales. In relation to England, they resulted in a change (introduced in the Enterprise and Regulatory Reform Act 2013) whereby works that would have previously required conservation area consent now merely required planning permission – with failure to obtain planning permission for such works becoming a criminal offence.[57] The Historic Environment (Wales) Act 2016, which was the result of extensive stakeholder engagement, did not make a similar change in relation to Wales.

13.63 Against that background, we noted in our Scoping Paper the change that had been introduced in England, and provisionally proposed making a similar but more far-reaching change in Wales, whereby works that currently require either listed building consent or conservation area consent – either as well as planning permission or otherwise – would in future require only planning permission. This generated a number of responses, some of which were expressed in strong terms.

Views in favour of change

13.64 The majority of respondents to the Scoping Paper supported the proposals to unify consent regimes.[58] Support came from the Planning Inspectorate – which considered that bringing them together could be beneficial – as well as from the majority of planning authorities, and from all three branches of the Planning Officers' Society Wales ("POSW"). One member of the northern branch of POSW described the unification of consents as "a no-brainer".

13.65 POSW (South East) stated:

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53 *Barker Review of Land Use Planning – Final Report*, 2006, Recommendation 16.

54 See **paras 9.12 to 9.14**.

55 Planning Act 2008, s 33(1).

56 *Penfold Review of Non-planning consents*, Dept of Business Innovation and Skills, July 2010, para. 4.57.

57 TCPA 1990, s 196D, introduced by Enterprise and Regulatory Reform Act 2013, Sched 17, para 6.

58 39 consultees expressed a view on the merging of consents: 23 agreed, 11 disagreed and 5 held equivocal positions.

> Unifying consents is welcomed. Most members of the public consider that in all cases they are applying for planning permission; it is only the LPAs that distinguish between the consents because of the legislation. The important thing is that the legislative and policy support makes it clear that the material considerations for determining an application for permission to do work to a conventional building will be different to work involving a listed building, or in a conservation area, and so forth. This is something that will have to be thought through as part of this process to ensure the submission of a planning application does not become too complicated.

13.66 Rhondda Cynon Taf CBC considered that the unification of consent regimes would deliver a system that would be more accessible to the public, and would remove the duplication of work and some of the administrative burdens placed on councils having to deal with applications which straddle consent regimes.

13.67 A range of consultees who were in favour of unification qualified their support by explaining that any proposed merger of consents should not lead to a loss of any right to make representations or a dilution of protection of the historic environment. For example, Neath Port Talbot CBC and POSW (South West) agreed that the removal of duplication would simplify the process and improve efficiency, but noted that there was a risk that merging consent regimes could downgrade the significance of impacts upon the historic environment. They suggested that this could be addressed by including additional criteria in relation to applications relating to the historic environment.

13.68 POSW (South East) said:

> There are no objections to the later phases as described in the consultation. However, where overlaps are identified between those phases and the first (development plan and development management) stage, the opportunity should be taken to simplify the legislation, e.g. the overlapping duties arising from the need for planning permission, listed building consent, and ancient monument consent.

13.69 The Bar Council supported the principle of creating a single decision-making process, to avoid confusing and costly duplication of a single project being considered under separate regimes, provided that it would not lead to the loss of any right to make representations.

13.70 The Residential Landlords Association generally agreed with the unification of consents, but suggested the introduction of an opt-out so that applicants could apply separately for a particular consent should they wish to do so. It observed:

> … for the change of use for a listed building you might want to establish the principle that a change of use is acceptable before you embark on

> the detailed design process, which in the case of a listed building could mean that you have to employ a conservation architect.[59]

13.71 The Town and Country Planning Association thought it would be useful to merge consent regimes in the Code but 'at a later stage'. It suggested that the unification would mean that the 'planning process would become more integrated', however it 'should not be pursued if it simply results in adding further layers of complexity and paperwork'.

13.72 Richard Harwood QC suggested that we should consider abolishing listed building consent and conservation area consent, by extending the definition of development (to include works to listed buildings) and introducing criminal sanctions to cover such works and demolition.

13.73 Nigel Hewitson, formerly legal director of English Heritage, also expressed his view that the unification of planning permission, listed building consent and conservation area consent (but not scheduled monument consent) "is definitely the way to go".[60]

Equivocal views

13.74 Five of our consultees – including three planning authorities – held equivocal positions. For example, Cardiff Council said that there could be an advantage to a single application in certain circumstances but the matter will require careful consideration due the complexity of issues that sometimes arise. It observed that combining the relevant areas of legislation could be an advantage, but that it might be advantageous to retain separate applications.

13.75 Newport CBC also held an equivocal view. In its overall response, it noted that 'duplication adds to the bureaucratic burdens and can be confusing to the public and to applicants where a single scheme requires several consents'. However, the conservation officer at the Council expressed 'serious concern regarding the unification of consents'. He noted:

> Firstly, though there may be merit on unifying all planning and heritage consents, we already have a split in the determining authorities in that [scheduled monument consent] is determined by Cadw. I am assuming that this is unlikely to change and, especially given that some sites are both listed and scheduled, I am a little worried about the potential to reinforce this division at a time when much work is being done through the Historic Environment (Wales) Act in order to produce a unified suite of legislation and guidance on the historic environment.

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59 See **para 13.42**.

60 And see **para 13.113**.

Views against change

13.76 Opposition (in some cases strong opposition) was expressed by around one-third of respondents, largely but not exclusively those within the heritage sector.[61]

13.77 The Wales Heritage Group, an umbrella group representing 13 different organisations, told us that it would 'strongly object' to any change to the existing consent processes that would undermine the status of historic assets, or a consent authority's responsibilities and powers to protect historic assets. It expanded on its concerns in the following terms:

> The Group is concerned that consideration for preserving the historic environment would become a secondary issue to general planning considerations, particularly to the overarching presumption in favour of sustainable development outlined in Planning Policy Wales. This presumption is often at odds with the requirement in the Listed Buildings Act 1990 for decision makers to 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'.

13.78 However, the Wales Heritage Group (and the Theatres Trust) noted that conservation area consent had been abolished in England, and considered that a similar rationalisation could be beneficial in Wales.

13.79 Only one planning authority disagreed with the merging of consent regimes, preferring instead that the two procedures (planning permission and listed building consent) both be retained but be governed by the same piece of legislation, akin to the model adopted in the Planning Act (Northern Ireland) 2011.

13.80 Concern was also raised by several respondents as to the effect of the unification of consents on the likelihood of planning authorities employing staff with sufficient conservation expertise. They noted that there is already a marked shortage of such staff; and suggested that the merging of consents might exacerbate this.

13.81 Civic Trust Cymru, for example, strongly objected to the proposal to merge planning permission and listed building consent, as well as conservation area consent. Their objection was expressed in the following terms:

> We would be extremely concerned that there would be further loss of local authority conservation specialists as conservation is side-lined and applications decided by planners with little or no experience or expertise in building or monument conservation. The current trend of reducing specialist staff and making savings through staff reduction makes this a very real possibility.
>
> The lack of specialists skills will mean that the historic environment is not given sufficient consideration and that a reduction in the quality of decision making will result in the historic environment being side-lined

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[61] Including the Ancient Monuments Society (AMS), Civic Trust Cymru, the Council for British Archaeology (CBA), the Institute of Historic Buildings Conservation (IHBC), the Society for the Protection of Ancient Buildings (SPAB), the Theatres Trust, and the Wales Heritage Group.

which would additionally prevent the fulfilment of the legal requirements for the protection of historic assets in Wales.

13.82 Monmouthshire CC commented:

> There are concerns over the unification of the planning and listed building consent regimes, mainly over the potential decrease in the level of specialist skills to advise on the appropriate management of the heritage environment and that where specialist advice is provided this could get diluted in its importance when balanced against other material considerations.

13.83 It is not just those who currently provide such advice who raise this problem; similar concerns were also raised by the CLA:

> The problem is that the current LBC system requires any change to any listed building to be scrutinised by experts in the local authority (and usually in Cadw), but that that requirement is less and less adequately resourced in local authorities. That lack of resource
>
> (i) makes it too difficult to get consent for sympathetic change of the kind needed to ensure that listed buildings are updated and will be valued and maintained by their owners. and
>
> (ii) makes it too easy for malign owners to damage the special interest of listed buildings without sanction because lack of resource makes enforcement unlikely.

13.84 Those opposed to the suggested reform raised a number of points, arising from the need to maintain the existing level of protection for historic assets. They related primarily to issues of principle – notably as to the policy basis for control – but also touched various more detailed points.

OPTIONS FOR POSSIBLE REFORM

13.85 In light of the considerations above, we have identified five possible options as to the way in which this issue could be dealt with in the Bill:

(1) No change (retain planning permission, listed building consent and conservation area consent);

(2) Retain two types of consent (planning permission and LBC/CAC), but in one piece of legislation;

(3) Retain two types of consents, but provide for only one to be needed;

(4) Merge planning permission and conservation area consent, but retain listed building consent;

(5) Abolish listed building consent and conservation area consent, and require that planning permission be obtained for all the types of works that currently require either type of consent.

13.86 We consider each in turn.

Option one: no change

13.87 In producing the new Planning Code for Wales, there are a number of possible ways in which this issue could be dealt with.

13.88 It would, firstly, be possible simply to carry forward the present arrangement – that is,

(1) to retain the need for "planning permission" to be obtained for development, with the provisions relating to planning permission to be in the Planning Code, and

(2) to retain a separate requirement for listed building consent and conservation area consent, and to include the provisions relating to such consent in the new Historic Environment Code, along with the provisions relating to topics other than consent (such as designation, partnership agreements, grants, repairs).

13.89 That would retain the advantage that currently exists of emphasising the significance of listed buildings and conservation areas by having separate types of consent, but would also perpetuate the existence of separate but overlapping statutory schemes, requiring users of the system in many cases to obtain two consents from a single authority for a single set of works.

Option two: two consents, but in one piece of legislation

13.90 It would, secondly, be possible to retain the two systems, but to include them both within the new Planning Code. The Historic Environment Code would then contain only the non-consent provisions – that is, those relating to identifying listed buildings, conservation areas and scheduled monuments, repairs, grants, guardianship, partnership agreements and so forth.

13.91 That would be similar to the approach adopted in England and Wales prior to 1990, whereby both codes were in the TCPA 1971. It would also be similar to the Planning Act (Northern Ireland) 2011, although that Act also includes the non-consent provisions relating to listed buildings and conservation areas (but not those relating to ancient monuments).

13.92 This second approach would retain the two separate but overlapping statutory consent schemes, but would slightly simplify the law by locating them both in the same piece of legislation. However it would separate the consenting regime away from all the other provisions associated with designating and managing listed buildings.

Option three: two consents, but only one needed

13.93 Another possible approach would be to retain both systems of consent but to provide that, where both types of authorisation are required for a single programme of works,

the grant of planning permission would automatically operate as a grant of listed building consent. This is similar in concept to the regime introduced in respect of major projects by the Planning Act 2008, which provides that

> to the extent that development consent is required for development, none of the following is required to be obtained for the development or given in relation to it –
>
> (a) planning permission….[62]

13.94 It would be possible to introduce a similar provision to the effect that listed building consent is not required for the demolition, alteration to or extension of a listed building where planning permission has been granted for the same works.

13.95 However, that would leave in place two types of approval. It would also mean that where a proposal contains a package of works, some of which are in different categories in the list at **paragraph 13.35** above – for example, a new use for a listed building, including internal conversion works, some external works, and some works within its curtilage, it would still be necessary (and far from straightforward) to work out which type of consent is required for which parts of the proposal.

13.96 We therefore provisionally consider that this approach would not be advisable.

Option four: merge conservation area consent (only) with planning permission

13.97 It would be possible to merge conservation area consent with planning permission, but to leave the listed building consent regime in place. This is the approach that was taken in the 2013 reforms in England.

13.98 That would have the advantage of eliminating at least some of the procedural difficulties highlighted above. But the number of applications for conservation area consent is relatively small, and the effect of such a change would be correspondingly limited.

13.99 We provisionally consider that this would be better than leaving the position as it is, although to eliminate only one of the two heritage consents would seem to be a lost opportunity.

Option five: one consent

13.100 Fifthly, the legislation could be more radically simplified by amending the legislation so that all works that require any of the three types of consent, or two of them – as listed in **paragraph 13.35** above – would in future simply require planning permission. That would remove the problem identified above; and would also enable the entire statutory code providing for listed building consent to be removed from the legislation.

13.101 That could be achieved by requiring that planning permission is always needed for "heritage development", to be defined as the carrying out of works for;

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62 Planning Act 2008, s 33(1)

(1) the demolition of a listed building,

(2) 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;

(3) the demolition of an unlisted building in a conservation area.

13.102 The first and third of these are already "development" (subject to any direction made under section 55(g)); and the second may be in many cases. But bringing together the three categories would help to emphasize that there is no loss of control over any such works. It would also reflect the extended definition of "development" in the Planning Act 2008.[63]

13.103 It would also mean that the provision whereby the Welsh Ministers can make a direction exempting certain categories of demolition from the definition of "development" would become otiose, and would not need to be restated, which would significantly clarify the law.[64]

13.104 It has already been noted that planning permission may be granted by a development order for minor building works – but that the GPDO in some instances has different limits as to the categories of development that may be carried out without an application in the case of works affecting a listed building or its curtilage, or in a conservation area. [65] It would be appropriate to include in primary legislation a provision that a development order may not grant permission for any works to a listed building that affect its special character. And the order may itself contain different limits for development affecting a listed building or its curtilage or a conservation area.

13.105 But it might be appropriate to make exceptions in relation to particular categories of works – for example, internal works to structures that are only part of a listed building by virtue of section 1(5)(b) (those in the curtilage of a building in the list) – subject to the issue of an Article 4 direction in appropriate cases.[66]

13.106 Planning permission could also be granted by the GPDO for the categories of demolition in conservation areas that are currently exempt from the need for conservation area consent.[67] Such a provision in the GPDO would be easier for users to find than a direction in a Circular. Again, where appropriate, the general

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63 For the purposes of this Act (except Part 11) the following works are taken to be development (to the extent that they would not be otherwise)— (a) works for the demolition of a listed building or its alteration or extension in a manner which would affect its character as a building of special architectural or historic interest; (b) demolition of a building in a conservation area; (c) works resulting in the demolition or destruction of or any damage to a scheduled monument; (d) works for the purpose of removing or repairing a scheduled monument or any part of it; (e) works for the purpose of making any alterations or additions to a scheduled monument; (f) flooding or tipping operations on land in, on or under which there is a scheduled monument." (Planning Act 2008, s 32(3)). See **para 13.93**.

64 See **paras 7.14 to 7.17**.

65 See **para 13.19**.

66 A direction under article 4 of the GPDO, withdrawing the permission granted under article 3 for particular categories of generally innocuous development.

67 See para **13.34**.

permission thus granted could be excluded in particular cases by the making of an article 4 direction.

13.107 Finally, it would of course be possible to seek authorisation for just one element of a complex proposal.[68] So, for example, where it is proposed to change the use of a listed building and to make physical alterations to it, just as it is possible at present to seek planning permission for the change of use and listed building consent for the physical alterations, so it would be possible under this approach to seek planning permission for the change of use or planning permission for the alterations. In either case, the planning authority might be willing to authorise only one aspect of the proposal, or it might require to see details of both. But the names of the consents involved would not result in any substantive change.

Consequential provisions

13.108 Of the five approaches outlined above, the fifth is the most radical. Later in this Chapter, therefore, we explore in slightly more detail what would be involved, to see whether it leads to any problems that would be insuperable. In doing so, we are very conscious that any advantages arising from the simplification of the legislation must be set against possible drawbacks. Clearly if any of the options were to be implemented, the consequences would be less significant, and the analysis below would need to be adjusted accordingly.

THE POLICY BASIS OF DECISION-MAKING

Concerns raised in response to the Scoping Paper

13.109 The major concern of those respondents to the Scoping Paper who were opposed to unification of consents was that it would lessen the protection given to the historic environment.[69] They saw this as a significant risk.

13.110 Thus the Wales Heritage Group stated that it would strongly object to any change to the existing consent processes that would undermine the status of historic assets, or a consent authority's responsibilities and powers to protect historic assets. It expressed concern that consideration for preserving the historic environment would be subordinated to general planning considerations, particularly the presumption in favour of sustainable development.[70]

13.111 The Ancient Monuments Society (AMS) expressed the view that:

> listed building consent is important precisely because its whole premise is the protection of the historic environment. The fact that there is a separate regime puts applicants and decision-makers on their mettle – it tells them that they are dealing with sensitive, valuable, precious *structures*. It is fundamentally different in its legal basis and ethos from

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68 See the concern raised by the Residential Landlords Association, noted at **para 13.70**.

69 See for example the response to the Scoping Paper from Newport BC, noted at **para 13.112**.

70 See **paras 13.56, 13.57.**

> planning permission. To have a single regime for the construction of a utilitarian industrial shed and the demolition of a listed building is to downgrade the significance of the latter.

13.112 Newport BC noted that "a single consent regime appears attractive, but should not lead to any underplaying of conservation interests".

13.113 On the other hand, Nigel Hewitson, formerly legal director of English Heritage, said:

> I understand the concerns of some in the conservation sector that removing the requirement for separate heritage consents somehow diminishes in the public mind the importance of historic assets. However, I don't share those concerns.

In support of that view, he pointed out that the list of buildings of special interest would still exist – just as conservation areas continue to exist in England despite the abolition of conservation area consent. And he drew attention to the various technical points referred to later in this Chapter, noting that they could all be simply dealt with.

13.114 The Ancient Monuments Society, in its Newsletter, comments as follows on the provisional proposal to merge listed building consent with planning permission:

> We have always taken the view that to have a concurrent and parallel system of consent for historic buildings, dedicated to their protection, establishes just how important they are. Demolishing a listed building or taking out a sash window in a Georgian façade is different in kind from obtaining permission to put up an office block. The answer to the latter is normally a straight yes or no, while the response to the former should be much more nuanced.[71]

13.115 The response to either category of proposal may be straightforward or may be nuanced, depending on the circumstances; but it will not depend on the name of the consent required; and will not of itself justify requiring two applications to be submitted and determined.

Possible change

13.116 The existing duty, under sections 16 and 66 of the Listed Buildings Act, to have special regard to the desirability of preserving the listed building applies only to the determination of applications for planning permission or listed building consent. That is in contrast to most of the duties noted in **Chapter 5** above, which apply to the carrying out by public authorities of any of their functions under any legislation.

13.117 We have already proposed that this duty, and the duties relating to the historic environment generally, should be widened, to require that all public authorities, in carrying out any statutory functions with respect to any historic asset or its setting, should be under a duty to have special regard to the desirability or preserving or enhancing the asset, its setting, and any features of special architectural or historic

[71] AMS Newsletter 03/2016, p 3.

interest that is possesses.[72] That would make abundantly clear the importance of the historic environment – both within the planning process and otherwise.

13.118 We have also noted that the sustainable development principle (currently in section 2 of the P(W)A 2015) will apply explicitly to the performance of any function under the Planning Code – which would obviously include the determination of planning applications relating to listed buildings and conservation areas. [73]

13.119 If the three consents were to be merged (the fifth of the options outlined earlier), the result would be that the determination of applications for planning permission – which would include applications for the authorisation of works that currently require only listed building consent or conservation area consent – would then have to be carried out in light of all of the various relevant duties, including the duties with regard to the following:

(1) the development plan, so far as relevant;

(2) any other relevant considerations;

(3) the historic environment;

(4) the sustainable development principle; and

(5) all of the other matters mentioned in **Chapter 5**.[74]

13.120 That is, in reality, the position at present; but it would be good for it to be made explicit.

13.121 The position is well-stated by Monmouthshire BC, which comments:

> There would be a need to reconcile the general duty in s.66 of the Listed Buildings Act 1990 with the 'combined application' being considered, against the Development Plan and any other material considerations. This would need to be the primary consideration for such applications if the regimes are merged. It is essential that core values are identified and that these form the basis of the objectives. There should be no dilution of the current level of protection of the historic environment.

13.122 We agree, and our proposals are not designed to weaken in any way the level of protection afforded to the historic environment, but rather to strengthen it by ensuring that such protection is a central consideration in all planning decisions.

13.123 The position was summarised by Allen Firth, a conservation academic, as follows:

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[72] See **Consultation question 5-4**. A historic asset could be defined to mean a world heritage site, a scheduled monument, a listed building, a conservation area, and land included in the registered of historic parks and gardens.

[73] The sustainable development principle includes, amongst other matters, achieving a Wales of vibrant culture; see **para 5.81.**

[74] See **paras 5.92 to 5.113**.

> [The approach set out above] is correct in setting out ways in which new 'integrated PP/LBC' processes can be made to mirror and enshrine existing requirements and safeguards, these are mechanistic and cannot, in themselves, guard against subtle psychological shifts in the profile that stand-alone LBC applications currently enjoy. To set against this, if the new proposed arrangements succeeded in getting both planning officers and conservation officers (and other interested parties) to routinely be working in closer partnership in properly considering all aspects of all applications, then heritage issues may become more ingrained in the planning psyche. Much would depend on the quality of implementation and local LPA management commitment.

13.124 He further comments that at present some "LBC only" applications are in effect dealt with solely by conservation officers in planning authorities, without reference to wider planning considerations; whereas some applications for planning permission only, such as for development affecting the setting of a listed building, are determined by planning officers with insufficient weight being given to conservation issues. A unified approach has the potential to lead to heritage issues being considered in all cases; again, much would depend on management attitudes and priorities within each authority.

Possible shortage of specialist staff

13.125 As to the possible shortage of those with appropriate experience to advise on applications affecting the historic environment[75], we recognise that there is a risk that planning authorities and others could use the merger of the two systems of control as a means to justify the loss of specialist staff. This would have to be resisted, possibly by appropriate guidance form the Welsh Government or through pressure from relevant professional bodies.[76]

13.126 However, in practice, applications for the authorisation of works affecting listed buildings and conservation areas would continue to require precisely the same level of expertise regardless of whether the authorisation is called "listed building consent" or "planning permission". The availability of an appropriate level of staff time and expertise to process such applications must be a matter for each authority to decide. Those authorities that afford high priority to protecting the heritage will no doubt continue to employ suitably qualified and experienced staff; those that have other priorities will not. But there is no reason why that decision would be affected by a change to the name of the relevant authorisation

UNIFICATION OF CONSENTS: CONCLUSION

13.127 We provisionally consider that there would be considerable advantages to be gained from the unification of planning permission, listed building consent and conservation

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75 See **paras 13.80 to 13.83** above.

76 The Institute of Historic Buildings Conservation (IHBC), for example, is already very concerned as to the decline in the number of suitably qualified staff in planning authorities.

area consent into a single form of authorisation – the fifth of the possible approaches outlined earlier. There are only two categories of works that currently require an application for listed building consent but not an application for planning permission – namely, works to the interior of a listed building that affect its character as a building of special architectural or historic interest, and works to the exterior that affect its character but are permitted by the GPDO. There are no works that require conservation area consent but do not require planning permission.

13.128 To have just one form of authorisation for all building works, including demolition, would considerably simplify the law, and would significantly assist both those seeking such authorisation and those administering the consent process. For any proposal, there would need to be only one application, one set of drawings, one committee report (or equivalent), one decision notice, one set of conditions, one appeal, one appeal decision, and one enforcement notice – in place of two of each, as at present. The impact of the works on the special interest of the building or area would, as at present, be a major consideration in decision-making.

13.129 The necessary change to achieve this could readily be achieved with no loss of control, by marginally adjusting the definition of "development" to include any alterations to a listed building (including to its interior) that affect its character as a building of special architectural or historic interest. The simplest method might be to define development to include "heritage development", as indicated above[77]; and then to provide that the carrying out of heritage development without planning permission is a criminal offence.

13.130 We also emphasise that the duties laid upon decision-makers need to be clarified and rationalised, to ensure that the significance of historic assets is not lost. We have already considered this in **Chapter 5**.[78]

13.131 The changes thus proposed would thus not remove any of the existing requirements for the approval of the planning authority to be obtained for works affecting listed buildings and conservation areas, nor the policy basis on which applications for such approval will be determined, but would merely simplify the relevant procedure.

13.132 We recognise that this would have various consequences, which we consider in more detail in the remainder of this Chapter, under the following headings:

(1) the need for permission;

(2) the submission of an application;

(3) appeals and other supplementary points;

(4) unauthorised works.

[77] See **para 13.101**.

[78] See **paras 5.50 to 5.56** and **Consultation question 5-4.**

13.133 Each of the points would need to be carefully considered, but we do not consider that any of these are of great significance. However, we do emphasise that the changes we propose have to be considered as a single package, to ensure no loss of control.

Consultation question 13-1.

We provisionally consider that the control of works to historic assets could be simplified by:

(1) **amending the definition of "development", for which planning permission is required, to include "heritage development", that is:**

(a) the demolition of a listed building; or

(b) 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

(c) the demolition of a building in a conservation area.

(2) **removing the requirement for listed building consent and conservation area consent to be obtained for such works; and**

(3) **implementing the additional measures outlined in consultation questions 13-2 to 13-8, to ensure that the existing level of protection for historic assets would be maintained.**

Do consultees agree?

NEED FOR PERMISSION

13.134 We do not repeat here the discussion earlier in the Consultation Paper as to the need for planning permission generally, nor our consultation questions in **Chapter 7** – which would apply to works affecting listed buildings and conservation areas as to any others. We merely explore a few detailed points that would arise if **Consultation question 13-1** were to be implemented.

Development orders

13.135 If listed building consent and conservation area consent are merged with planning permission, one result will be that it would be possible for general and local development orders to be made granting planning permission for works that currently require only listed building consent. That does not of course mean that such orders would have to be made, or that it would necessarily be desirable in policy terms that they should be made; but it would at least be possible.

13.136 In fact, provisions corresponding to those relating to general and local development orders were introduced into the Listed Buildings Act in relation England (as sections 26C to 26G and Schedule 2A) by section 60 of the Enterprise and Regulatory Reform Act 2013. No corresponding provisions were introduced in Wales by the Historic Environment (Wales) Act 2016; but there seems to be no obvious reason why they should not be; and the present exercise would enable that to be done with minimum disruption.

13.137 It would then be possible to consider how, if at all, the new powers should be used in Wales.

Consultation question 13-2.

We provisionally propose that the power to make general and local development orders should be extended to enable the grant of planning permission by order for heritage development.

Do consultees agree?

Heritage partnership agreements

13.138 As noted above, once the relevant provisions of the Historic Environment (Wales) Act 2016 are in force, it will be possible for listed building consent to be granted by a heritage partnership agreement. If listed building consent is merged with planning permission, it would be necessary to provide that such an agreement can in principle grant planning permission (rather than listed building consent). It might be appropriate to limit the works for which permission can be granted in this way, by specifying that planning permission can be granted for such categories of works as may be prescribed.

Consultation question 13-3.

We provisionally propose that heritage partnership agreements should be capable of granting planning permission by order for heritage development in such categories as may be prescribed.

Do consultees agree?

Uncertainty as to the need for permission

13.139 The need to discover whether listed building consent or conservation area consent 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.[79] Further, it can be

[79] This is because unauthorised works to an existing building, unlike the construction of a new one, cannot be reversed.

particularly difficult to be certain as to whether consent is required, due to the potential uncertainty as to

(1) what is included in a listing (by virtue of section 1(5) of the Listed Buildings Act), and

(2) which works to a listed building affect its special character – a question that will often involve an element of subjective judgement.

13.140 Where works are to be carried out that may require planning permission, it is possible to find out whether a planning application is required by seeking from the planning authority a certificate of lawfulness of proposed use or development (CLOPUD), which is binding in the event of any subsequent disagreement. Where the works have already been completed, an application can be made for a certificate of lawfulness of existing use or development (CLEUD).[80] But there is no equivalent procedure available in Wales to enable a person to obtain a binding opinion as to whether listed building consent would be required for works proposed to be carried out.

13.141 One solution to this problem is to apply to the High Court for a declaration. However, the Court has indicated clearly that, whilst it does have jurisdiction to make such a declaration, that should not be the normal way to resolve uncertainty – not least because of the cost implications for all concerned.[81] More recently, provisions corresponding to those relating to CLOPUDs (but not CLEUDs) were introduced in England in 2013.[82]

13.142 If listed building consent is subsumed into planning permission, as proposed in the previous part of this Chapter, the provisions as to CLOPUDs and CLEUDs would automatically extend to works that currently only require listed building consent or conservation area consent. We provisionally consider that that would be a welcome step forward, removing uncertainty without the need for an application to the court for a declaration.

13.143 However, 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.

13.144 By contrast a CLOPUD (under section 192 of the TCPA 1990) answers the broader question of whether development is "lawful" – that is, whether, if carried out, it could or could not be subject to enforcement action, either because it does not involve development or because it does or does not require planning permission or for any other reason). If applied to works that currently require only listed building consent,

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80 See **paras 7.83 to 7.97**.

81 *Chambers v Guildford BC* [2008] EWHC 826 (QB), [2008] JPL 1459.

82 As sections 26H to 26K of the Listed Buildings Act (introduced by section 61 of the Enterprise and Regulatory Reform Act 2013).

that approach would enable a prospective applicant to obtain an answer to both of the questions above.

13.145 We therefore consider that one benefit of the proposal to bring together planning permission with listed building consent and conservation area consent would be that the CLOPUD and CLEUD procedure would automatically apply in all cases. This would enable the uncertainty as to the need for approval for works to listed buildings and conservation areas to be resolved, by means of a procedure that already exists and is familiar to planning authority officers.

Consultation question 13-4.

We provisionally consider 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.

Do consultees agree?

APPLICATIONS FOR APPROVAL

13.146 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.

13.147 Further, we have mentioned in the footnotes to those chapters that Chapter a number of instances where the Listed Buildings Act 1990 contains provisions relating to applications for listed building consent that are similar or identical to provisions in the TCPA 1990 relating to planning applications.[83] If the three consents were to be merged, the proposals in **Chapter 7 to 11** would apply automatically to all such applications, without any need for legislative change.

13.148 However, there are a few other detailed points that would arise if the consents were to be merged. We deal with each in turn.

Applications

13.149 We have made a number of proposals as to the submission of planning applications, and the material that is be submitted with an application.[84] Clearly applications for works to listed buildings will often require the submission of more detailed information than would be appropriate in other cases; and it may well be that authorities will perfectly properly decline to accept applications that do not contain full details of all aspects of what is proposed, with no such details reserved for subsequent approval.

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[83] See **Chapter 8**, footnotes 4, 9, 10, 28, 39, 40, 45, 48, 54, 58, 59, 63, 70, 71, 74, 82, 88, 99, 101, 110; **Chapter 10**, footnote 32A; and **Chapter 11**,footnotes 1, 17, 19, 24, 27, 35, 38, 40.

[84] See **Consultation question 8-1**.

13.150 However, we consider that this should be a matter for guidance, and possibly regulations, rather than for primary legislation.

13.151 We note in passing that there appears to be no requirement in the Listed Buildings Act for a planning authority to maintain a register of applications for listed building consent and conservation area consent, equivalent to the requirement under section 69 of the TCPA 1990 to maintain a register of planning applications and other related matters. If the consents were to be merged, that anomaly would automatically be resolved.

Notification of applications

13.152 There are at present a number of directions (originally made by the Secretary of State for Wales) specifying:

(1) categories of applications for listed building consent that must be referred to national amenity societies[85]; and

(2) categories of applications for listed building consent that can be determined by planning authorities without the need to notify the Welsh Ministers (in practice, Cadw).[86]

13.153 If the three consents were to be merged, as outlined earlier, it would be possible to make similar directions relating to the corresponding categories of applications for planning permission. However, it would seem to be preferable – in line with the general approach of replacing directions by regulations – for provisions to the same effect to be added into the TCP (Development Management Procedure) (Wales) Order 2012 or its replacement, by including the national amenity societies in the list of consultees in relation to planning applications for particular categories of development.[87]

13.154 There is no reason why the level of involvement by all interested parties – planning authorities, Welsh Ministers, Cadw, and the national amenity societies – could not be identical to that which currently exists. And it would continue to be open to the Welsh Ministers to call in particular applications for planning permission affecting historic assets where they consider that Cadw should be more closely involved.

Fees

13.155 At present, applications for planning permission are to be accompanied by a fee – as are applications for consent under the Advertisements Regulations. By contrast, applications for listed building consent and conservation area consent do not require the payment of a fee; nor do applications for planning permission that are made necessary solely by an article 4 direction, or applications for consent under a tree preservation order.

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85 Listed Buildings Act 1990, s 15; direction currently in WO Circ 1/98, para 10, replaced in May 2017 by a new direction, made alongside the production of TAN 24.

86 Listed Buildings Act 1990, s 13; direction in WO Circ 1/98, para 15, also replaced in May 2017.

87 See **paras 8.69 to 8.95**.

13.156 It seems that the distinction was made when the fees regime was first introduced, on the basis that applications for planning permission are required for the development of any land; applications for works to listed buildings or protected trees, by contrast, are only necessary in certain, special cases; those who have to manage such assets should not be discouraged by the imposition of fees. As against that, it could be argued that applications for special consent take up planning authority time, and should be charged for.

13.157 If the three consents were to be merged, there would be no difference in the case of applications for works that currently need both planning permission and listed building consent – as a fee is already payable. And applicants would be saved the cost of extra sets of drawings.

13.158 Where planning permission is in the future required for works that currently require only listed building consent – essentially works affecting only the interior of a listed building and relatively minor external works – they could be exempt from the requirement to pay a fee, as with various other exceptions specified in the Fees Regulations,[88] if it were desired to retain the status quo. But we provisionally propose in a later Chapter that the power to impose a fee (in primary legislation) should apply to all applications for planning permission.[89] If that is accepted, it would then be open to the Welsh Ministers to consider whether an exemption should be introduced to exempt from fees applications for works in particular categories – for example, those affecting only the interior of a listed building, or those that are currently permitted development, or those affecting a dwelling.

Conditions

13.159 We noted that section 17 of the Listed Buildings Act 1990 specifies some conditions that can be appropriately attached to grants of listed building consent, with respect to—

(a) the preservation of particular features of the building, either as part of it or after severance from it;

(b) the making good, after the works are completed, of any damage caused to the building by the works;

(c) the reconstruction of the building or any part of it following the execution of any works, with the use of original materials so far as practicable and with such alterations of the interior of the building as may be specified in the conditions.

13.160 We have noted that such conditions may be appropriate in relation to cases other than those involving listed buildings, and therefore proposed that the Planning Bill, or regulations under the Bill explicitly the authorise the imposition of such conditions (in appropriate cases) in relation to planning permissions generally.[90] If that proposal is

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88 2015 SI 1522, regs 4 to 6.

89 See **para 18.74 to 18.79**.

90 See **paras 8.131, 8.132**.

accepted, that would clearly extend to conditions on permissions that do involve listed buildings – and indeed unlisted buildings in conservation areas.

13.161 The power to impose the types of conditions referred to in section 17 of the Listed Buildings Act 1990 would thus be automatically retained.

APPEALS AND OTHER SUPPLEMENTARY PROVISIONS

13.162 General proposals about appeals and other supplementary provisions are contained in **Chapter 11**.

Appeals

13.163 Section 21 of the Listed Buildings Act specifies certain grounds on which appeals can be made against the refusal of listed building consent – to the effect that the building in question is not of special interest. If those consents are merged with planning permission, appropriate adjustments would need to be made to enable appellants for planning permission to rely on equivalent grounds of appeal in cases relating to listed buildings, to ensure that there is no change from the current position.

13.164 It would thus be necessary to include in the Bill 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; and

(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.

13.165 In making a decision on such an appeal, the Welsh Ministers may remove the building from the list, or decline to include it.[91] Equivalent powers would need to be retained.

[91] Listed Buildings Act 1990, s 22(1)(b).

Consultation question 13-5.

We provisionally consider 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 exercise their powers not to include it in the list.**

Do consultees agree?

Other supplementary provisions

13.166 Appropriate changes may also need to be made to the provisions relating to purchase notices, to incorporate the provisions currently relating to listed building purchase notices and conservation area purchase notices.

13.167 The procedural details governing the handling of planning applications and appeals – for example, those relating to applications by planning authorities, statutory undertakers or the Crown – would need to be carefully checked to ensure that the unification of consents does not lead either to any loss in control or any unnecessary procedural burdens. But it is not anticipated that there would be any such problems that could not be readily dealt with by ensuring that the Bill – or, more likely, regulations supplementing or replacing the Development Management Procedure Order – contain appropriate provisions equivalent to those in the Listed Buildings Act 1990 and regulations made under it.

UNAUTHORISED WORKS AFFECTING LISTED BUILDINGS AND CONSERVATION AREAS

The existing law

13.168 The carrying out of development without planning permission is a breach of planning control, but not a criminal offence.[92] If such development has been carried out, the

[92] See **para 12.3**.

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 listed building consent or conservation area consent without such consent having been obtained is from the outset a criminal offence, under the Listed Buildings Act 1990. It is a defence to a charge of such an offence that the works were necessary for health or safety, and limited to the minimum necessary.

13.169 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. And if the latter is not subject to a criminal penalty, there is nothing to deter future transgressors.

13.170 As noted above, 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.[93]

13.171 Where unauthorised works are carried out to a listed building that are reversible, they 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, and in due course two decision notices.

13.172 It should also be noted that the carrying out of building works without planning permission is generally immune from enforcement action after four years; whereas the carrying out of building works without listed building consent is never immune from enforcement action. And 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[94];

(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.[95]

13.173 Where unauthorised demolition works are carried out in a conservation area, they may lead in theory to the issue of a conservation area enforcement notice. However,

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93 TCPA 1990, s 196D, introduced by Enterprise and Regulatory Reform Act 2013, Sch 17, para 6.

94 A ground equivalent to the defence under s 9(3) to a charge of unauthorised works, and framed in the same terms: see **footnote 98**.

95 Listed Buildings Act 1990, s 39(1)(a), (d), (i)-(k) (summarised). Equivalent grounds apply in relation to an appeal against a conservation area enforcement notice (see SI 2012/793, Sched 3).

that will not often occur, as demolition on a scale sufficient to require conservation area consent[96] is likely to be incapable of being reversed.

13.174 Our general proposals relating to unauthorised development, in **Chapter 12**, apply to cases relating to listed buildings and conservation areas. Below, we touch on one or two specific points arising from our proposals earlier in this Chapter.

Possible change: prosecution

13.175 If the three consents are merged, as outlined earlier, it would of course be necessary to ensure that unauthorised works to listed buildings and demolition in conservation areas was made a criminal offence, for the reasons noted above. We agree with the Institute of Historic Buildings Conservation, which states that it would strongly oppose any move to decriminalise breaches of listed building control.

13.176 This could be achieved by inserting a new provision at the appropriate point to the effect that the carrying out of heritage development without planning permission is an offence – assuming that "heritage development" has been defined along the lines indicated earlier.[97] That would in effect be similar to the new section 196D inserted into the TCPA 1990 in England, but extended to include works to a listed building.

13.177 The penalties for such an offence, and the defence to a charge[98], would be the same as currently apply to an offence under section 9 of the Listed Buildings Act 1990.

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96 See **para 13.30**.

97 See **para 13.101** above.

98 "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).

Consultation question 13-6.

We provisionally propose that the Bill should include provisions to the effect that:

(1) **the carrying out without planning permission (or in breach of a condition or limitation attached to permission) of heritage development – defined along the lines indicated in Proposal 13-1 – be a criminal offence, punishable**

- **on summary conviction by imprisonment for a term not exceeding six months or a fine or both; or**

- **on summary conviction by imprisonment for a term not exceeding two years or a fine or both; and**

(2) **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.**

Do consultees agree?

Possible change: enforcement action

13.178 It would need to be made clear that unauthorised heritage development does not become immune from enforcement action after a certain period. This could be achieved by excluding heritage 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.

13.179 In addition, 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, summarised above.[99]

13.180 As with applications for consent, noted above, there appears to be no requirement in the Listed Buildings Act for a planning authority to maintain a register of listed building enforcement notices and conservation area enforcement notices, equivalent to the requirement under section 188 of the TCPA 1990 to maintain a register of planning enforcement notices and other types of notice. Here too, if the consents were to be merged, that would automatically be resolved.

[99] See **para 13.172**.

Consultation question 13-7.

We provisionally propose that the Bill should 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.

Do consultees agree?

Consultation question 13-8.

We provisionally propose that the Bill should 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 Planning (Listed Buildings and Conservation Areas) Act 1990;**

(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.**

(3) **in determining an enforcement appeal relating to a building subject to a building preservation order, they may exercise their powers not to include it in the list.**

Do consultees agree?

WORKS TO SCHEDULED MONUMENTS

13.181 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* (which between them constitute most significant listed buildings, and amount to about 4% of them).[100]

13.182 Scheduled monument consent is required for the carrying out of almost any works to a scheduled monument. Failure to obtain consent is an offence. However, 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

[100] WO Circular 60/96, Annex 1, para 4.

restoration works or visitor facilities.[101] Applications for consent are thus relatively infrequent, and only rarely overlap with applications for planning permission.[102]

13.183 Planning permission, listed building consent and conservation area consent are normally obtained from the planning authority (or the Welsh Ministers on appeal). But scheduled monument consent is obtained directly from the Welsh Ministers.[103]

13.184 Where a structure is both a listed building and a scheduled monument, scheduled monument consent is required for works affecting it, but listed building consent is not.[104] The UK Government introduced some while ago a draft Bill proposing the merger of scheduled monument consent and listed building consent into a single "historic asset consent" (in relation to both England and Wales).[105] That never progressed any further, but it would have achieved little, as there is no situation in which both types of consents would be required for the same works. Further, if every application for such a unified consent were to be made to 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.

13.185 Whilst, therefore, it would in theory be possible to take the process of unification one step further by extending the definition of "heritage development"[106] to include works to a scheduled monument, as in the Planning Act 2008[107] – which would obviate the need for scheduled monument consent to be obtained – we consider that to 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.

Proposal 13-9.

We provisionally consider that planning permission should not be unified with scheduled monument consent.

Do consultees agree?

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101 An indication of the types of works that are the subject of applications for SMC in Scotland can be gained from the register maintained by Historic Environment Scotland, which is available online.

102 There were 57 applications for scheduled monument consent in Wales in the year 2013-14 – compared to 525 applications for listed building consent received by Cadw, and 907 consultations on applications for planning permission (Cadw Annual Report, 2013-14, p 13).

103 Or granted by a heritage partnership agreement (see the Ancient Monuments Act 1979, s 9ZA, to be inserted by HE(W)A 2016).

104 Listed Buildings Act 1990, s 61.

105 In the Heritage Protection Bill, presented to Parliament, April 2008 (Cm 7349). As it turned out, the Bill did not proceed due to lack of Parliamentary time before the 2010 General Election. Some of the proposals that were to have been included in the Bill were introduced, (at least in England) by way of Government guidance; but not the proposal to introduce a single heritage asset consent.

106 See **para 13.101**.

107 See **footnote 63** above.

THE HISTORIC ENVIRONMENT: OTHER POINTS

13.186 We recognise that the brief given to the Law Commission extended to the Planning Code, and not to the review of historic environment legislation. However, there are two detailed points that have emerged in the course of our work which we think appropriate to mention here, for inclusion in suitable legislation as and when an opportunity arises, either in the course of the present context or otherwise. They both have consequences for mainstream planning control.

Definition of "listed building"

13.187 We consider in Chapter 17 the definition of "curtilage", a term that occurs in various locations in the TCPA 1990 and in subordinate legislation under that Act.[108] Our proposals there would apply equally in relation to historic environment legislation.

13.188 However, a number of those responding to the Scoping Paper 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.

13.189 Case law makes it clear that the relevant date is generally the date on which the building was first included in the list.[109] We agree that it would be helpful that could be made plain on the face of the statute, to distinguish the position from that which arises in relation to other statutory provisions. For example, where the GPDO defines permitted development rights by reference to the curtilage of a building, what is to be considered is the extent of the curtilage at the present – that is, at the date of the development in question.[110]

13.190 Secondly, the provision that is now section 1(5) of the Listed Buildings Act 1990 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. But that too could be clarified, for the avoidance of unnecessary litigation.

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108 See **paras 18.128 to 18.145**.

109 *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.

110 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.

Consultation question 13-10.

We provisionally consider that the definition of "listed building" should be clarified by making it clear that the definition 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; and**

(2) **in any other case, at the date on which the building was first included in the list.**

Do consultees agree?

Areas of archaeological importance

13.191 One specific requirement as to the giving of publicity for planning applications applies in areas of archaeological importance, designated as suchunder the Ancient Monuments and Archaeological Areas Act 1979. Within such an area, generally in the centre of a historic city, proposed development 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.

13.192 In the Scoping Paper, we noted that five areas had been designated as areas of archaeological importance in 1984 in England, and that no areas had ever been designated in Wales.[111] We also noted that the UK Government had accepted that the protection given by the designation of an area of archaeological importance is not as great as can be achieved by the use of other policy mechanisms (currently under TAN 24) and had accordingly proposed over 20 years ago that Part 2 of the Act would be repealed at the first appropriate legislative opportunity.[112]

13.193 In the scoping paper, we suggested that this would be a good opportunity to amend the 1979 Act so that Part 2 no longer applies in Wales. This suggestion was supported by the Country Landowners and Business Association ("CLA"), Richard Harwood QC, Persimmon, and PEBA.

Consultation question 13-11.

We provisionally propose 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.

Do consultees agree?

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111 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 5.79.

112 House of Commons Environment Committee, Session 1986-1987 (ref 146) vol 2, p 19.

Chapter 14: Outdoor advertising

INTRODUCTION

14.1 The control of outdoor advertising is one of the more successful, if sometimes unappreciated, aspects of the planning system in the UK. It is based on a self-contained legislative scheme, largely contained in secondary legislation.

14.2 The relevant primary legislation is in Chapter 3 of Part 8 of the TCPA 1990. This provides that Regulations under the Act shall make provision for restricting or regulating the display of advertisements so far as appears to be expedient to the Welsh Ministers in the interests of amenity and public safety. The relevant Regulations are the TCP (Control of Advertisements) Regulations 1992 ("the 1992 Regulations").[1] When they were first made, they were applied in England and Wales, but they now apply only in Wales since the appearance of the TCP (Control of Advertisements) (England) Regulations 2007.

14.3 Section 336 of the TCPA 1990 provides a very wide-ranging definition of "advertisement".[2] Regulation 1 of the 1992 Regulations then excludes from control altogether the display of an advertisement in any of the categories in Schedule 2 – largely items that are outside the generally understood meaning of the word "advertisement" or are almost always unobjectionable, such as advertisements inside buildings, promotional material on vending machines, and traffic signs. Regulation 6 grants "deemed consent" for an advertisement in any of the categories of advertisements listed in Schedule 3 that are acceptable in most but not necessarily all cases – such as brass plates outside doctors' surgeries, estate agents' boards, and shop fascia signs – although a planning authority can withdraw that deemed consent in a particular case by serving a discontinuance notice under regulation 8. Other advertisements – in particular roadside hoardings – require "express consent", obtained from the planning authority or on appeal from the Welsh Ministers.

14.4 The categories of advertisements in Schedules 2 and 3 are generally subject to strict limitations as to the size of the display in question, and other details; and those limitations may be more stringent in more sensitive areas.

14.5 The display of an advertisement may sometimes amount to "development", which would, in principle, require planning permission.[3] Section 222 of the 1990 Act accordingly provides that permission is deemed to be granted, where required, for any display that is in accordance with the Regulations. The display of an advertisement attached to a listed building may amount to an alteration of a listed building, for which listed building consent would be required.

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1 SI 1992 No 666, amended by SIs 1994 No 2351 and 1999 No 1810; amended by TCP (Control of Advertisements) (England) Regulations 2007 (SI No 783), reg 32 so as to apply only in Wales; subsequently amended by SIs 2012 No 791 and 2017 No 553.

2 See **para 14.11**.

3 See **para 7.12**.

14.6 The display of an advertisement without the required consent is not just a breach of planning control – as with other unauthorised development – but constitutes a strict liability offence.[4]

Possible reforms

14.7 Given that the focus of this Consultation Paper is on the primary legislation to be contained in the new Planning Code, the emphasis of this Chapter is on changes to that legislation, currently in the TCPA 1990.

14.8 However, the details of the law as to the display of outdoor advertising are largely contained in the relevant secondary legislation. It is to be expected that the 1992 Regulations applying in Wales, now 25 years old, will be updated in due course; and at that time it will no doubt be appropriate to consider whether it would be appropriate to make amendments. Any proposals for such changes will obviously need to be the subject of consultation with those directly involved (including planning authorities and advertisers).

14.9 In particular, the changes made in 2007 in England generally derived from proposals first included in a Government consultation paper issued in 1999 – apparently in relation to both England and Wales.[5] Many of those seem to have resulted in an improved system, and we consider that they should be considered carefully when the Regulations are updated.

14.10 We also make some reference below to other possible changes to the Regulations.[6]

BASIC CONCEPTS

Definition of "advertisement"

14.11 The starting point of the statutory provisions relating to advertising is the definition of the word "advertisement". This is defined in section 336 of the TCPA 1990 as follows:

> "advertisement"
>
> [a] 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, and
>
> [b] (without prejudice to the previous provisions of this definition), includes any hoarding or similar structure used or designed, or

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4 Presumably because advertisements are easy to put up and take down, so that conventional enforcement action would be insufficient to deter unauthorised displays.

5 *Modernising Planning: Outdoor Advertisement Control*, Department of the Environment, Transport and the Regions, July 1999.

6 See **Consultation questions 14-3, 14-7, 14-8, 14-9 and 14-10**.

adapted for use, and anything else used, or designed, or adapted principally for use, for the display of advertisements;

and references to "the display of advertisements" shall be construed accordingly."[7]

14.12 The definition has been split into two parts [a] and [b] to assist clarity.

14.13 It will be noted, firstly, that each part of this definition is circular, in that the term "advertisement" is defined by reference to, amongst other things, the term that is being defined. As has been pointed out in the High Court:

> "There is a degree of circularity in this definition ... In this respect the definition of an advertisement is like the definition of the proverbial elephant. One knows an elephant (or advertisement) when one sees it because it is in the nature of an elephant (or advertisement)."[8]

This is intrinsically unsatisfactory.

14.14 Secondly, part [a] is an exclusive definition – that is, for something to be an advertisement, it must come within it; and includes the items mentioned in part [b]. Thus, for example, a beam of light produced by a searchlight is clearly not a placard, board, notice, awning or blind; but it has been held by the High Court that it is a "sign", and could therefore be included within the definition if it were to be used for the display of advertisements, that is, words, letters etc., employed wholly or partly for the purposes of advertisement.[9]

14.15 The "advertisement" that is to be controlled is thus not the message being put forward (in words or pictures) by the advertiser; it is rather the physical means by which that message is put across – be it a paper poster on a conventional roadside hoarding, a brass plate outside a doctor's surgery, a fascia over a shop window, a blind over the window of a café or an umbrella on its forecourt (if, in either case, it is carrying advertising material), a freestanding sign announcing the presence of a car dealer, a "For Sale" sign, a flag, or a balloon being used for advertising – or, it would seem, a searchlight beam.

14.16 The definition in the Act is therefore seeking to encapsulate a concept 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
>
> (a) designed, or adapted for use for the purpose of announcement, publicity or direction, and

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7 TCPA 1990, s 336, as amended by the Planning and Compensation Act 1991, s 24.

8 *Butler v Derby CC* [2006] 1 WLR 1346, per Sullivan J at [18].

9 *Newport BC v Secretary of State*; *Great Yarmouth BC v Secretary of State* (1997) 74 P&CR 147 at p 155. The Newport (Wales) case related to an unfocussed beam of light projecting into the sky; the Great Yarmouth case related to a searchlight located at an amusement arcade, producing a beam that moved across the base of the clouds to form a "space-flower" pattern.

(b) used wholly or partly for such a purpose.

14.17 The definition in the Act applies equally to the interpretation of the Regulations.[10] However, there is also a definition of "advertisement" in the Regulations, which excludes memorials (including funerary memorials) and railway signals.[11] The corresponding definition in the Regulations applying in England additionally excludes placards and other objects borne by people or animals.

14.18 We provisionally consider that it would be helpful to include in the Bill, alongside the provisions dealing with advertising, a single non-circular definition of "advertisement", to include both the essence of the definition currently in the Act and the refinements currently in the Regulations.

14.19 Finally, the definition of "advertisement" in the Act concludes with the words "… and references to the display of advertisements shall be construed accordingly". And both the TCPA 1990 and the 1992 Regulations refer in many places to the "display of advertisements".

14.20 No further definition of the term "display" is provided. However, this seems to cause no problem in practice. Further, given the many different kinds of advertisements, it is unlikely that there is any definition of "display" that would be particularly helpful. We therefore provisionally consider that the closing words of the definition of "advert" are simply omitted.

Consultation question 14-1.

We provisionally propose that the definition of "advertisement" in the TCPA 1990 should be clarified, and included in the Bill alongside other provisions relating to advertising.

Do consultees agree?

Consultation question 14-2.

We provisionally consider that the reference to "the display of advertisements", currently included in the statutory definition of "advertisement" in the TCPA 1990, could be omitted.

Do consultees agree?

10 Interpretation Act 1978, s 11.

11 1992 Regulations, reg 2(1).

Definitions: the site of a display of advertisements

14.21 The Act also refer to the "site" on which an advertisement is displayed.[12] "Site" is not defined in the Act; but it is defined in the Regulations, as "any land or building, other than an advertisement, on which an advertisement is displayed".[13] And section 336 of the Act defines "land" as meaning any corporeal hereditament, including a building", and "building" to include "any structure or erection, and any part of a building, as so defined".

14.22 We provisionally consider that there is no instance in either the Act or the Regulations where the word "land" could not be used in place of "site" – bearing mind that "land" includes "building". To do so would lead to no change in the substantive law, but would avoid introducing a different technical term in either the Act or the Regulations, and lead to both clarity and simplicity. For example, section 220(2)(a) of the TCPA 1990 provides that regulations may regulate "the sites on which advertisements may be displayed and the manner in which they are to be affixed to the land"; this would become "the land on which advertisements may be displayed and the manner in which they are to be affixed to it".

14.23 Since, as noted, the term "site" is defined in the existing Regulations, it could be replaced with "land" when they are next updated. Alternatively, given that there are almost inevitably going to have to be regulations amending all the relevant secondary legislation to take account of the coming into force of the new Act, those regulations could amend the various references in the Advertisements Regulations so as to refer to "land".

Consultation question 14-3.

We provisionally propose that the word "land" should be used in place of "site" and "sites":

(1) **in the provisions of the Bill relating to the control of advertisements; and**

(2) **in the Regulations when they are next updated.**

Do consultees agree?

Definitions: the person displaying an advertisement

14.24 It is important to know: who is responsible for obtaining consent for the display of an advertisement, and for complying with any conditions subject to which consent (deemed or express) may have been granted; who is liable for prosecution in the event that consent has not been granted for a particular display, or those conditions or limitations have not been complied with; and on whom a discontinuance notice must be served if the authority wishes to bring about its removal.

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12 TCPA 1990, ss 220(2)(a), 221(7)(b),(8)(b), 223(1)(b), 224(1)(b).

13 1992 Regulations, reg 2(1).

14.25 Section 224(4) of the TCPA 1990 provides as follows:

> "a person shall be deemed to display an advertisement for these purposes if:
>
> (a) he is the owner or occupier of the land on which the advertisement is displayed; or
>
> (b) the advertisement gives publicity to his goods, trade, business or other concerns."

14.26 Regulation 2(3)(b) of the 1992 Regulations provide as follows:

> Any reference in these Regulations to a person displaying an advertisement includes—
>
> (a) the owner and occupier of the land on which the advertisement is displayed;
>
> (b) any person to whose goods, trade, business or other concerns publicity is given by the advertisement; and
>
> (c) the person who undertakes or maintains the display of the advertisement.

14.27 It will be noted that the definition in the Regulations is not exclusive; and that the third category is not mentioned in section 224(4). That seems surprising, as the person undertaking the display – that is, in conventional terms, the advertising contractor – is in many cases the one principally responsible. Presumably such a person is liable, in addition to those in the two categories mentioned in section 224(4).

14.28 There are in fact few references in the Regulations specifically to a person displaying an advertisement[14], but regulation 27 provides that "a person displaying an advertisement in contravention of these Regulations shall be liable on summary conviction of an offence under section 224(3) of the Act to a fine …".

14.29 We provisionally consider that it would be preferable for there to be a single definition – in the primary legislation – which would apply both to assist in the interpretation of the Regulations and to determine who is liable to conviction for unlawful display. That definition should be based on the inclusive definition currently in the Regulations.

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[14] 1992 Regulations, reg 7(2)(b),(8) (notification of directions restricting deemed consent); reg 8(2),(6) (service of discontinuance notice); reg 27 (liability); Class A, condition 4 (display of balloon advertisement); Class 3C, condition (4), Class 8, condition (4) (categories of deemed consent).

Consultation question 14-4.

We provisionally propose 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 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.**

Do consultees agree?

CONSENT FOR ADVERTISING

Deemed consent

14.30 The most significant feature in practice of the system of advertisement control is the deemed consent granted by the Regulations for numerous categories of advertising prescribed in 14 Classes in Schedule 3 to the 1992 Regulations. These categories have been widened over the years since the first Regulations were made in 1948. Advertising being displayed with deemed consent can be brought to an end by the planning authority serving a discontinuance notice, subject to a right of appeal to the Welsh Ministers.

14.31 As noted above, it is to be expected that the Regulations applying in Wales, now 25 years old, will be updated in due course[15]; and at that time it will no doubt be appropriate to review the classes of deemed consent, and in particular to consider whether to include new classes equivalent to those that have been introduced in England in and since 2007[16]; or others particular to Wales. We therefore make only limited proposals for technical reform in relation to the classes of deemed consent.[17]

Discontinuance notices

14.32 Where an advertisement is being displayed with the benefit of deemed consent, the planning authority may seek to bring it to an end by serving a discontinuance notice, requiring a particular display to be removed, or the site no longer to be used for such display.

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15 See **paras 14.8 to 14.10.**

16 Including those in SIs 2007 No 783 (advertisements on balloons and on the exterior of telephone kiosks – new Classes 15 and 16), 2011 No 2057 (advertisements on electric vehicle charging points – new Class 17) and 2012 No 2372 (flags – amended Class 7).

17 Exceptions relate to advertisements benefitting from planning permission (**Consultation question 14-7**), advertisements on vehicles (**question 14-8**) and advertisements on sites used for advertising for more than 10 years (**question 14-10**).

14.33 There is no requirement in the 1992 Regulations that a discontinuance notice should contain any statement of the right to appeal against it. This may be contrasted with the requirement in section 173(10) of the TCPA 1990 that every enforcement notice shall be accompanied by an explanatory note giving prescribed information as to the right of appeal under section 174.

14.34 The High Court, in *Swishbrook Ltd v Secretary of State for the Environment*,[18] considered that the absence of such a requirement (in the 1989 Regulations) was "curious", but made it clear that it should not be implied. The opportunity to insert such a requirement was not taken when the Regulations were consolidated in 1992 and (in England) in 2007; although a note to that effect was included in the precedents at Appendix F to the Annex to DCLG Circular 03/2007.[19]

14.35 We provisionally consider that this omission should be rectified when the regulations are next updated.

14.36 Secondly, a discontinuance notice must specify the period at the end of which it will take effect.[20] That is crucial, partly because any appeal to the Welsh Ministers against the notice must be made before it comes into effect, and partly because, in the absence of any such appeal, any display will be unauthorised, thus rendering those responsible liable to prosecution.

14.37 That period must be at least eight weeks from the date on which the notice is served.[21] However, since it is currently the notice itself, and not a copy, that is to be served on each of the various recipients, and since (in the absence of an appeal) it comes into effect at the end of the period specified in it, the periods specified in each of the notices at the end of which it comes into force must be calculated so as to expire simultaneously. Otherwise, if different recipients of a notice relating to the same advertisement are told (in effect) that it will take effect on several different dates, the notice may be found to be a nullity (see below), and all who have received it may then ignore it with impunity.

14.38 This somewhat unsatisfactory situation arises because the wording of this regulation follows the pre-1981 code as to the enforcement of mainstream planning control. The effect of that was considered by the Divisional Court in *Bambury v Hounslow LBC*,[22] a case where enforcement notices relating to a single breach were "served" on various interested parties on different dates, with each stating that it was to come into effect within a certain period after the date of "service". The court held that, as a result, each notice was a nullity. However, the Court in *Nahlis v Secretary of State*[23] declined to follow that approach in a case where discontinuance notices under regulation 8 of the 1992 Regulations had been served on nine different interested parties, some on different dates, as it considered that no prejudice had been caused.

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18 [1989] JPL 137, upheld in the Court of Appeal at [1990] JPL 824.

19 There is no corresponding detailed guidance applying in Wales (TAN 7 is much briefer)

20 1992 Regulations, reg 8(3).

21 1992 Regulations, reg 8(4).

22 [1966] 2 QB 204; also *Stevens v Bromley LBC* [1972] Ch 400, CA; affirming [1972] Ch 39.

23 [1995] 3 PLR 95; (1995) 71 P&CR 553.

No explanation was given by the Court in *Nahlis* for departing from the approach in *Bambury*.

14.39 The current provisions relating to the service of planning enforcement notices now envisage the "issue" of a single enforcement notice, coming into effect on a particular date specified in it, with copies of that being served as appropriate.[24] In that way, there is no date as to the date by which the notice must be complied with. The same approach was unfortunately not adopted in either the 1992 or the 2007 Regulations. We provisionally consider that suitable amendments should be made when the regulations in Wales are next updated, since irregularities in service can sometimes cause uncertainty, and may be argued to cause prejudice.

Consultation question 14-5.

We provisionally propose 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.**

Do consultees agree?

Express consent

14.40 Where an advertisement is not the subject of deemed consent, it will require express consent. The details as to the submission and determination of applications for express consent – and associated appeals – are largely to be found in the Regulations, and are thus not considered further here.

14.41 The statutory mechanism governing the making of advertisements regulations is not entirely satisfactory. At present, the TCPA 1990 provides as follows:

(1) by virtue of section 220(2)(a), the regulations may regulate the dimensions, appearance and position of advertisements that may be displayed, the sites on which advertisements may be displayed, and the manner in which they are to be affixed to the land;

(2) by virtue of section 220(2)(b), they may require the consent of the local planning authority to be obtained for the display of advertisements, or advertisements of any specified class;

[24] TCPA 1990, s 172(5), (6).

(3) by virtue of section 220(2)(c), they may apply, in relation to any such consent and to applications for such consent, any of the provisions mentioned in section 220(3), "subject to such adaptations and modifications as may be specified in the regulations"; and

(4) by virtue of section 220(2A), they may make provision as to the form and manner in which an application for consent must be made; the matters to be included in the application; and the documents or other materials that must accompany the application.

14.42 The provisions mentioned in section 220(3) are some of those in Part 3 of the TCPA 1990 relating to planning applications, and those in Part 6 relating to purchase notices following the refusal of planning permission. It is notable that section 220(2)(c) limits the regulation-maker to applying those provisions subject to modifications that must be actually specified in the Regulations.

14.43 This is in contrast to section 220(2A), which creates a general power to make provision for the matters referred to, without any need for modifications to the Act to be spelled out in the Regulations. Section 220(3) is the result of an amendment made to the TCPA 1990 made by section 42(4) of the PCPA 2004.

14.44 The regulations in fact provide a more or less self-contained code of control in relation to applications for express consent, with provisions as to applications, decisions and appeals – very roughly corresponding to those in the Act relating to planning applications and appeals. It is noticeable that in some cases – power of the planning authority to decline applications, appeals against refusal of consent, and appeals against discontinuance notices – the modifications are set out in Parts of Schedule 4 to the Regulations; and in the first and second cases, but not the third, the provisions as thus modified are set out in further Parts of that Schedule. That is not particularly convenient for the user of the Regulations. In the case of other provisions relating to consent, the Regulations simply sets them out, with no attempt to relate them to the provisions of Part 3 of the Act from which they are derived.

14.45 Further, as might be expected, there are many provisions relating to planning permission in Part 3 of the TCPA 1990, mentioned in s 220(3), that are not in fact included in the Regulations, with or without modifications.

14.46 We consider that a much more straightforward approach would be simply to specify the nature of the provisions that may be included in secondary legislation, as has been done in section 220(2A).[25] That 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 – notably as to:

(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;

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[25] And also in the new provisions governing the contents of tree preservation regulations (TCPA 1990, ss 202A to 202G, inserted by the Planning Act 2008); see **para 15.8**.

(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.

14.47 In particular, it will be noted that the first of these is worded so as to make it clear that the effect of consent is to authorise either the display of a particular advertisement or the use of land for the display of advertisements generally. This would echo regulation 5 of the 2007 Regulations applying in England, to which there is no equivalent in the 1992 Regulations in Wales, but which is arguably of sufficient importance that it should be in primary rather than secondary legislation in any event.

Consultation question 14-6.

We provisionally propose 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.**

Do consultees agree?

The development plan

14.48 Many planning authorities include policies relating to advertising in their local plans. And many authorities refer to the local plan in decisions on applications for express consent, and in decisions to take discontinuance action to bring about the removal of advertisements displayed with deemed consent. This is in spite of the development plan, at least in Wales, not being directly relevant to such decisions (other than by virtue of general public law principles.[26] In England, this has been recognised by the 2007 Regulations providing that the development plan is to be taken into account[27] – whether or not that is allowed under the enabling provisions in section 220 as they currently stand.

14.49 One result of widening the duty to have regard to the development plan to the exercise of any function under the TCPA 1990, as proposed earlier,[28] would be that it would automatically apply to the exercise of any function (under either the Act or the 1992 Regulations) relating to the control of advertisements, without the need for any explicit provision in the Regulations.

Overlap with planning permission

14.50 As noted above; planning permission is deemed to be granted for any display of advertisement that constitutes "development", provided that it has deemed or express consent under the Regulations.[29]

14.51 In the Scoping Paper, we noted that in the Republic of Ireland, under the Planning and Development Act 2000, the display of advertisements is development, for which planning permission is required. That enables permission to be granted by the Planning and Development Regulations 2001 (the equivalent to the GPDO 2015) for certain categories of advertisements, as with any other class of "exempted development" (the equivalent of "permitted development" in Wales).

14.52 As a result of the categories of advertising that have been defined as exempted development, the control regime in Ireland is in effect equivalent to the regime in Wales as it was prior to 1969. But the crucial difference is that advertising is firmly within mainstream planning control, rather than being the subject of a discrete statutory code as in the UK.

14.53 It would obviously be possible to introduce a similar system in Wales, so that the definition of "development" is extended to include the display of advertisements, which therefore requires planning permission under the TCPA 1990; but to provide that permission is granted by the GPDO for categories of advertising similar to those currently in the 1992 Regulations. That would be somewhat similar to the approach we have proposed in relation to works to listed buildings.[30]

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26 See **paras 5.28 to 5.32.**

27 TCP (Control of Advertisements) (England) Regulations 2007, reg 3(1)(a).

28 See **Consultation question 5-1.**

29 TCPA 1990 s 222; see para 14.5.

30 See *Scoping Paper*, Chapter 6; and **Chapter 13** of this paper.

14.54 However, whereas many building projects require both listed building consent and planning permission, there are not many displays of advertisements that require both planning permission and consent under the Regulations. Those that do – such as roadside poster hoardings – are automatically deemed to have received planning permission provided that they have the benefit of deemed or express consent under the Regulations. That means that the decision to allow or prevent a proposed display is taken in response to an application for express consent (where required), rather than a planning application. That makes sense, as the issues involved in assessing such a proposal are likely to be entirely site-specific, raising no wider planning issues.

14.55 There will be a few cases in which planning permission is granted for a building project that necessarily includes an element of advertising – for example, a new shopfront that includes a fascia sign. It would be helpful to avoid the need to apply for two types of consent by introducing a new class of deemed consent, "the display of an advertisement that forms part of a building or other operation for which planning permission has been granted". That could be considered when the Regulations are next updated.

14.56 Apart from that, we do not propose changing the law so as to bring the display of advertisements in Wales within the scope of development requiring planning permission.

Consultation question 14-7.

We provisionally propose that deemed consent under the Advertisements Regulations should be granted for a display of advertisements that has the benefit of planning permission.

Do consultees agree?

Advertisements on and in vehicles

14.57 One category of display that continues to present problems is advertising on and in vehicles. At present, consent is not required for the display of an advertisement on "a site", which means any land or building on which it is displayed.[31] That would not include an advertisement displayed on a vehicle. However, 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.[32]

14.58 This is designed to permit advertising in the form of paper posters on the outside or the inside of buses or taxis and, indeed the painting or other treatment of a bus or taxi so as to form in effect one large advertisement. It also allows the display of the operator's name and other promotional artwork on commercial vehicles generally;

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31 TCP (Control of Advertisements) Regulations 1992, regs 3, 2.

32 TCP (Control of Advertisements) Regulations 1992, Sched 2, Class C.

many companies understandably take advantage of the opportunity for free publicity provided by the sides of their lorries and vans.

14.59 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 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*.[33]

14.60 One way to avoid the problem of unsightly advertising on parked vehicles would be to amend the Regulations 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 exterior of a vehicle on a public highway;

(2) deemed consent is granted for the display of an advertisement the display of on 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.

14.61 That 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 site for such advertising, which would bring the display to an end (subject to a right of appeal to the Welsh Ministers).[34]

14.62 If there were to be as a persistent problem in relation to a site, the authority could seek a direction from the Welsh Ministers withdrawing the deemed consent altogether. Such a direction could apply just to a particular site, or to a larger area of land – it could, for example, apply to the fields to either side of a trunk road or railway running through a national park. It would have to be publicised in draft, and the Welsh Ministers would have to consider objections before confirming it; but that would enable an authority to control the problem.[35]

14.63 We provisionally consider that this would be a worthwhile change to introduce when the regulations are next updated. Clearly the making of a discontinuance notice or the seeking of a direction in a particular case would involve the authority in the expenditure of resources, but that would a matter for its discretion in each case.

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33 [2010] EWHC 2929 (Admin), [2011] JPL 754.

34 1992 Regulations, reg 8.

35 1992 Regulations, reg 7. Such directions are rare, but one was made in 2015 withdrawing the deemed consent for estate agents boards in the Cathays and Roath areas of north Cardiff.

Consultation question 14-8.

We provisionally propose 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) be required for the display of an advertisement inside a vehicle, or on the outside of a vehicle on a public highway;**

(2) **deemed consent be granted for the display of an advertisement on 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.**

Do consultees agree?

Need for consent

14.64 There can be considerable uncertainty as to whether consent is required for a specific display of advertisements, and particularly as to whether it falls within one or more of the classes benefitting 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.

14.65 In some cases, a display of advertisements may constitute development, for which planning permission will be deemed to be granted by section 222 of the TCPA 1990 where it benefits from consent under the Regulations[36]. The need for planning permission thus depends on the need for consent under the Regulations; and that entitles an advertiser to seek to put the matter beyond doubt by applying for a certificate of lawfulness – a certificate of lawfulness of existing use or development (CLEUD) where the display has already started or a certificate of lawfulness of proposed use or development (CLOPUD) where it has not.[37] In practice, some authorities are not keen to entertain such applications; and not all displays necessarily constitute development.

14.66 It is of course possible to seek an informal opinion from an 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.

14.67 The Divisional Court has held that it is an abuse of process for a planning authority to bring, or to continue, a prosecution where an advertiser has acted on an assurance by its officers that consent was not required for the display in question.[38] However, it

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36 See **para 14.5**.

37 See **paras 7.83 to 7.97**.

38 *Postermobile v Brent LBC*, The Times, 8 December 1997.

has also subsequently held that it is not necessarily unfair for an authority, realising that it has made a mistake in the past, to seek to correct it.[39] Neither decision can therefore be relied on with complete safety. In any event, it should be possible for an advertiser to seek a definitive ruling without having to await prosecution.

14.68 It is in theory possible to apply for a declaration from the High Court as to the need for consent, but the Court has made it plain that it does not welcome such applications.[40]

14.69 We provisionally consider, therefore, that it would be more straightforward for there to be a mechanism, similar to that governing applications for CLEUDs and CLOPUDs, 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.

14.70 However, although an application for a certificate would assist the applicant, it would be a new procedure to be operated by the authority. It is not clear how many such applications there might in fact be, nor whether the burden of processing them would be greater or less than the benefit that would arise from having an easy means of achieving certainty. We would welcome the views of consultees on this.

14.71 The procedure as to such applications would probably best be included in the Regulations when they are next updated; but the enabling provisions in the Bill would need to be adjusted accordingly.

Consultation question 14-9.

We provisionally propose 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 consultation question 14-6.**

Do consultees agree? And what might be the resources implications of this proposal?

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39 *R (Westminster CC) v National Car Parks* [2002] 21 February, unreported.

40 *Chambers v Guildford BC* [2008] JPL 1459, QB.

BREACH OF ADVERTISEMENTS CONTROL

14.72 In practice, many signs and advertisements are unauthorised; but many in fact cause no problem. There are therefore three mechanisms to deal with unauthorised displays:

(1) deemed consent is granted for the display of advertisements on sites that have been used for advertising, with or without consent, for many years;

(2) planning authorities have some powers to remove unauthorised displays; and

(3) they may prosecute those responsible.

We consider each in turn.

Deemed consent

14.73 Deemed consent is granted for the display of advertisements on sites that have been used for advertising, with or without consent, for many years (currently by virtue of Class 13 of Schedule 3 to the 1992 Regulations). This is a helpful provision, as it regularises many displays after there has been an opportunity for the planning authority to take action. And the possibility of discontinuance action enables an authority to retain at least some measure of control in relation to particular displays that are now considered harmful to amenity or safety – not least where the character of an area changes.

14.74 In Wales, Class 13 includes advertisements being displayed on sites that have been used for advertising since 1 April 1974.[41] The corresponding provision in England authorises advertisements on sites that have been used for ten years.[42] As 1974 recedes gradually into history, it becomes increasingly difficult to be certain when a site was first used for advertising; and the same would apply in due course if a more recent date were to be substituted. The rolling ten-year period applying in England seems greatly preferable; and we provisionally consider that this should be adopted in Wales when the Regulations are next amended or replaced.

Consultation question 14-10.

We provisionally propose that what is now 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 a site that has been used for that purpose for ten years, rather than by reference to a fixed date (currently 1 April 1974).

Do consultees agree?

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41 1992 Regulations, Sched 3, Class 13. That date may have been selected as it was the date on which new local authorities came into existence (in England and Wales) under the Local Government Act 1972.

42 2007 Regulations, Sched 3, Class 13.

Removal of advertisements

14.75 In most cases where advertisements are displayed without consent, the principal concern of the planning authority – on behalf of the local community – is not so much to punish those responsible as to remove the offending display. Further, many displays are unauthorised, possibly reflecting the fact that to display advertisements is relatively straightforward, and can result in very substantial income to advertisers, particularly in urban areas.[43] For that reason, authorities use their powers to take direct action more frequently in connection with unauthorised advertisements than they do with other forms of unauthorised activity.

14.76 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.[44] There is just such a procedure in Scotland, under the corresponding provision of the legislation north of the border[45]; but none of the regulations applying in England and Wales since 1948 have contained such a procedure.

14.77 We provisionally consider that this is not necessary, and the enabling powers in sections 224(1) and (2) need not be restated in the Bill.

14.78 Instead, section 225 of the TCPA 1990 enables a planning authority to remove or obliterate any placard or poster that is being displayed in its area without consent under the Regulations (other than one within a building). Before taking such action, the authority must give two days' notice to those responsible for the display – where they can be identified – or to those whose goods or services are being publicised.[46] There is no right of appeal against such a notice – other than by way of an action for judicial review in the High Court – but compensation may be claimed if the exercise of the power causes loss or damage to any person other than the person responsible for the display. The Court of Session in Scotland has suggested that the intention of Parliament in enacting section 187 of the TCP (Scotland) Act 1997 (the equivalent of section 225) was to enable the removal of fly-posting[47]; but there is nothing in section 225 to suggest that it cannot be used in connection with *any* unauthorised poster or placard.

14.79 A more extensive power was introduced in relation to unauthorised advertising in areas of special control and conservation areas in Ceredigion, Carmarthenshire and Pembrokeshire. Section 43 of the Dyfed Act 1987 provides that a planning authority may remove any unauthorised advertisement other than a poster or placard (to which

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43 The rent payable in 2017 by an advertising contractor to the owner of a small patch of land next to a large roundabout in central London, to be used for the display of a hoarding, is in the region of £20,000 to £45,000 per annum, depending on the type of display, yielding £200,000 to £500,000 over the term of a 10-year lease (source: Lambeth Council planning report). The net income received by the contractor is unknown.

44 TCPA 1990, s 224(1), (2); and see *Wyatt v Jarrad* [1998] 2 PLR 81, QBD, at p 87H.

45 TCP (Scotland) Act 1997, s 186(1)(2). This may be because of the difficulties experienced by planning authorities in achieving convictions for unauthorised advertising, due to the need to persuade the Local Procurator Fiscal to proceed with a prosecution.

46 TCPA 1990, s 225(3),(5).

47 *Baillie Lite Ltd v Glasgow City Council* [1999] 3 PLR 64, at p 72E.

section 225 of the TCPA 1990 would apply) after giving 14 days' notice to those responsible. Here too there is no right of appeal against such a notice, but during the 14-day period, anyone may make representations to the authority stating why the advertisement in question is not unauthorised, and the authority must then consider those representations and tell the person making them what it proposes to do. If it subsequently transpires that the advertisement was not unauthorised, the authority is to pay compensation to anyone who suffers any loss as a result of its removal.

14.80 A somewhat similar power was introduced in section 11 of the London Local Authorities Act 1995, enabling planning authorities in Greater London to remove any unauthorised advertisement (not just a poster or placard) after giving 21 days' notice to those responsible. That power was subsequently extended to all parts of England by the Localism Act 2011, which repealed section 11 of the 1995 Act and inserted sections 225A, 225B and 225K into the TCPA 1990.

14.81 Section 225A enables a planning authority to remove any "display structure" – that is, any structure used for the purpose of the display of advertisements – which would itself amount to an "advertisement" under the Act (see above) where the erection of that structure does not benefit from consent under the advertisements regulations. Before removing the structure, the authority must give at least 22 days' notice to those responsible.

14.82 Under section 225B, there is a right of appeal to the magistrates' court against such a notice by those on whom it is served and by owners and occupiers of the site of the advertisement.[48] The principal grounds of appeal are that the display is not in contravention of the regulations; that the notice is defective; or that the time for removal is insufficient. Here too, if the authority ends up removing the advertisement itself, it is liable to pay compensation for any damage, other than to the structure itself. Under section 225K of the 1995 Act, statutory undertakers are able to serve a counter-notice in respect of removal works to be carried out on their operational land.

14.83 There is clearly a need for planning authorities to be able to remove unauthorised advertisements. 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 – but do not enable the removal of the structures used for their display. In England and in some of West Wales, by contrast, it is possible to remove any unauthorised "advertisement" – in the broadest sense of that term.

14.84 We provisionally consider that it would be helpful to replace 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. It would need to involve provisions similar to those in section 225B and 225K of the TCPA 1990, as inserted in 2011, requiring:

(1) no advertisement to be removed without 21 days' notice having first been given to those responsible;

[48] It may be noted that there was no such right of appeal under the 2011 Act.

(2) a right of appeal to be available to recipients of such a notice, and to owners and occupiers of the site of the offending advertisement, as under section 225B of the TCPA 1990 – on grounds relating to the lawfulness of the advertisement, the service of the notice, and the time for its removal;

(3) compensation to be payable 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 as under section 225K.

Consultation question 14-11.

We provisionally propose that the power (currently in section 224(1), (2)) for the Welsh Ministers to include in Regulations provisions similar to those governing enforcement notices should not be restated in the Bill.

Do consultees agree?

Consultation question 14-12.

We provisionally propose that the powers currently in section 225 of the TCPA 1990 (removal of unauthorised posters and placards) and in section 43 of the Dyfed Act 1987 (removal of other unauthorised advertisements) should be replaced with a new single procedure allowing the removal of any unauthorised advertisements, subject to

(1) **no advertisement being removed 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, as under section 225B of the TCPA 1990 – 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 as under section 225K.**

Do consultees agree? What are the likely resource implications of this proposal?

Prosecution

14.85 As noted earlier, the display of advertisements without the necessary consent – unlike the carrying out of unauthorised development – constitutes a criminal offence. This

too may reflect the fact that to display advertisements is relatively straightforward, resulting in very substantial income to the advertiser. It follows that prosecutions are by no means uncommon, and the relevant law needs to be fit for purpose.

14.86 In particular, the maximum sentence needs to be appropriate. It may be noted that, when the legislation was first introduced in England and Wales, the maximum fine for displaying an advertisement in breach of the Regulations was initially £50;[49] the equivalent in 2017 would be around £1,920. In 1968, that was doubled to £100, although the real value had fallen so as to be only £1,670 at 2017 rates.[50] The level of the fine in real terms had fallen substantially by 1982, when it was changed to "Level 3" on the new standard scale, initially £200 (£710 today).[51] It was doubled two years later, and then increased to £1,000 in 1992 (£1,970 in 2017 prices).[52] The fine was then was increased by the Anti-social Behaviour Act 2003 from Level 3 to Level 4 – £2,500 (£3,730 in 2017 prices).[53] It is still £2,500. There was a proposal in 2014 to increase Level 4 from £2,500 to £10,000, but it was not pursued.[54]

14.87 The maximum has thus fluctuated significantly in real terms since 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. 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.

14.88 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.[55] Since 2015, the penalty in each case is an unlimited fine, either on summary conviction or on indictment.[56]

14.89 There has been no directly relevant guidance from the Sentencing Council in relation to planning offences, but the Council has issued guidelines in relation to environmental offences (including waste tipping and water pollution). Those suggest that the starting point for sentencing following the conviction of a large corporate defendant for a deliberate offence involving minor localised damage to amenity value (category 3) would be £180,000.[57] And recent decisions of the Court of Appeal

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49 TCPA 1947, s 32(3).

50 TCPA 1962, s 63(2); TCPA 1968, s 101, Sched 8.

51 TCPA 1971, s 109(2); Criminal Justice Act 1982, s 37.

52 SI 1984 No 447; Criminal Justice Act 1991, s 17; SI 1992 No 333.

53 TCPA 1990, s 224(3); Anti-social Behaviour Act 2003, s 53.

54 Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Standard Scale of Fines for Summary Offences) Order 2014, made under Legal Aid [etc] Act 2012, s 87(6); laid before Parliament, but not approved, in the light of a change of policy.

55 Listed Buildings Act 1990, s 9(4); TCPA 1990, s 210(2).

56 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on Summary Conviction) Regulations 2015 (SI 664), Sched 4, paras 18, 19.

57 *Environmental Offences: Definitive Guideline*, Sentencing Council, 2014.

suggest that larger fines may be appropriate in relation to offences by wealthy corporations and individuals.[58]

14.90 We provisionally consider that it would be more appropriate to increase the maximum penalty for unauthorised advertising in line with those applying to other planning offences, especially in view of the very substantial financial gains that can be made from such offence, to an unlimited fine.[59] The actual level of the fine in any particular case would of course be determined in line with normal sentencing principles.

Consultation question 14-13.

We provisionally propose that the maximum sentence on conviction for unauthorised advertising should be increased to an unlimited fine, in line with other offences under the TCPA 1990 and the Listed Buildings Act 1990.

Do consultees agree?

Policy basis for action against unauthorised advertising

14.91 Regulation 4 of the 1992 Regulations provides that a planning authority exercising its powers under the Regulations must do so in the interests of amenity and public safety. However, that principle does not extend to the exercise of functions relating to advertising under the TCPA 1990 itself. Functions under the Act include prosecutions for unauthorised advertising brought under section 224 and the removal of unauthorised advertisements under section 225 (and section 225A in England, and in Wales as proposed above[60]).

14.92 In some cases, those accused of displaying unauthorised advertisements rely on an unmeritorious argument that the display in question does not cause any harm to amenity, and the breach of Regulations is merely "technical". Bingham LJ, as he was, noted in *Kingsley v Hammersmith and Fulham LBC* that

> "Regulation 4 is clearly intended to ensure that in exercising the specific powers to give or refuse consent which are conferred on a local authority under the regulations, they should exercise those powers in the interests of amenity and public safety. But there is nothing in the Regulations which confer on the local authority a power to prosecute. I am unpersuaded that the exercise of a prosecuting function is subject to the duties specified in regulation 4. It appears to me that in the interests of maintaining control over [the display of advertisements] for which there has been no consent,

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58 *R v Sellafield Ltd* [2014] EWCA Crim 49, Env LR 19; applied in *Natural England v Day* [2014] EWCA Crim 2683, [2015] Env LR 15. Both related to offences under environmental legislation – in *Day*, the penalty was a fine of £450,000 (plus costs of £457,000) for unlawful tree felling in an area of special scientific interest; the Court of Appeal noted that a fine of over £1 million would not have been inappropriate.

59 See **footnote 32** above.

60 See **Consultation question 14-12**.

a local authority are entitled to take a strict view and to insist on compliance with that which the statute and the regulations provide." [61]

14.93 However, in practice, a very large number of advertisements are displayed that are technically in breach of the Regulations for one reason or another – in particular, the classes of deemed consent are drafted by reference to numerous detailed conditions as to dimensions and other matters, which are often not complied with. But it does not seems to be appropriate for an authority to bring a prosecution where there is merely a technical breach.

14.94 We therefore provisionally consider that it would be sensible to remove this problem by transferring from the regulations to the Bill the principle that any functions under the Code relating to advertising (thus including the removal of unauthorised displays and the prosecution of those responsible for them) are to be exercised in the interests of amenity and public safety. The regulations could still, as at present, prescribe the detailed matters that are to be taken into account when considering amenity and public safety.

14.95 That would have the incidental effect that a planning authority proposing policies in a development plan relating to the control of advertising would only be able to do so if those policies were in the interests of amenity and public safety. So, for example, it would not be possible to include a policy as to the content of an advertisement. That would effectively make explicit the existing law.

Consultation question 14-14.

We provisionally propose that it be made clear on the face of the Bill, rather than (as at present) in the Regulations, that all functions under the Code relating to advertising should be exercised in the interests of amenity and public safety.

Do consultees agree?

MISCELLANEOUS AND SUPPLEMENTARY PROVISIONS

Advisory committees and tribunals

14.96 Section 220 of the TCPA 1990 (in common with all planning Acts since 1947[62]) provides that advertisements regulations may provide for special advisory committees, and for independent tribunals to determine appeals in place of the Welsh Ministers.[63] No such committees or tribunals have ever been set up.[64]

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61 62 P&CR 589 at p 592.

62 See TCPA 1947, s 31(1)(e),(2).

63 TCPA 1990, s 220(2)(d),(4).

64 It was argued in *O'Brien v Secretary of State and Doncaster MBC* [2001] JPL 375, at [11] that the omission rendered the whole system in breach of human rights, but that argument did not succeed.

14.97 We provisionally consider that there is no need for these provisions, which have not been used for seventy years.

Consultation question 14-15.

We provisionally propose that the provisions in section 220 of the TCPA 1990 relating to advisory committees and tribunals should not be included in the Bill.

Do consultees agree?

Experimental areas

14.98 Section 222(1)(b) of the TCPA 1990 provides that advertisements regulations may make special provision for the display of advertisements in "experimental areas". An experimental area may be defined as such for the purpose of assessing the effect of particular types of advertising over a specific period.[65]

14.99 This provision was first introduced by the Housing and Planning Act 1986; the intentions of the Government at the time was set out in the White Paper *Building Businesses not Barriers*.[66] The first experimental area to be defined, in consultation with the relevant local planning authorities, was in Kent, and was to have effect for a period of two years from 1 July 1987. During that period, deemed consent was granted for brown signs directing tourists to attractions, to enable their effect to be assessed.[67] This remains the only area to have been defined, and it was not renewed when the two-year experimental period ended in 1989. The relevant Class of deemed consent for such signs was accordingly withdrawn.[68] However, the power to define further experimental areas remains on the statute book in both England and Wales.

14.100 We provisionally consider that this provision, now unused for thirty years, is no longer required.

Consultation question 14-16.

We provisionally propose that the provisions in section 221(1)(b), (2) of the TCPA 1990 relating to experimental areas should not be included in the Bill.

Do consultees agree?

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65 TCPA 1990, s 221(2).

66 Cmnd 9794, para 5.11.

67 1989 Regs, reg 6 and Sched 3, Class 11B, inserted by SI 1987 No 804. The brown signs in question are now included in the Traffic Signs Manual, and are thus outside the scope of the Advertisements Regulations (1992 Regulations, Sched 2, Class H).

68 SI 1990 No 881, reg 5(c).

Compensation for removal of advertisements

14.101 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, 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.[69] 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.

14.102 Deemed consent is automatically granted for the display of an advertisement on a site that has been used continually for such display since 1 April 1974.[70] However, a planning authority may bring to an end the display of advertisements on such a site, or the display of a particular advertisement there, by serving a discontinuance notice. Unless the person on whom the notice is served successfully appeals against it, the use of the site for advertising must then cease, or the particular advertisement must be removed, as the case may be. Where the site was being used for advertising not just since 1974 but also on 1 August 1948, or the particular advertisement to be removed was being displayed on that date, limited compensation may be recovered by virtue of section 223. Note that it would not matter for this purpose if the advertising use was temporarily in abeyance at some stage between 1948 and 1974, provided that it was in existence both in 1948 and throughout the period since 1974.

14.103 Compensation under these provisions may also be recoverable where a site was being used for advertising in 1948, and is still being used for that purpose, but the deemed consent under Class 13 now no longer applies – because there was a break in the advertising use, or because the nature of that use was at some stage after the start of the relevant period altered or its extent increased – and one of the following applies:

(1) the present use of the site for advertising is such that it still attracts deemed consent (under one of the other Classes in Schedule 3), but a discontinuance notice is now served and comes into effect; or

(2) that the present use for advertising is such that it attracts deemed consent under Class 4A, Class 4B or Class 8, but now has to cease because the site is included within an area of special control, a conservation area, a national park or an area of outstanding natural beauty; or

(3) the advertising use is now of a kind for which express consent is required, but such consent is not applied for (or is applied for and refused) and the advertising thus has to cease.

14.104 As a result, it will be appreciated that the circumstances where compensation can be claimed under section 223 are now very few.

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69 The significance of that date is that that was when the first Advertisements Regulations came into effect in (England and) Wales.

70 1992 Regulations, reg 6, Sched 3, Class 13. This applies as much in an area of special control or other sensitive area (conservation area, etc.) as elsewhere.

14.105 Further, the amount that can be claimed is very limited. It is restricted to the expenses that have been reasonably incurred on the works that have actually been carried out to discontinue the advertising (or to remove the particular advertisement, as the case may be).[71] 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 where it arises due to discontinuance or enforcement action under the Regulations.

14.106 A claim for compensation under section 223 is to be made by the person who actually incurred the cost of the relevant works – which will usually be the advertising contractor. There is no provision for a separate claim by the landowner, if different.

14.107 We suspect that few, if any, claims for compensation are now made under section 223. We therefore provisionally consider that it need not be restated in the Bill.

Consultation question 14-17.

It appears 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 is no longer of any practical utility, and should not be included in the Bill.

Do consultees agree?

[71] TCPA 1990, s 223(1).

Chapter 15: Works to protected trees

INTRODUCTION

15.1 Conditions are frequently imposed on planning permissions to protect existing trees and to ensure the planting of new ones; and there is a duty on planning authorities when granting planning permission to ensure that new trees are planted in appropriate cases.[1]

15.2 The carrying out of works to trees is not development, requiring planning permission; nor is there any other universal requirement under the planning Acts for consent to be obtained for such works.[2] However, all planning Acts since 1932 have made some provision for the protection of trees of special value. The relevant primary legislation is currently in Chapter 1 of Part 8 of the TCPA 1990. The secondary legislation is in the TCP (Trees) Regulations 1999 ("the 1999 Regulations"), which when first made applied in England and Wales, but since 2012 apply only in Wales.[3]

Tree preservation orders

15.3 Section 198 of the TCPA 1990 provides that a tree preservation order ("TPO") may be made by a planning authority to protect particular trees and woodlands where it is expedient in the interests of amenity.

15.4 Under the Act as it now applies in Wales, the wording of an order will follow that of the model order in force at the time the order is made. The current model order is in the Schedule to the 1999 Regulations. Details as to the making and confirmation of orders are also contained in the Regulations. An order may be made so as to take effect at some date in the future.[4] More usually, it will be made on a provisional basis, so as to take effect immediately and remaining in force for six months, but needing to be confirmed if it is not to lapse.[5]

15.5 Where an order has been made, the consent of the planning authority must be obtained for the carrying out of any works to any of the trees protected by it.[6] Carrying out works without such consent is an offence, under section 210.[7] The details of the consent system – including the numerous exemptions from the need for consent, the

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1 TCPA 1990, s 197.

2 See **para 15.16** as to felling licences.

3 1999 SI 1892, revoked so far as they apply to England by SI 2012 No 605, reg 26(1).

4 TCPA 1990, s 199.

5 TCPA 1990, s 201.

6 The precise extent of the works for which such consent must be obtained depends, at least under the present law, on the wording of the order in question, which will in turn depend on the date when it was made.

7 This is a criminal offence presumably because the unauthorised works are not capable of being reversed.

procedure by which consent can be obtained, and the consequences of such consent not being forthcoming – are currently as set out in the order itself.

15.6 All existing orders will have been made in accordance with the model order in existence at the time they were made. And it may be noted that there are still some orders in force that were made as long ago as the 1940s. Model orders used to be contained in Government circulars[8], and more recently they have been in regulations (which in turn have been amended on various occasions).[9] That has meant that any changes to the model order, to accord with changing policy over the years, would not be reflected in orders already made. The procedural and other requirements in the order – for example, as to the exemptions from the need for consent, and the availability of compensation – accordingly vary, depending on when the order in question was made.

15.7 This means that every order is necessarily lengthy, and difficult for non-planning lawyers to understand – and even more so for property owners, tree contractors and local authority tree officers.

15.8 The system has for many years been regarded as unsatisfactory, and was finally changed by the Planning Act 2008. Section 192 of that Act made extensive changes to Chapter 1 of Part 8 of TCPA 1990, which introduced a new system under which the Secretary of State and the Welsh Ministers are able to make regulations providing for a freestanding code of control – somewhat similar in concept to the Advertisements Regulations.[10]

15.9 Section 193 of the 2008 Act made a transitional provision, to the effect that any order made under the old system will continue in force but omitting all of its provisions other than those necessary to identify the tree being protected.

15.10 Sections 192 and 193 of the 2008 Act (and thus the new provisions in the TCPA 1990) was brought into force (along with new regulations) in England in 2012, but the new system has not yet been implemented in Wales.

15.11 Once the relevant legislative changes have been brought into force in Wales, and assuming that regulations are made that are broadly similar to those now applying in England, it is likely that the system will operate as follows:

(1) regulations under section 202A of the TCPA 1990 will provide that any new order will in future contain merely the details of the trees or woodlands it protects (specified by a schedule and a map), and not the requirements as to consent etc;

(2) the regulations will provide that every new order takes effect immediately, but will cease to have effect after six months unless it has been confirmed;

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8 Appendix A to *The Memorandum on the Preservation of Trees and Woodlands*, 1949; Appendix A to Circular 27/53; Appendix A to the second edition of the *Memorandum*, 1966.

9 TCP (Tree Preservation Order) Regulations 1969 (SI 17), Sched (amended by 1975 SI 148, 1988 SI 963); and TCP (Trees) Regulations 1999 (SI 1892).

10 See **Chapter 14**.

(3) they will govern applications for consent for works to any tree protected by the order, and appeals; and

(4) they will provide other procedural details, such as the availability of compensation.

15.12 Failures to obtain consent under the regulations will still be an offence, under section 210 of the TCPA 1990 – subject to various exceptions, considered below.[11]

15.13 Section 193 of the 2008 Act was a transitional provision, to the effect that any order made under the old system will continue in force but omitting all of its provisions other than those necessary to identify the tree being protected.

15.14 This will provide a much simpler system, which will be easier to use both by tree owners and planning authorities. In the remainder of this Chapter, we assume that it will indeed be introduced in Wales in due course, subject to any changes that may be made as a result of the present exercise.

Trees in conservation areas

15.15 In recognition of the fact that many trees of amenity value are to be found within conservation areas, section 211 of the TCPA 1990 provides that the planning authority must be given six weeks' notice of almost any works to a tree in such an area (other than one that is not protected by a TPO), so that it has an opportunity to impose a TPO if it wishes. Failure to give such notice is also an offence.

Felling licences

15.16 Alongside the controls in the planning Acts, the Forestry Act 1967 (which currently applies throughout Great Britain[12]) requires a felling licence to be obtained where any tree is to be felled – again, subject to numerous exceptions. In England and Scotland, licences are issued by the Forestry Commission; but in Wales, since 2013, they have been issued by Natural Resources Wales. Failure to obtain a licence is an offence.[13]

Other provisions

15.17 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.[14] 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 order to carry out development that has been permitted in response to a planning application.

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11 See **paras 15.59 to 15.85**.

12 The law in Scotland is likely to be significantly changed by the Forestry and Land Management (Scotland) Bill, currently before the Scottish Parliament. If enacted, this will replace the 1967 Act in Scotland.

13 Forestry Act 1967, s 17.

14 Forestry Act 1967, s 15.

Possible reforms

15.18 In this Chapter, we consider first the making of tree preservation orders, and the need for consent to be obtained for works to trees protected by them, and then the need to notify the authority of works to trees in conservation areas.

15.19 In this Consultation Paper, we focus 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 raise some points that could be considered for reform when regulations are being drafted to underpin the introduction of the new system. We understand that any such regulations will be the subject of a further consultation exercise before they are introduced.

15.20 We note in particular a number of legislative reforms that were proposed by the UK Government in 1994, in respect of England and Wales.[15] Those proposals received wide support at the time, but were not implemented, presumably due to legislative priority. We consider that many of those reforms are still worthy of consideration.

15.21 As noted in Part One of this Consultation Paper, we have not made any proposals as to the reform of the law on felling licences, or forestry in general. However, we are mindful of the proposals made by the Welsh Government in its recent consultation document *Taking Forward Wales's Sustainable Management of Natural Resources*, particularly in relation to ancient, veteran and heritage trees, which are relevant to our proposals with respect to preservation orders.[16]

TREE PRESERVATION ORDERS

What may be protected

15.22 The first obvious question is what may be protected by a tree preservation order – what is a tree? Most Acts not directly related to planning that refer to "trees" also refer to hedges, bushes and shrubs, making no distinction between them.[17] That is because, in all the situations being referred to (for example, the removal of a tree overhanging a highway), it makes no difference whether the plant in question is best classified as a tree or shrub. The Forestry Act 1967 refers to all "trees", but excludes from the need for a licence the felling of a tree with a diameter of under 150 mm, implying that a tree can have a trunk of a diameter of less than that – as is recognised by the definition of a sapling as "a young tree".

15.23 The question was considered, in the context of references to "trees" in planning legislation, by Cranston J in *Palm Developments Secretary of State*.[18] He noted that

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15 *Tree Preservation Orders: Review*, Department of the Environment, 1994.

16 *Taking Forward Wales's Sustainable Management of Natural Resources*, Welsh Government, June 2017.

17 For example, Highways Act 1980, ss 96, 141, 142; Plant Health Act 1967, s 1; Theft Act 1968, s 4; Criminal Damage Act 1971, s 10; Electricity Act 1989, Sched 4.

18 [2009] EWHC 220 (Admin), 2 P&CR 16, at [1].

the relevant dictionary definitions were of limited assistance. 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].[19]

And he concluded that a "sapling" (of any size) is a tree, and are capable of being protected by a woodland order.

15.24 The dictum in *Bullock*, although commonly cited and helpful in a general sense, is clearly not capable of being transformed into a watertight definition.[20] No more helpful is the observation by Collins J in *R (Fowler) v Ealing LBC* that obviously there can be arguments as to whether something is a shrub or a tree, and that it would not be irrational for a council to use a tree preservation order to protect a rhododendron or an arbutus.[21] However, these statements do suggest that there is a distinction between a shrub and a bush, on the one hand, and a tree. One dictionary defines a "shrub" as "a woody plant which is smaller than a tree and has several main stems arising at or near the ground"; and a "bush" as "a shrub or clump of shrubs with stems of moderate length".[22]

15.25 We do not consider that there is likely to be any exclusive definition of "tree" that will be entirely satisfactory for present purposes. We have considered whether it would be helpful to provide a partial definition, in the context of the provisions currently in Part 8 of the TCPA 1990, by stating that it does not include a bush or a shrub. That would help to distinguish it from the provisions in other Acts mentioned above.[23] It would also suggest that where, for example, a particular rhododendron is properly classified as a "tree" it can be protected by a tree preservation order; but where it is (as will usually, but not always, be the case) a "shrub", it cannot.

15.26 On balance, however, we suspect that such a definition – if in the form of a statutory provision – would create as much uncertainty as it would avoid; and we therefore provisionally consider that the term "tree" should not be defined in primary or secondary legislation. That would still leave open the possibility of non-statutory guidance as to what types of may be appropriately be protected – we note, for example, the statement in TAN 10 that "A TPO cannot apply to bushes, shrubs or hedges. However a TPO may be made to protect trees in hedges or an old hedge which has become a line of trees". We consider that approach to be more appropriate.

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19 (1980) 40 P&CR 246 at 251. See also TAN 10, para 5.

20 See our comments in the previous Chapter on the definition of "advertisement".

21 *R (Fowler) v Ealing LBC* [2004] EWHC 2860 (Admin), at [13] to [16].

22 *New Oxford Dictionary of English*, 1st Edn, 1988.

23 See **footnote 17**.

15.27 We also consider below the possibility of exempting from the need for consent works to smaller trees.[24]

15.28 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.[25] It is sometimes argued that a particular group of trees does not constitute a "woodland". However, as noted by Sullivan J in *R (Plimsoll Shaw Brewer) v Three Rivers DC*, that is pre-eminently a question of fact and degree for the planning authority to decide.[26] We do not consider that a statutory definition would assist.

Consultation question 15-1.

We provisionally consider 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.

Do consultees agree? If they do not, what definitions would be appropriate?

Policy basis for protection

15.29 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".[27] 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.

15.30 Traditionally it has been assumed that "amenity" in this context refers solely to visual amenity – whether a tree provides public benefit is a matter of what it looks like, and how readily visible it is to how many people. One definition of "amenity" referred to in a decision of the High Court from 1968 is "visual appearance and the pleasure of its enjoyment".[28] And we note that the recent Welsh Government Consultation Paper on *Natural Resources* suggests that:

> The "amenity" test does not, for example, take into account the wider value of ancient, veteran and heritage trees, particularly their often significant biodiversity value.[29]

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24 See **paras 15.81 to 15.85**.

25 *Evans v Waverley BC* [1995] 3 PLR 81, CA, per Hutchinson LJ at p 93D. As to area orders, see **paras 15.41 to 15.45**.

26 [2007] EWHC 1290 (Admin) at [12].

27 TCPA 1990, s 198(1). This will not be not affected by the changes to be made by the Planning Act 2008 (see **para 15.8**).

28 *Cartwright v Post Office* [1968] All ER 646 at p 648.

29 *Taking Forward Wales's Sustainable Management of Natural Resources*, Welsh Government, June 2017, p. 26 – paragraph (a).

15.31 The corresponding provision applying in Scotland explicitly refers to the possibility of a TPO being made either in the interests of amenity or because the trees or woodlands in question are of cultural or historical significance or both.[30] That suggests that "amenity" does not extend to include the wider significance of a tree.

15.32 However, a wider meaning of the term may be implied by a decision the Court of Appeal in 1981, to the effect that "amenity" means "pleasant circumstances or features, advantages".[31] And one dictionary definition suggests that it means "the pleasantness or attractiveness of a place".[32]

15.33 The general perception as to the value of trees, both by relevant professionals and more generally by the public, is now based on a significantly wider range of factors than would be encompassed by the concept of visual amenity alone. This is particularly so in relation to ancient, veteran and heritage trees, as indicated by the quotations above. Further, section 6(1) of the Environment (Wales) Act 2016 requires public authorities to seek to maintain and enhance biodiversity in the exercise of their functions.

15.34 We therefore consider that it would be desirable to make it plain that a tree preservation order may be made on the basis of factors other than appearance (visual amenity). 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.

15.35 We note that regulation 4 of the TCP (Control of Advertisements) Regulations 1992, considered in the previous Chapter, provides that, in exercising powers under those Regulations, an authority is to do so in the interests of amenity and public safety; and it then goes on to list (on a non-exclusive basis) some factors that are relevant to amenity and some to public safety.[33] We provisionally consider that a similar approach could be adopted in relation to the exercise of functions of the Code relating to trees. The Bill could thus state

(1) that those functions are to be exercised in the interests of amenity;

(2) that "amenity" for these purposes includes appearance, rarity, biodiversity, and historic, scientific and recreational value; and

(3) that the Welsh Ministers may provide in regulations a list of factors relevant to amenity.

15.36 The Regulations could then include, if it were considered desirable, a more detailed list of factors to be taken into account in the interests of amenity. That would enable the legislation to be changed more readily to reflect changing policy imperatives,

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30 TCP (Scotland) Act 1997, s 160(1), (1A), substituted by Planning etc (Scotland) Act 2006, s 28.

31 *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.

32 Oxford Dictionary.

33 See **para 14.2**.

15.37 In addition, the inclusion – as we proposed earlier – of a general duty to have regard to the development plan and to national policy will mean that those will automatically be relevant to the exercise of functions in relation to trees. Many development plans already contain policies and supporting text relating to the use of TPOs to protect trees. National policy is in TAN 10, of which an updated version will no doubt be issued at the same time as the new system introduced by the Planning Act 2008 comes into effect in Wales.

15.38 Such policies and guidance are invariably framed to be in the interests of amenity – in the wider sense of that term, outlined above – so that the reference to the development plan in this context will help to create a joined-up system.

Consultation question 15-2.

We provisionally propose that the Bill should provide;

(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.**

Do consultees agree?

The making of tree preservation orders

15.39 The TCPA 1990 states that a planning authority may make an order to preserve "trees, groups of trees or woodlands".[34] The 1999 Regulations require that an order "shall specify the trees, groups of trees or woodlands to which it relates".[35] And the current model order (in the Schedule to those Regulations[36]) prohibits the cutting down [etc] of "any tree specified in Schedule 1 to this Order or comprised within a group of trees or in a woodland so specified". And all orders require to be confirmed if they are to have effect for more than six months after they are made.

15.40 An order protecting a single tree or a group of individually specified trees is straightforward – the trees to be protected are specified in a schedule, and shown on a map attached to the order.

15.41 However, the Schedule to the model order envisages that it may protect "trees specified individually" or "trees specified by reference to an area", "groups of trees"

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34 TCPA 1990, s 198(1).

35 TCP (Trees) Regulations 1999, reg 2(1)(a).

36 See **para 15.6**.

and "woodlands".[37] This introduces the concept of an "area order", not referred to anywhere else in the legislation. An "area" order is designed to protect all trees, of whatever age or species, growing anywhere within an area shown on an Ordnance Survey plan accompanying the order.

15.42 This raises several problems. First, it is commonly assumed that an area order only protects those trees that were in existence at the time the order was made. As time goes on this becomes increasingly problematic.

15.43 Secondly, the Court of Appeal in *Evans v Waverley BC* has held that woodland orders protect all trees, of whatever species or age, that are within the relevant block of land.[38] However, the prohibition in the model order (noted above) relates to "any tree specified in Schedule 1 … or comprised within a group of trees or in a woodland so specified". It is not clear why the approach in *Evans*, if correct, would not also apply to the interpretation of an area order, so that it would protect all trees in the area, whether or not they were in existence at the time the order was made. If there is to be a distinction between area orders and woodland orders, it should be made explicit on the face of the Bill.

15.44 Thirdly, 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.

15.45 The use of area orders has for many years been discouraged by the UK Government. TAN 10 thus states that "the area classification should only be used exceptionally, and only until the trees can be given individual or group classification".[39] The courts too have urged authorities to exercise care in not making "blanket TPOs".[40] The UK 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 being protected individually or by reference to groups; and that existing area orders would cease to have effect after a five-year transitional period.[41] We provisionally consider that that is still a sensible approach.

15.46 As to woodland orders, if the approach of the courts in *Evans* (noted above) were not correct, it would be administratively burdensome to have to renew orders at regular intervals to ensure the protection of trees coming into existence (either planted or self-seeded) after an order had first been made. We therefore consider that it would

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37 Sch 1 to the sample order (in the Schedule to the TCP (Trees) Regulations 1999,

38 *Evans v Waverley BC* [1995] 3 PLR 81, CA, at p 87B, 93C; *R (Plimsoll Shaw Brewer) v Three Rivers DC* [2007] EWHC 1290 (Admin) at [22]; *Palm Developments Secretary of State* [2009] EWHC 220 (Admin), 2 P&CR 16, at [42].

39 TAN 10, Annex A, para A.5; see also Welsh Office Circular 64/78, *Memorandum*, para 43.

40 *Robinson v East Riding of Yorkshire Council* [2002] EWCA Civ 1660 at para 24.

41 *Tree Preservation Orders: Review*, Department of the Environment, 1994, paras 2.16-2.19.

be helpful to confirm that they do indeed protect all trees – of whatever age – within the specified area.

15.47 We therefore provisionally propose that the powers in the Bill enabling the Welsh Ministers to make regulations as to tree preservation orders provide

(1) for orders to be made to protect trees, specified individually or by reference to an area; groups of trees; and woodlands;

(2) that orders relating to trees specified by reference to an area or groups of trees protect only those trees that were in existence at the time the orders were made;

(3) that all orders cease to have effect unless they have been confirmed within six months;

(4) 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;

(5) that existing area orders, already confirmed as such, cease to have effect after five years; and

(6) 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.

We provisionally propose that the Bill and the Regulations made under it should provide:

(1) **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.**

Do consultees agree?

Notification of new orders

15.48 Any breach of a tree preservation order is a strict liability offence. In order to minimise the chance of anyone inadvertently committing an offence, therefore, it is therefore important that:

(1) the making (and subsequent confirmation) of an order is promptly and properly notified to all those likely to be affected, who may be about to carry out works to the tree in question;[42]

(2) the existence of the order is made a local land charge, so as to bring it to the attention of future owners of the property; and

(3) a copy of the order is kept available for public inspection, to inform those intending to carrying out works in the future.

15.49 This is achieved by procedural requirements in the relevant regulations.

15.50 As to the first point, 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.[43] In some cases, this can be a major administrative exercise. The 2012 Regulations in England

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42 See for example *Knowles v Chorley BC* [1998] JPL 593.

43 TCP (Trees) Regulations 1999, reg 1(2).

sought to simplify this, by limiting the notification to the owners and occupiers of "the land on which the trees [etc] are situated". This 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.

15.51 We provisionally consider that the regulations should make it clear that an 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.

15.52 We consider the significance of the third point in the context of prosecutions for unauthorised works.[44]

Consultation question 15-4.

We provisionally propose that it should be clarified that the making of 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.

Do consultees agree?

WORKS TO PROTECTED TREES

Overlap with planning permission

15.53 In our Scoping Paper, we noted that there was some overlap between planning permission and consent for works to protected trees.

15.54 This arises partly because the carrying out of works to trees could be said to be development, requiring planning permission – as such works have something in common with landscaping works, which are sometimes considered to be engineering operations. It is true that a tree is part of the land itself, but so are minerals before they are extracted. However, we note that "mining operations" are specifically highlighted as a separate category of development; and that there appears to be no reported case in which anyone has even suggested, far less successfully argued, that tree works are development requiring planning permission.

15.55 We therefore do not see any need for any clarification of the law to include works to trees within the scope of development requiring planning permission.

15.56 Secondly, tree works are sometimes carried out in association with development proposals. However, in each case, the relevant regulations ensure that the grant of permission overrides the need for consent under any tree preservation order, or notice in relation to any conservation area, or felling licence, as the case may be. It

[44] See **paras 15.114 to 15.119.**

is therefore desirable if those considering applications for such consents are aware of the general planning position, and if those considering the grant of planning permission are aware of the implications of the proposed development on any trees. But there is no question of two consents being required.

15.57 However, more often tree works are carried out as an entirely freestanding operation, and there is no overlap with mainstream planning control.

15.58 We therefore do not see any benefit in bringing works to trees within the general planning system.

Consultation question 15-5.

We provisionally consider that there would be no benefit in bringing works to trees within the scope of development requiring planning permission.

Do consultees agree?

Need for consent

15.59 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.

15.60 Under the current law (prior to amendment by the Planning Act 2008), the principal exceptions are contained within the TCPA 1990:

(1) works to trees that are dying, dead or dangerous;

(2) works necessary as a result of a statutory requirement;

(3) works necessary to prevent or abate a nuisance; and

(4) forestry works approved by Natural Resources Wales.[45]

Other exceptions are provided within the order itself – the precise wording of which will depend on the model order in force at the time it was made.

15.61 Under the new system, introduced by the Planning Act 2008, all of the exceptions to the need for consent – regardless of the date of the order – will be in the regulations made under the Act, which will no doubt be slightly amended from time to time. This will be much simpler. However, 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.

[45] TCPA 1990, ss 198(6), 200.

Works to dead, dying or dangerous trees

15.62 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".

15.63 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. When the new system was introduced in England, therefore, the Regulations excepted from the need for consent only the following categories of works:

> "14(1)(a) the cutting down, topping, lopping or uprooting of a tree
>
> (i) 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 serious harm, or to such other extent as agreed in writing by the authority prior to the works being undertaken; …"[46]

15.64 This effectively removes the "dying" element of the exception in section 198(6)(a), and tightens up the "dangerous" element.

15.65 The new exception relating to dead branches is clearly designed to allow householders and others to remove deadwood regularly without consent, thus rendering lawful activity that has no doubt occurred on very many occasions. It is to that extent sensible. But it may have unfortunate consequences where, as commonly occurs with veteran trees, a substantial proportion (but not the whole) of a tree is dead – since it would be possible to remove, perfectly lawfully, one branch after another until there is no point in keeping what is left.

15.66 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".[47] 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.[48] That means that if a tree is dead (or dying) ***and*** dangerous, consent will not be required to make it safe. And if the removal of a branch is necessary for safety reasons – for example because of a weak fork – that too would not need consent. But the need for consent cannot be avoided merely because a tree is dead or dying, so long as it is not dangerous.

15.67 We are aware that a tree that is dead or dying may in some cases be a significant habitat for wildlife; and that its removal may for that reason be undesirable. In other

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47 TCP (Scotland) Act 1997, s 160(6)(a).

48 Scottish Government Circular 1 of 2011, *Tree Preservation Orders*, Annex A.

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.

15.68 We provisionally suggest, therefore, that the approach taken in Scotland is preferable, so that 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.[49]

15.69 As to works said to be necessary for safety, we consider that the approach taken in regulation 14(1)(c) of the new English Regulations is preferable to that envisaged by the current wording of section 198(6)(a) of the TCPA 1990, in that the former focusses on the necessity of the particular works proposed, rather than on the state of the tree. The new English provision is also more tightly drafted than the corresponding exemption in Scotland. It also accords with the decision of the Court of Appeal in *R v Brightman*, which established that a duty lies on the accused to establish that a tree was dangerous at the time of the works, not on the authority to prove that it was not).[50] And it follows the approach that has been taken since 1986 in relation to works to listed buildings that are said to have been necessary for health or safety.

Consultation question 15-6.

We provisionally consider 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 consider that the exemption 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).

Do consultees agree?

Works to prevent or abate a nuisance

15.70 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 in identical terms.[51]

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49 *Taking Forward Wales's Sustainable Management of Natural Resources*, Welsh Government, June 2017., p 26 – paragraph (b).

50 [1990] 1 WLR 1255.

51 TCP (Scotland) Act 1997, s 160(6)(b).

15.71 This provision has given rise to considerable uncertainty.[52] 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, they can be removed wherever they encroach into neighbouring airspace or soil, without there being any need to show that they have caused any damage (the latter is sometimes referred to as "pure encroachment").

15.72 A provision in the same terms has been in existence in each planning Act in England and Wales since 1947. The position at common law at that date was as had been stated by the Court of Appeal in *Lemmon v Webb* half a century earlier, as follows:

> The encroachment of the boughs and roots [of a tree] over and within the land of an adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance. For any damage occasioned by this, an action on the case would lie. Also, the person whose land is so affected may abate the nuisance if the owner of the tree after notice neglects to do so.[53]

15.73 That decision, which was followed in other pre-1947 decisions,[54] strictly related only to encroaching branches; but it was more recently adopted by the House of Lords in *Delaware Mansions Ltd v Westminster CC* in relation to encroaching roots.[55] And it has also been followed in very many other cases over the years. It was also held in *Delaware Mansions* that "damage consisting of the impairment of the load-bearing qualities of residential land is … itself a nuisance".[56]

15.74 The phrase "the abatement of a nuisance" thus had a clear and well-established meaning well before its first appearance in the context of tree preservation orders in the TCPA 1947 (and earlier private legislation[57]). It referred then, and still refers, to the self-help remedy available to anyone who owns or occupies land over or in which there is a branch of a tree that is growing on neighbouring land. There was no need to prove damage. Lord Parker CJ in *Edgeborough Building Co v Woking UDC* thus

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52 TAN 10, para 26 notes that "the legality of such action is uncertain".

53 *Lemmon v Webb* [1894] 3 Ch 1, CA, per Kay LJ at p 24. That decision also reviewed all the authorities going back to the eighteenth century; and was not doubted when the case went on to the House of Lords ([1895] AC 1).

54 *Smith v Giddy* [1904] 2 KB 448, *Mills v Brooker* [191] 1 KB 555 (branches); *Butler v Standard Telephones and Cables* [1940] 1 All ER 121 (roots).

55 *Delaware Mansions Ltd v Westminster CC* [2002] AC 321, HL at [12], per Lord Cooke of Thorndon; and see the decision of the Court of Appeal in *Davey v Harrow Corpn* [1958] 1 QB 60.

56 (1998) 88 BLR 99 at [33]. It is not clear why this principle should be limited to residential land.

57 See, for example, Essex County Council Act 1933, s 144: "no person shall cut down … any tree … except … (c) to such an extent as may be necessary to prevent its constituting a nuisance to the owner or occupier of neighbouring lands; or (d) to such an extent as may be necessary in pursuance of a right to abate a nuisance."

considered (obiter) that there was much to be said for the view that there was no reason for departing from the ordinary meaning of "nuisance" in the legal sense.[58]

15.75 More recently, in *Perrin v Northampton BC*, it was argued that the nuisance identified in section 198(6)(b) did not have to be an "actionable nuisance", but merely a nuisance in the broader sense of the common law. At first instance, Judge Peter Coulson QC, sitting in the Technology and Construction Court, considered that argument to be incorrect.[59] However, when the case went on to the Court of Appeal, both Sir John Chadwick and Blackburne J had some doubt as to whether it was possible to distinguish between "actionable nuisance" and "pure encroachment". The latter noted that "it is, to say the least, surprising, that if Parliament intended the expression involved some ingredient over and above "pure encroachment" it did not say so." However, the Court allowed the appeal on other grounds, and did not have to decide the point.[60]

15.76 The precise meaning of the phrase "abatement of a nuisance" thus remains uncertain; it is indeed probably one of the most significant of the 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 consider that it would be helpful for that uncertainty to be resolved.

15.77 Thus, it commonly occurs that a tree in A's garden overhangs the boundary with B's garden, and affects both A's property and B's property – either by, for example, shedding leaves and blocking drains, or by causing foundations to subside. If the tree is protected by a TPO, under the present law, A requires consent to carry out the works to the parts of the tree in or above his garden; but B probably does not require consent to carry out works to the roots or branches in or above her garden (even if they amount to almost half the tree). This seems illogical.

15.78 The Government has, in the past, suggested introducing a new requirement whereby works to prevent or abate an actionable nuisance could be carried out without consent, but subject to a requirement to give prior notice to the planning authority. That seems very cumbersome, and begs the question of what, precisely, constitutes an actionable nuisance.

15.79 We provisionally consider that it would be more straightforward to abolish altogether the "nuisance" exemption, so that landowners would still have a common law right (as per *Lemmon v Webb*) 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 precisely 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.

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58 (1966) 198 EG 581.

59 [2007] 1 All ER 929, 1 P&CR 481, JPL 723 at [34]. [35].

60 [2008] 1 WLR 1307, CA at [27], [29], [66], [67]. Wall LJ agreed with both judgments.

15.80 This proposal, if implemented, would potentially lead to more applications for consent than at present. However, because of the considerable uncertainty as to the law that currently exists, we suspect that very few people proposing to carry out works to protected boundary trees actually rely on the exemption at present. We therefore consider that the resources implications arising from a slight rise in the number of applications would be counterbalanced by a decrease in uncertainty. But we would welcome the views of consultees on this point.

Consultation question 15-7.

We provisionally consider 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.

Do consultees agree?

Works to saplings

15.81 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[61]) following the removal of a tree because it is dead or dangerous or has been removed unlawfully. In such a case it would be illogical for the owner of the sapling to be able to remove it without consent.

15.82 However, an order will also apply to self-seeded saplings within a protected woodland – since, as noted above, a woodland order protects all trees, even those first appearing many years after it was made. In that case, it would be unhelpful to require consent to be obtained for the removal of undergrowth and scrub (which is likely to contain such saplings).

15.83 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 less than a specified size.[62] 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 just such a provision, whereby consent under the order is not required for the cutting down, uprooting, topping or lopping of a tree having a diameter not exceeding 75mm (or 100mm in a woodland where the work is to improve the growth of other trees).[63]

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61 See **para 15.92**.

62 TCP (Trees) Regulations 1999, reg 10(1)(e), (f).

63 Art 4(c), (d) of the model order at Scottish Govt Circular 1 of 2011, *Tree Preservation Orders*, Annex A.

This allows for the thinning of woodlands, although it does not protect newly planted saplings in other cases.

15.84 We provisionally consider 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

(1) a requirement under section 206 of the TCPA 1990; or

(2) a condition of a planning permission or a consent to fell another tree.

15.85 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.

Consultation question 15-8.

We provisionally propose 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

(1) **a requirement under section 206 of the TCPA 1990 or**

(2) **a condition of a planning permission or a consent to fell another tree.**

Do consultees agree?

Certificate as to need for consent

15.86 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). And here too, this is particularly unfortunate given that the carrying out of works to protected trees without consent is a criminal offence.

15.87 It is possible to seek an informal opinion from an authority; but such an opinion will not necessarily bind it in the event of subsequent enforcement proceedings.[64] And it would in theory be possible to obtain from the High Court a declaration as to the need for consent.[65] But it is not possible to obtain from the planning authority a binding certificate of lawfulness, as there is no link with planning permission (as there is in relation to at least some displays of advertisements).

15.88 Again, therefore, we provisionally consider that it would be more straightforward for there to be a mechanism, not dissimilar to that governing applications for certificates

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64 *Postermobile v Brent LBC* , the Times, 8 December 1997; *R v Westminster CC) v National Car Parks* [2002] 21 February, unreported; see **para 14.67**.

65 Although this may be difficult in practice; see *Chambers v Guildford BC* [2008] JPL 1459, QB.

of lawfulness of proposed development (CLOPUDs), whereby anyone could seek a binding decision as to the lawfulness of proposed works to protected trees – that is, as to whether they would amount to an offence under section 210 of the TCPA 1990 if they were to be carried out. Such a certificate, if issued, would then prevent the authority from instituting a prosecution.

15.89 As with our similar proposal relating to certificates as to the need for consent for the display of advertisements[66], we would welcome the views of consultees as to how many such applications there might in fact be for certificates as to the need for consent for tree works, and as to whether the burden of processing them would be greater or less than the benefit that would arise from having an easy means of achieving certainty.

15.90 The procedure as to such applications would probably best be included in the new Regulations when the new system is brought into effect; but the enabling provisions in the Bill would need to be adjusted accordingly.

Consultation Question 15-9.

We provisionally propose 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.

Do consultees agree? And and what might be the resource implications of this proposal?

Applications for consent

15.91 There is at present no requirement for a planning authority to acknowledge receipt of an application for consent under a tree preservation order, as there is with other types of application under the TCPA 1990. Government guidance in England suggested that to do so would be good practice.[67] We suggest that this omission could be rectified when new regulations are made.

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66 See **para 14.70**.

67 *Tree Preservation Orders: A Guide to the Law and Good Practice*, Department of the Environment, 2000, para 6.42.

Consultation question 15-10.

We provisionally propose that planning authorities should be required to acknowledge applications for consent under the trees regulations.

Do consultees agree?

REQUIREMENT TO PLANT REPLACEMENT TREES

Location of the replacement tree

15.92 Section 206 of the TCPA 1990 imposes a duty to plant a replacement tree where

(1) a tree protected by a tree preservation order is removed, uprooted or destroyed unlawfully, or

(2) a tree protected by an order (other than a woodland order) is removed without consent because it is dead, dying or dangerous.

15.93 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 provisionally consider 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.[68]

15.94 This would reflect the replanting requirement as it applies to protected woodlands, which requires the replacement of trees that have been removed etc by the planting of the same number of trees "on or near" the land on which those trees stood.

Consultation question 15-11.

We provisionally propose 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).

Do consultees agree?

Variation of tree replacement notice

15.95 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

[68] And see *Tree Preservation Orders: Review*, Department of the Environment, 1994, paras 2.44, 2.45.

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.

15.96 It appears that there is at present no power for a planning authority to waive or relax a replacement notice. However, the Courts have held that an authority may enforce only some of the requirements of a planning enforcement notice[69]; and there is no reason why it should not also be able to vary a tree replacement notice, albeit not in such a way as to extend its scope.

15.97 We provisionally consider that the present exercise provides a good opportunity to introduce an explicit power to vary a replacement notice.[70]

Consultation question 15-12.

We provisionally propose that there should be an explicit power enabling a planning authority to waive or relax a replacement notice.

Do consultees agree?

Costs incurred by the planning authority

15.98 Section 209 of the TCPA 1990 provides that, where a replacement notice is not complied with, a planning authority may take action itself 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.[71]

15.99 It could be that the absence of a power for an authority to recover the costs it incurs in planting replacement trees could act as a deterrent to it taking such action; and the production of regulations to introduce the new system of tree preservation orders would be an opportunity to rectify this omission. On the other hand, the costs involved in planting replacement trees are not likely to be great, and the cost of recovering them are likely to be almost as great, which might make recovery not worthwhile.

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69 *Arcam Demolition & Construction Co. Ltd. v Worcestershire CC* [1964] 1 WLR 661.

70 *Tree Preservation Orders: Review*, Dept of the Environment, 1994, para 2.47.

71 Compare TCP General Regulations 1992 (SI No 1492), reg 14(2) (enforcement notices) and reg 14(3) (waste land notices).

Consultation question 15-13.

Section 209 of the TCPA 1990 provides for regulations be made enabling a planning authority to recover any expenses it has incurred in making and enforcing a tree replacement notice; but no such regulations have yet been made.

Would such powers be helpful in ensuring that replacement trees are planted in appropriate cases?

UNAUTHORISED WORKS TO TREES

15.100 Section 210(1) of the TCPA 1990 provides that it is an offence

(1) to cut down, uproot, or wilfully destroy a protected tree;

(2) wilfully to damage, top or lop the tree in such a manner as to be likely to destroy it; or

(3) 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).[72]

15.101 Section 210(4) provides that any other breach of a tree preservation order is an offence, attracting a maximum penalty of a fine of Level 4 on the standard scale (currently £2,500).

Reckless or indirect damage

15.102 The wording of section 210(1) indicates that the offence under that subsection is only committed where destruction or damage is "wilful". It might at first sight appear that this would not extend to damage etc caused as a result of acts that are carried out recklessly as to whether or not they will have that effect. A notable example is where a statutory undertaker, or a contractor on its behalf, is carrying out a programme of cable or pipe renovation over a large area including a number of protected trees.

15.103 Other examples of activities that might lead to trees being damaged include interfering with the water table, the use of harmful chemicals, the raising or lowering of soil levels (particularly during development) and the grazing of animals in woodlands. All of those might well have the effect of killing trees, even if only gradually, but it might be difficult or impossible to prove that the result was consciously intended.

15.104 The Courts have held that the word "wilful" in a criminal statute includes recklessness.[73] We consider that the phrase "intentional or reckless" is clearer than

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72 TCPA 1990, s 210(2), amended by 2015 SI 664, Sched 4, para 18.

73 *R v Sheppard* [1981] AC 394, per Lord Diplock at p 398.

"wilful" – and arguably has the same meaning.[74] We provisionally consider that the present exercise provides a good opportunity to make such a change. [75]

Consultation question 15-14.

We provisionally propose that the scope of the matters prohibited by a tree preservation order be extended to include the causing of harm to a tree:

(1) **intentionally; or**

(2) **recklessly (for example, by the raising or lowering of soil levels around the base of a tree, or the grazing of animals in woodlands).**

Do consultees agree?

One offence or two

15.105 In the TCPA 1947, the relevant offence was simply the contravention of a tree preservation order; the maximum penalty was a fine of fifty pounds. This presumably included both the felling of a magnificent specimen tree and the removal of a branch of a tree in a woodland.

15.106 Problems can arise where works (other than cutting down, uprooting or destruction) have been carried out in circumstances such that, at the time of mounting a prosecution, it is not clear whether or not they will lead to the destruction of the tree. If a contractor is charged under section 210(1), the evidence adduced may be sufficient to prove that the contractor carried out works to a tree, and thus to justify conviction under section 210(4), but not to prove beyond reasonable doubt that those works were likely to destroy the tree.

15.107 The distinction between the two offences was introduced in the Civic Amenities Act 1967. The original Bill (a private members' Bill) simply proposed increasing the maximum penalty for any contravention of an order, from £50 to £250. In response, the Government proposed an amendment that was subsequently enacted, differentiating between the two categories.[76] The fines have since been substantially increased.[77]

15.108 If the trial is in the Magistrates' Court, the bench can simply find the accused guilty of the lesser offence, but only if there is a separate charge on the summons referring to subsection (4).[78] However, if the accused has opted for jury trial, that course is not

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74 Blackstone, *Criminal Practice*, 2017, para A2.13.

75 See also *Tree Preservation Orders: Review*, Dept of the Environment, 1994, paras 2.40, 2.41, which suggested proscribing damage caused "negligently or indirectly"

76 Standing Committee C, 8 February 1967, col 123.

77 See **paras 15.100, 15.101**.

78 *Lawrence v Same* [1968] 2 QB 93.

open, since the offence under subsection (4) is only triable summarily. Whilst a jury may find an accused person guilty of a lesser offence, it may only do so if the lesser offence is triable either way.[79] It follows that an accused person who has been charged with the more serious offence, whether or not in conjunction with a charge on the lesser offence, if he or she considers that the evidence may only support conviction on the latter, should opt for jury trial and then submit that there is no case to answer on the former.

15.109 It is also possible for an unscrupulous developer to destroy a tree that is inconveniently located by carrying out a series of relatively minor operations, each of which would only be punishable under subsection (4), but which together would render the tree not worth saving.

15.110 The simple solution to this problem would be to revert to the formula used in the TCPA 1947, referring to "any breach of a tree preservation order" – or, under the new system introduced by the Planning Act 2008, "any contravention of tree preservation regulations". Such a change was proposed by Alun Michael MP when the 2008 Act was proceeding through the House of Commons, but did not attract Government support.[80]

15.111 It would also bring the law relating to unauthorised works to trees in line with the position as to unauthorised works to listed buildings, in relation to which section 9 of the Listed Buildings Act 1990 simply provides that contravention of section 7 is an offence – triable either way, with an unlimited fine on conviction.[81] Section 7 in turn simply states that "no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration in any manner which affects its character as a building of special architectural or historic interest unless the works are authorised".

15.112 That clearly envisages a range of circumstances from the demolition of a Grade I building through to the removal of a chimney-pot from a Grade II building. In practice, the level of harm is reflected in the sentence imposed.[82]

15.113 We provisionally consider that it would be more straightforward to replace section 210(1) and 210(4) of the TCPA 1990 with a single offence, consisting of any contravention of tree preservation regulations.

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79 Criminal Law Act 1967, s 6(3).

80 Proposed amendment no 439 to clause 157. Hansard, 25 January 2008, col 407.

81 Listed Buildings Act 1990, s 9, amended by 2015 SI 664, Sched 4, para 19.

82 In line with the guideline cases *R v Duckworth* (1995) 16 Cr App R (S) 529 at p 531 and *R v Palmer* (1989) 121 Cr App R (S) 407 at 408, and guidance from the Sentencing Advisory Panel.

Consultation question 15-15.

We provisionally propose 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.

Do consultees agree?

The need to prove an order is available for inspection

15.114 It has already been noted that it is important that a copy of a tree preservation order is kept available for public inspection, to inform those who may wish to carry out works to the tree in question many months or even years after it was made.[83] It was partly the existence of this requirement that enabled the Divisional Court in *Maidstone BC v Mortimer* to conclude that the offence under section 210 of the TCPA 1990 was an offence of strict liability, not requiring proof by the prosecution of knowledge on the part of the accused. It noted that

> "it is not a difficult task for any member of the public … to obtain from the local authority reliable information on the question whether the tree is subject to a preservation order."[84]

15.115 The consequence of an authority failing to comply with the requirement as to keeping a copy of the order available for inspection were considered by the Divisional Court in *Vale of Glamorgan v Palmer*, in which the accused had tried to discover whether a tree was protected, but had failed to discover the existence of the order.[85] The Court observed that the quoted passage in *Maidstone* presupposed that a copy the relevant order was in fact available to be inspected at the time of the works. It went on to hold that where an authority could not establish that the order had been deposited for inspection, it could not be relied upon to found to found a prosecution.

15.116 Unfortunately, the Court in *Vale of Glamorgan* went on to hold that a failure to make the order available for inspection rendered it "invalid". That seems to be incorrect, since the validity of an order could only be challenged by an application to the High Court made within six weeks of it being confirmed; it is not open to the accused in a criminal trial to argue that an order is invalid. But the Divisional Court was clearly seeking to emphasise that such procedural requirements are important; so the accused in such a situation might have to rely on applying to have the prosecution stayed as an abuse of process. However, that seems to place too high a burden on someone who has in good faith tried to comply with the requirements of the law.

15.117 We consider 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 had

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83 See **para 15.48** above.

84 [1980] 3 All ER 552, per Park J at p 554f.

85 [1984] JPL 334.

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.

15.118 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 prohibited tree in contravention of tree preservation regulations; and the regulations (in England) prohibit to works to "a tree to which an order relates".[86] We provisionally consider 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.

15.119 It would also be appropriate for there to be a defence to a charge if the accused is able to show that he or she had not been served with a copy of the order, 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.

Consultation question 15-16.

We provisionally consider 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.

Do consultees agree?

86 TCP (Tree Preservation) (England) Regulations 2012.

TREES IN CONSERVATION AREAS

Notification procedure: the existing law

15.120 The existing legislation providing protection for trees in conservation areas is somewhat unsatisfactory, in that it involves a two-stage approval process – 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.

15.121 If the authority does make an order, and if the applicant is determined to carry out the works, the applicant then has to make an application for consent under the order (or, in future, under the regulations). If such consent is applied for, and is refused or granted subject to onerous conditions, it is then possible to appeal in the usual way. If the authority does not make an order, or if it makes no decision within six weeks of being notified, the works may go ahead with impunity at any time in the following two years.

15.122 In some cases, an authority may be content to see the proposed works go ahead, but only if they are carried out in a particular manner; and if the tree is to be felled, the authority may wish to secure the planting of a replacement. But there is no power for an authority to attach any conditions to a notice to the applicant allowing the works to proceed.

15.123 In practice, it is likely that the relevant officer of the planning authority, on receipt of a notice under section 211, will inspect the site and the tree in question – unless they are already well known – and will make a decision on the spot as to whether the proposed works are desirable (possibly subject to conditions). It would therefore involve no extra burden on the authority to issue a "decision" promptly, if necessary subject to conditions, rather than make an order, then await a further application for consent under that order, and then have to determine it formally.

Possible reform

15.124 We therefore provisionally consider 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.

15.125 This would not introduce a new procedure, so much as condense the rather 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 without further ado.

15.126 But it would allow applicants to know where they stand, and would avoid the need for any second application if the authority wishes to choose options (2), (3) or (4). If no response were received within the six-week period, and no TPO had been imposed, it could be assumed that the answer was as per the first option; if the answer were (2) or (3), there would be a right of appeal against the conditions; and if (4), against the refusal. If a tree preservation order were to be made, it would be on the usual provisional basis, needing to be confirmed within six months.

15.127 The notification procedure would operate just as at present. The procedure for option (1) would be as currently exists under section 211. The procedure would under option (2) would require a new power enabling an authority to impose conditions on a consent granted under section 211(3)(b)(i). And the procedure for options (3) and (4) could be simply a slight variation for the procedures that would otherwise relate to the determination of an application for consent to a TPO tree – the only difference would be that the notification that had been submitted under section 211 would automatically be deemed to an application for consent under the new TPO.

Consultation question 15-17.

We provisionally consider 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 (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.**

Do consultees agree?

Other points

15.128 A number of the points raised earlier in this Chapter in connection with the protection of trees by tree preservation orders also apply in relation to trees in a conservation area.

15.129 In particular, the definition of a “tree” as suggested above would apply equally to the provisions in the Bill as to trees in conservation areas.

15.130 And the points made earlier as to the exemptions relating to dead, dying and dangerous trees and works necessary to abate a nuisance would apply equally to the need to notify a planning authority where the tree in question is in a conservation area.

Chapter 16: Improvement, regeneration and renewal

INTRODUCTION

16.1 The TCPA 1990 is principally concerned with the management of development proposals by owners and occupiers of land and other developers. However, there are some provisions in the Act enabling planning authorities and other public bodies to intervene positively to secure improvements and regeneration.

16.2 In the first place, there are various powers, in the TCPA 1990 and related legislation, for planning authorities to intervene in respect of individual buildings and plots of land in private ownership:

(1) to bring about the improvement of land whose condition is affecting the amenity of the area, under sections 215 to 219 of the TCPA 1990 and section 89(2) of the National Parks and Access to the Countryside Act 1949 (in this Chapter referred to as "the 1949 Act"); and

(2) to carry out landscaping works on any land, under section 89(1) of the 1949 Act.

16.3 These are considered in **paragraphs 16.7 to 16.43**.

16.4 Secondly, there were available until recently powers for planning authorities in Wales to bring about the removal of graffiti and flyposting, under sections 48 to 52 of the Clean Neighbourhoods and Environment Act 2003 – similar to powers under sections 225F to 225K of the TCPA 1990, recently introduced in England. These are considered in **paragraphs 16.44 to 16.55**.

16.5 Thirdly, there are a number of area-based initiatives, generally in legislation other than the TCPA 1990 but closely linked with the planning system, including:

(1) enterprise zones, designated under Schedule 32 to the Local Government, Planning and Land Act 1980 ("the 1980 Act") ;

(2) new towns, now designated under the New Towns Act 1981 and related legislation; and

(3) urban development corporations, set up under Part 16 of the 1980 Act;

(4) housing action trusts, set up under Part 3 of the Housing Act 1988; and

(5) rural development boards, set up under the Agriculture Act 1967.

16.6 These are each considered in turn, in paragraphs **16.56 to 16.92**.

IMPROVEMENT OF UNSIGHTLY LAND AND BUILDINGS

Powers available

16.7 There are various statutory provisions enabling planning authorities to bring about the improvement of land whose condition is harming the amenity of the local area. It is probable that they are little used in practice, but they could potentially be useful in certain circumstances to enable neighbourhoods to be improved, often at relatively little cost. Which power is appropriate in a particular case will depend principally on whether the necessary improvement works are to be carried out by the owners of land, at their expense, or by the authority at its expense.

16.8 The first group of provisions are those in the TCPA 1990, enabling a planning authority in certain circumstances to serve a notice (under section 215) on the owner and occupier of land whose condition is harming the amenity of the neighbourhood, specifying steps to be taken to remedy it. Where such a notice is served, the recipient may appeal against its requirements (under section 217), and may be prosecuted for failure to comply (section 216). And the authority may itself carry out the specified steps at that person's expense (under section 219). The use of this procedure thus puts the duty to carry out the works – and to pay for them – firmly on the owner of the land.

16.9 The power to serve such a notice is in Chapter 2 of Part 8 of the TCPA 1990. This is slightly odd, as Part 8 (entitled "special controls") generally deals with controls over proposed works to protected trees (Chapter 1) and over proposed displays of advertising (Chapter 3). Chapter 2, by contrast, deals with the situation that arises where no-one is proposing to do anything (or at least anything constructive).

16.10 The powers available to a planning authority under the TCPA 1990 should be set alongside those available under the 1949 Act.[1] Under section 89(2) of that Act, an authority may carry out – with the agreement of the owners of the land – works for the improvement of any land in its area that is derelict, neglected or unsightly (or of any land that is likely to become derelict etc as a result of former underground mining operations). And under section 89(1) it may carry out landscaping works on any land (not just land that is derelict etc). An authority may also acquire land compulsorily, under section 89(5), for either purpose. The use of these procedures puts the responsibility for carrying out the works – and in practice for meeting (or at least contributing to) the costs of them – on the authority.

16.11 Although the provisions enabling an authority to carry out such works are within the 1949 Act, they can be used – unlike any other powers under that Act – in relation to land that is neither in a national park nor in the countryside.[2] That too is slightly odd.

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1 Section 89 of the 1949 Act has been substantially amended since it was first enacted – notably by the Local Authorities (Land) Act 1963, the Local Government Act 1972, and the Derelict Land Act 1982.

2 Of the substantive provisions of that Act, Part 2 deals with national parks; Part 3 with nature conservation; Part 4 with long-distance footpaths; Part 5 (and ss 90-92) with access to open country; Part 6 mostly with Natural England and Natural Resources Wales (NRW), and areas of outstanding natural beauty (AONBs). Part 1, dealing with National Parks Commission – and latterly the Countryside Council for Wales – has been repealed.

16.12 The two sets of provisions overlap to a significant extent, and we therefore consider them together here, beginning with those in the TCPA 1990.

Requiring the owner of unsightly land to carry out remedial works (section 215)

16.13 The effect of sections 215 and 217 of the TCPA 1990 is that a planning authority may serve a notice on the owner and occupier of land in its area requiring the land to be properly maintained, if the condition of the land:

(1) is adversely affecting the amenity of part of the authority's area or of the area of an adjoining authority; and

(2) is not attributable to, and does not result in the ordinary course of events from, the carrying on of operations on that land or a use of that land which is lawful under the TCPA 1990.

16.14 Where a notice is served under section 215, and comes into effect (possibly following an unsuccessful appeal), the recipients must comply with its requirements. Where they do not, the authority may enter the land and carry out the necessary works itself, and register the notice as a charge in Part 3 of the Local Land Charges Register, thus enabling the cost of the works to be recovered when the land changes hands.

16.15 Guidance was given by the UK Government in 2005 as to best practice in the use of powers under section 215.[3] It may be noted in particular that "land" includes a building, so this power can be used to bring about the improvement of a building in poor condition, as well as of open land.

16.16 The drafting of section 215(1) suggests that a notice may be served in any case where the first of the two tests above is satisfied – the first of the statutory grounds on which an appeal can be made against such a notice is that the condition of the land does not adversely affect the amenity of the area.[4]

16.17 However, the second ground of appeal is "that the condition of the land … is attributable to, and such as results in the ordinary course of events from, the carrying on of operations on that land or a use of that land which is not in contravention of Part 3 [of the TCPA 1990]".[5] This 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.

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3 *Town and Country Planning Act 1990 Section 215: Best Practice Guidance*, Office of the Deputy Prime Minister, London, January 2005. This in England. It only applies in England (and was not cancelled in 2014 when the Planning Practice Guidance was first issued there), but it is relevant to practice in Wales. Guidance on section 215 may be incorporated in due course into the *Development Management manual*.

4 TCPA 1990, s 217(1)(a).

5 TCPA 1990, s 217(1)(b).

16.18 In practice, therefore, both of the two tests above have to be satisfied before a notice can be served.[6] We provisionally consider that it would be clearer both for authorities and for landowners if the relevant provision in the Bill makes plain at the outset that both tests must be satisfied – rather than merely through the provision of a ground of appeal. And it would seem that the reference to the condition of the land being "attributable to" the activity on the land is superfluous.

16.19 It could also be made clearer that the second test relates only to the condition of land resulting from a lawful use of land that is currently in existence, rather than from a former use of land that was then (but is not now) lawful. In other words, where for example land was lawfully used some while ago for the storage of scrap vehicles, but that use was abandoned so that the land now has no lawful use, a notice under section 215 could be served to bring about its improvement.

Consultation question 16-1.

We provisionally propose that the Bill should be drafted so as to make clear that a notice under what is now section 215 of the TCPA 1990, requiring land to be properly maintained, can be issued 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 operations on that land or a use of that land that is lawful.**

Do consultees agree?

Consultation question 16-2.

We provisionally propose 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 once lawful, but are no longer lawful.

Do consultees agree?

The coming into effect of a section 215 notice

16.20 Section 215(3) of the TCPA 1990 provides that a notice under section 215 is to take effect at the end of the period specified in it, which must be at least 28 days from the date of service. This leads to the problem, already identified in relation to the discontinuance of advertisements, where notices relating to a single piece of land

[6] See **para 16.13**.

may be served on various interested parties (notably the owner and occupier of the land) on different dates, resulting in each of them being a nullity.[7]

16.21 Here too, we provisionally consider that the requirements as to the contents of a notice under section 215 be amended to ensure that a single notice is "issued", coming into force on a fixed date stated in it, with copies of that notice being served as appropriate. The fourth statutory ground of appeal would need to be modified accordingly.[8]

16.22 And – again as with discontinuance notices[9] – a notice under section 215 should contain a notice as to the recipient's right to appeal against it.

Consultation question 16-3.

We provisionally propose 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.**

Do consultees agree?

Appeals against section 215 notices

16.23 Since 5 May 2017, an appeal against a notice under section 215 lies to the Welsh Ministers.[10] The grounds of appeal are set out in an exclusive list in subsection 217(1). The first two relate to the condition of the land, and have been considered above.[11] The second two relate to the works that are required by the notice – that they exceed what is necessary for preventing the condition pf the land from adversely affecting the area; and that the period in which to carry them out is insufficient.[12]

16.24 The new procedure, which is designed to ensure that appeals against notices under section 215 can be handled by inspectors, is greatly preferable to the previous

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7 *Bambury v Hounslow LBC* [1966] 2 QB 204; see **paras 14.36 to 14.39**.

8 TCPA 1990, s 217(1)(d). See **para 16.23**.

9 See **para 14.34.**

10 TCPA 1990, s 217(2), amended by PWA 2015, s 48(2). This brings the law in Wales in line with the law in Scotland (TCP (Scotland) Act 1997, s 180).

11 See **paras 16.13 to 16.17**.

12 TCPA 1990, s 217(1)(c),(d).

arrangement, whereby appeals were to the magistrates' court.[13] The Welsh Ministers have made regulations providing for the steps to be taken in connection with making an appeal under section 217, the information to be provided, and as to the procedure by which such an appeal is to be considered.[14]

16.25 Paragraph I of Schedule 6 to the TCPA 1990 provides that the Welsh Ministers may by regulations prescribe certain classes of appeals that are to be determined by a person appointed by them.[15] Unfortunately, there is no such provision for appeals under section 217 – even though such appeals are eminently suitable to be determined by inspectors. We provisionally consider that this omission should be rectified. Such appeals could also be brought within the scope of the general provision in section 319B as to the handling of various proceedings.

16.26 In **Chapter 17**, we propose that the new Planning Code does not include special provision for planning-related challenges in the High Court, equivalent to Part 12 of the TCPA 1990.[16] If that is accepted, a provision equivalent to section 285(3) and (4) of the TCPA 1990, providing that a High Court challenge to a section 215 notice may not be brought on any ground that may be the basis of an appeal to the Welsh Ministers, will need to be included within the section of the Code dealing with unsightly land.

Consultation question 16-4.

We provisionally propose that the Bill should make it clear that all appeals against section 217 notices are normally to be determined by inspectors, in line with Consultation question 11-3.

Do consultees agree?

Carrying out remedial works on any unsightly land (section 89(2) of the National Parks and Access to the Countryside Act 1949)

16.27 Under section 89(2) of the 1949 Act, where it appears to a planning authority that any land in its area is "derelict, neglected or unsightly" – or is likely to become derelict, neglected or unsightly due to the collapse of the surface as the result of former underground mining operations – it may carry out "such works on that land or any other land as appear to it to be expedient for the purpose of reclaiming or improving that land or of enabling it to be brought into use".[17]

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13 That is still the case in England.

14 TCPA 1990, s 217(7); TCP (Referred Applications and Appeals Procedure) (Wales) Regulations 2017 (SI 544).

15 See **para 11.15**.

16 See Consultation question 17-9. Such challenges would instead be brought by ways of an application for judicial review under Part 54 of the Civil Procedure Rules.

17 National Parks and Access to the Countryside Act 1949, s 89(2) refers to "a local authority". By virtue of s 89(7), this means a planning authority.

16.28 Where land is not owned by the authority, it may only exercise its powers under section 89(2) with the consent of the owners of the land, on such terms as may be agreed. Any subsequent maintenance of the land, made necessary as a result of the tree planting or other works carried out under section 89, is to be carried out either by the authority or the owners, as may be agreed.[18]

16.29 The authority may acquire land that it does not own for the purposes of taking action under section 89(2).[19] Such acquisition is governed by the Compulsory Purchase Act 1965 and the Acquisition of Land Act 1981.[20]

16.30 We suspect that section 89(2) is probably largely unknown, and therefore little used in practice. And section 89(2) seems to overlap significantly with the provisions of sections 215 to 217 of the TCPA 1990, considered above. Land that is "derelict, neglected or unsightly" is likely to be such that its condition will adversely affect the amenity of the local area. Such land can therefore be the subject of a section 215 notice, unless its condition results from the carrying on of lawful operations or a lawful use.[21]

16.31 Under either section 215 of the 1990 Act or section 89 of the 1949 Act, action is initiated by the "local planning authority".[22] Under section 215, a notice is served by the authority; the necessary remedial works must then be carried out by the owners, at their expense (or at the expense of future owners, secured by a local land charge). Under section 89(2), there is no provision for the service of a notice as such, but the works may only be carried out with the consent of the owners, who must therefore be notified.

16.32 Where the condition of the land arises as the result of lawful use or operations, a notice under section 215 (as currently enacted) cannot be served. However, remedial works could be carried out by the authority itself under section 89, but only with the consent of the owner, which is only likely to be forthcoming on condition that the authority meets the cost of the work, which is likely to limit its applicability in practice.

16.33 "Land" for the purposes of a notice under section 215 is defined to mean any corporeal hereditament, including a building.[23] For the purposes of section 89 of the 1949 Act, it is defined to include land covered by water.[24] "Owner" has the same meaning in the two Acts.[25]

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18 1949 Act, s 89(3), (6).

19 1949 Act, s 89(5).

20 1949 Act, s 103.

21 For completeness, it may be noted that the Welsh Ministers have similar powers in relation to such land under the Welsh Development Agency Act 1976, s 16.

22 The term has the same meaning in the two Acts (see National Parks etc Act 1949, s 114.

23 TCPA 1990, s 336.

24 National Parks and Access to the Countryside Act 1949, s 114.

25 TCPA 1990, s 336; National Parks and Access to the Countryside Act 1949, s 114.

16.34 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 of the TCPA 1990 are thus 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 such 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.

16.35 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]

Harmonisation of the two procedures

16.36 We provisionally consider that it would be more satisfactory for the powers of a planning authority under section 89(2) of the 1949 Act – listed in the previous paragraph – 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 in the previous paragraph (buildings, and Crown land), that would not of itself give authorities any more powers than they currently possess, but it would bring those powers together into a coherent scheme.

16.37 The one additional power that would seem to be helpful would be to deal with the situation where an authority wishes to take action to improve the condition of land whose owner cannot be found. 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. We provisionally consider that this omission should be rectified.

16.38 Under a new procedure replacing section 89(2), therefore, 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:

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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).

(1) 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

(2) where it has received no response to the notices within a specified time.

16.39 This could be argued to be an interference with the entitlement of persons to the peaceful enjoyment of their possessions, and thus a breach of article 1 of the first Protocol to the ECHR, but we consider that the requirements as to notification and publicity would be sufficient to ensure that the provision would strike a reasonable balance between private rights and the public interest.

16.40 And, as with the existing procedure under section 89, where an authority does not receive a satisfactory response to such a notice, it would then be able to acquire the land in question, by the use of a compulsory purchase order requiring the confirmation by the Welsh Ministers.

16.41 As with the current procedure under section 215 of the TCPA 1990, the cost of the works carried out could be recovered from the owner, where practicable, or made a charge on the land.

Consultation question 16-5.

We provisionally propose that the new Planning Code could 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.**

Do consultees agree?

Carrying out landscaping works (section 89(1))

16.42 Under section 89(1) of the 1949 Act, a planning authority may plant trees on any land in its area for the purpose of preserving or enhancing its natural beauty, on terms to be agreed with the owner. By virtue of section 114 of the 1949 Act, the term "tree planting" in the 1949 Act includes the planting of bushes, the planting or sowing of flowers, and the sowing of grass and the laying of turf[28]; and "preservation of the natural beauty of land" includes the preservation of its flora, fauna and geological and physiographical features.[29] Again, where appropriate, an authority may acquire land for this purpose.

16.43 We provisionally consider that this is a potentially useful power to bring about environmental improvements, and could with advantage be brought into the new Planning Code. Here too, the power could be amended to deal with land where there is effectively no identifiable owner – not least because such pieces of land are likely to be those most in need of such improvement. The consultation question above as to notification, publicity and cost recovery would therefore apply equally in this context.[30] And the reference to "tree planting", even as extended by section 114, may be unhelpfully restrictive – in that it might not include hard landscaping such a paving or paths; we consider that it would be more appropriate to include a more extensive list of works, such as is currently found in section 5(2) of the Inner Urban Areas Act 1978.[31]

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28 1949 Act, s 114(3).

29 1949 Act, s 114(3).

30 See **paras 16.38 to 16.41**.

31 Set out in the contents of the Inner Urban Areas Act 1978 s 5(2) as a single list.

Consultation question 16-6.

We provisionally propose that the new Planning Code should include powers, equivalent to those currently available under section 89(1) 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, using compulsory powers or by agreement.**

Do consultees agree?

GRAFFITI AND FLY-POSTING

Legislative background

16.44 One specific form of environmental degradation that has received particular attention in recent years is the defacement of buildings and other structures with graffiti and flyposting. This has been dealt with by a bewildering variety of pieces of legislation in recent years, some of which have applied in England and Wales, some only in England, and some only in Greater London.

16.45 Sections 48 to 52 of the Anti-social Behaviour Act 2003, allowing for the service of "graffiti removal notices" to bring about the removal of graffiti from premises, came into force in Wales on 15 March 2004.[32] Under that Act, an authority could serve a notice on the owner of the surface subject to the graffiti, or any other person responsible for the surface, inviting them to remove it. If that yielded no result, the authority could step in and do the removal work itself – and could recover the cost of so doing from the owner etc of the surface (although guidance suggested that such recovery would often not be appropriate).

16.46 Those provisions in the 2003 Act were extended by the Clean Neighbourhoods and Environment Act 2005 to enable "defacement removal notices" to be served to secure

[32] SI 2004 No 999. Notices under these provisions were initially called "graffiti removal notices"; the new title was introduced in 2005. Somewhat similar provisions had earlier been introduced in the London Local Authorities Act 1995, which empowered London borough councils to bring about the removal of graffiti (London Local Authorities Act (LLAA) 1995, ss 11 – 13, amended by LLAA 2004, ss 7,12 and LLAA 2007, s 18).

the removal of either graffiti or fly-posting; the amendments came into force in Wales on 15 March 2007.[33] They remained in force – in relation to England and Wales – until they were repealed by the Anti-social Behaviour, Crime and Policing Act 2014.[34]

16.47 The 2014 Act introduced a system of "community protection notices", as a partial replacement for the system of defacement removal notices under the 2003 Act. The explanatory note to Part 4 of the Act stated that community protection notices would replace current measures, including defacement removal notices; but would be different from them in that they would cover a wider range of behaviour (all behaviour that is detrimental to the local community's quality of life) rather than being limited specifically to certain types of behaviour (for example, graffiti).

16.48 The system of defacement removal notices under the 2003 Act had by then been supplemented in England by a new system introduced by the Localism Act 2011, dealing more specifically with fly-posting and graffiti[35] – which remains in force, alongside the new provisions introduced in 2014. However, in Wales, the repeal of sections 48 to 52 of the 2003 Act in 2014 was not accompanied by the introduction of any similar system. It is not entirely clear whether this was deliberate.

The present position

16.49 The result of this slightly curious legislative history is that there were in force in Wales provisions enabling authorities to deal specifically with graffiti (from 2004 to 2014) and flyposting (from 2007 to 2014). But there are no such provisions in force at present.

16.50 In particular, the system of community protection notices under the 2014 Act does not seem to provide an adequate substitute, in that they are targeted at conduct by particular individuals, including the occupiers of premises affected by graffiti or fly-posting, rather than at the premises themselves. And they provide no special procedure for the removal of graffiti and fly-posting from land occupied by statutory undertakers.[36]

16.51 We therefore provisionally consider that it would be appropriate to re-introduce 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

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33 SI 2006 No 2797.

34 Anti-social Behaviour, Crime and Policing Act 2014, ss 58, 181; Sched 11, para 41, which came into force on 20 October 2014.

35 Section 127(1) of the 2011 Act introduced TCPA 1990, ss 225C to 225E, to deal with persistent unauthorised advertising (similar to LLAA 2007, ss 11, 12). Section 127(2) introduced TCPA 1990, ss 225F to 225K, to deal with graffiti and fly-posting (similar to LLAA 1995, ss 11-13).

36 As provided by the TCPA 1990 ss 225E, s 225G, s 225H, s 225K, introduced by the Localism Act 2011.

to take preventive measures (such as applying stippled paint, which makes fly-posting more difficult) to minimise recurrence.

16.52 In either case, appropriate powers would be required to enable the authority to taking direct action where necessary, and recharge those responsible where appropriate. And special provisions would also be necessary where the land in question is owned or occupied by statutory occupiers.

16.53 However, firstly, we consider that, rather than introducing such provisions into the new Planning Bill (in line with the approach taken in England in 2011), it would be more 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.

16.54 Secondly, we recognise 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.

16.55 We therefore suggest 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.

Consultation question 16-7.

We provisionally propose that the Bill 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.**

Do consultees agree?

AREA-BASED INITIATIVES GENERALLY

16.56 The second half of this Chapter touches briefly on a variety of legislative regimes that have created powers to enable 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.

16.57 As explained below, each of the various initiatives has been used only to a very limited extent or not at all in Wales. 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. It therefore seems unlikely that the various pieces of legislation highlighted in the remainder of this Chapter will be utilised in the future.[37]

16.58 Further, we are aware 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 what constitutes 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 (UDC) 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 UDC in Wales.

16.59 It could be argued, therefore, that the legislation governing these various statutory regimes falls outside the scope of the present exercise. On the other hand, it is clearly linked to mainstream planning legislation, if only by the nature of the subject matter. And if it is to be reviewed or abolished, this would be an ideal time to do so. It is easy to put off such a review indefinitely, but to do so would result in the statute book continuing to contain legislation that is extremely unlikely ever to be used, which is not helpful for those devising future legislation or, more important, for users.

16.60 Thirdly, any legislative change proposed as part of the present exercise must fall within the legislative competence of the Assembly. However, urban and rural regeneration of the kind envisaged here is not a reserved matter (within the terms of Schedule 7A to the Government of Wales Act 2006[38]). We therefore do not consider that this need prevent the reform of these special statutory regimes.

ENTERPRISE ZONES

16.61 The TCPA 1990, and other pieces of legislation amending it, refer in various places to "enterprise zones". However, there are two distinct categories of enterprise zones, arising under quite distinct legal regimes:

(1) those designated by the Secretary of State under powers in the Local Government, Planning and Land Act 1980 ("the 1980 Act"), and

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37 The Town and Country Planning Association (in its report issued in February 2014, *New Towns Act 2015?*) urged the Government to update the new towns legislation; but the UK Government's most recent initiative (announced on 7 January 2017) to back the creation of garden villages and garden towns in England was launched without any fresh legislation.

38 As it will be once Schedule 1 to the Wales Act 2017 has come into effect.

(2) those recognised by the Treasury under the Capital Allowances Act 2001, as amended by the Finance Act 2012.[39]

16.62 As might be expected, both statutory schemes were devised to achieve urban regeneration through the encouragement of private sector development. Both involve fiscal measures, but only the first includes specific planning incentives. In the present context, it is the first type of enterprise zone that is relevant. However, to avoid any confusion, it is necessary to consider both.

Enterprise zones designated in the 1980s and 1990s

16.63 As to the first type of enterprise zone, 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. 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.

16.64 The scheme also exempted occupiers of non-domestic premises from the 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.

16.65 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.[40] 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.

16.66 Even though no enterprise zone has been designated under the 1980 Act for over 20 years, a variety of pieces of legislation amending older Planning Acts still refer to enterprise zones – for example, in recent years, the Mobile Homes (Wales) Act 2013, and the PWA 2015, as well as (in relation to England only) the Localism Act 2011, the Infrastructure Act 2015, and the Housing and Planning Act 2016.[41] Other legislation – notably the annual Supply and Appropriation Acts – refer in passing to "enterprise zones", and it appears that they mean zones that might be designated under the 1980 Act.[42]

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39 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 – but that is not relevant for present purposes.

40 Swansea (the first zone to be designated in Great Britain, under 1981 SI 757), 13 on the shores of the Milford Haven Waterway (1984 SIs 443/ 44), and Lower Swansea Valley (1985 SI 137).

41 Mobile Homes (Wales) Act 2013, s 39; PWA 2015, Sched 4, para 9; Localism Act 2011, Sch 12, para 12; Infrastructure Act 2015, Sched 4, para 13; Housing and Planning Act 2016, explanatory note, para 39.

42 Supply and Appropriation (Main Estimates) Act 2016, Sched ; Supply and Appropriation (Anticipation and Adjustments) Act 2016, Sched 1, para 2; and corresponding Acts for previous years.

Enterprise zones designated since 2011

16.67 More recently, following an announcement in the 2011 budget, 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. An "enterprise zone" in this context means "an area recognised by the Treasury as an area in respect of which there is a special focus on economic development and identified on a map published by the Treasury for the purposes of section 45K of the Capital Allowances Act 2001, as inserted by the Finance Act 2012."[43]

16.68 Schedule 1 to the Local Government Finance Act 2012 then made amendments to the treatment of non-domestic rates collected by billing authorities in England under the Local Government Finance Act 1988. The explanatory note to the 2012 Act observed that paragraph 8 of that Schedule gives the Secretary of State power by regulations to make provision for deductions from a billing authority's central share payment, to give effect to the Government's commitment to fund certain discretionary rate relief in "enterprise zones".[44] It appears that this refers to enterprise zones recognised by the Treasury under the new section 45K of the 2001 Act, rather than those designated by the Secretary of State under the 1980 Act.

16.69 Further amendments to the 2001 Act were made by the Finance Act 2014, which enables the Treasury to extend the enhanced capital allowance scheme in enterprise zones from 2017 to 2020.[45]

16.70 There are currently eight zones in Wales that have been designated under these provisions.[46] Their extent is shown on maps that can be accessed via the Treasury website and the Welsh Government's "Business Wales" website.[47]

16.71 The recognition of an enterprise zone under these provisions has no direct implications for the planning system, although it is likely that the planning authority will be more sympathetic to new development, and may use other tools such as local development orders to assist business start-ups.

Conclusion

16.72 It seems clear that no more enterprise zones are likely to be designated under the powers in the 1980 Act, and 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.

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43 Capital Allowances Act 2001, s 45K(14), inserted by Finance Act 2012, s 11, Sched 14. Assisted areas have been designated under, for example, SI 2014 No 3183.

44 Explanatory Note to Local Government Finance Act 2012, para 72.

45 Finance Act 2014, ss 64, 65; Sched 13.

46 Anglesey, Cardiff Airport and St Athan, Central Cardiff, Deeside, Ebbw Vale, Haven Waterway, Port Talbot Waterfront, and Snowdonia.

47 https://businesswales.gov.wales/enterprisezones/zones

16.73 We therefore provisionally consider 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.

16.74 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.

Consultation question 16-8.

We provisionally propose the amendment of

(1) **Part 18 of and Schedules 32 to the Local Government, Planning and Land Act 1980 (enterprise zones), and**

(2) **the provisions relating to enterprise zones in the TCPA 1990 and related legislation**

so that they apply in future only in relation to England.

Do consultees agree?

OTHER AREA-BASED INITIATIVES

New town development corporations

16.75 The legislation relating to new towns originated in the New Towns Act 1949, which formed one of the three original pillars of the post-War planning legislation, initially as a means of dispersing the pressure for new development out of the major cities in the early years after the War. The original idea was that the planning of each new town should be the responsibility of a separate development corporation. Each such corporation would also be the local planning authority within its designated area, responsible for general planning as well as for the establishment of the new town itself.

16.76 The Commission for the New Towns was established, under the New Towns Act 1959, to manage the dissolution of the development corporations. The 1949 Act was significantly amended, before being replaced by the New Towns Act 1965 (a consolidation measure), which was itself amended, and in due course replaced by the New Towns Act 1981 (also a consolidating measure).

16.77 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 wound-up in 1988.[48] Newtown New Town (in Powys) was designated in 1967,[49] and the functions of the Development Corporation were subsequently transferred to the Development Board for Rural Wales.[50] A third Welsh new town was proposed in 1969, at Llantrisant; but this proposal never came to fruition.[51]

16.78 The New Towns and Urban Development Corporations Act 1985 then provided for the completion of the new towns programme, and the eventual disengagement 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.[52]

16.79 It follows that almost the whole of the New Towns Act 1981, as amended by the 1985 and 2008 Acts, is redundant. We therefore provisionally propose that both Acts should be amended so that they no longer apply in Wales. The provisions of the 1985 and 2008 Acts are largely now spent, and need not be retained either.

Consultation question 16-9.

We provisionally propose the amendment of

(1) **the New Towns Act 1981, and**

(2) **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 apply in future only in relation to England.

Do consultees agree?

Urban development corporations

16.80 Following the running-down of the new town corporations, urban development areas were introduced in Part 16 of the Local Government, Planning and Land Act 1980. Unlike enterprise zones, set up under the same Act, which were designed to encourage private initiative, urban development areas were intended to facilitate regeneration by the public sector; and urban development corporations were

48 1949 SI 2054; 1988 SI 265

49 London Gazette, 28 December 1967; 1967 SI 1893.

50 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).

51 HC debates, 13 May 1969.

52 Housing and Regeneration Act 2008, s 50, Sched 5.

generally given most of the functions that would have otherwise been exercisable by local authorities under the TCPA 1990.

16.81 The procedure for the creation of an urban development corporation, and the powers that could be made available to it, were provided for in Schedules 26 to 31 to the 1980 Act, as amended by the New Towns and Urban Development Corporations Act 1985 and sections 177 to 180 of the Leasehold Reform, Housing and Urban Development Act 1993.

16.82 Corporations were initially set up in various urban areas in England in the period from 1980 to 1993.[53] They were generally considered to have been successful, and were dissolved in 1998.[54] Further development corporations were set up in 2003 and 2004;[55] and, most recently, one in 2015.[56] In each case, the corporation was constituted as the local planning authority, with full development management functions.

16.83 Only one urban development corporation was ever set up in Wales. Cardiff Bay Development Corporation was set up in 1987, but (unlike all the English corporations) it was not given the powers relating to planning policy and development management that would otherwise have been available to a local planning authority.[57] Its principal role was to oversee the construction of the Cardiff Bay Barrage. The Corporation was dissolved on 31 March 2000, and its management responsibilities largely taken over by Cardiff Harbour Authority, as provided for by the Cardiff Bay Barrage Act 1993.

16.84 Here too, it seems unlikely that the urban development corporation procedure will be used again in Wales. It follows that Part 16 of the 1980 Act, and the associated Schedules to that Act, are therefore 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.

16.85 In response to the Scoping Paper, the Country Land and Business Association (CLA) strongly supported the removal of the power to create urban development corporations.

16.86 The removal of the provisions allowing for setting up of the urban development corporations was also supported by Persimmon Homes West Wales and the Planning and Environmental Bar Association (PEBA).

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53 Including the London Docklands, and Merseyside.

54 1998 SI 769.

55 Thurrock, Thames Gateway, and West Northamptonshire; all were dissolved in 2014 (2014 SI 1181).

56 Ebbsfleet (SI 2015/747).

57 1987 SI 646.

Consultation question 16-10.

We provisionally propose 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 apply in future only in relation to England.

Do consultees agree?

Housing action trusts

16.87 Housing action trust areas could be designated by the Secretary of State, 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.[58]

16.88 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. In the event, only six areas were ever designated, between 1991 and 1994; all were in England (three in London, three elsewhere); and it appears that none of the trusts were designated a local planning authority. They were wound up at various dates between 1999 and 2005.

16.89 There seems to be no prospect of such areas being designated in Wales in the future. Section 60(1) of the 1988 Act should 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.

[58] TCPA 1990, s 9. In our Scoping Paper, we referred to various types of area-based initiatives, considered in this Chapter, but noted that they were only examples; housing action trusts are a further example of such an initiative, not mentioned in the Scoping Paper.

Consultation question 16-11.

We provisionally propose 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 apply in future only in relation to England.

Do consultees agree?

Rural development boards

16.90 The initiatives described above largely related to the problems of urban areas. A somewhat different mechanism was devised by the UK Government some fifty years ago 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. Under Part 3 of the Agriculture Act 1967, the Government was empowered to set up rural development boards in such areas, to draw up a programme to deal with those problems and needs.

16.91 The mechanism to establish such a board was in Schedule 5 to the Act. In the event, only one board was ever set up, in the north of England, in 1969; it was dissolved two years later.[59] 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.[60]

16.92 The possibility of this statutory scheme ever being used in the future seems vanishingly small. In the Scoping Paper, we accordingly proposed its repeal in relation to Wales. Persimmon Homes West Wales and PEBA agreed with that proposal.

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59 1969 SI 1095; 1971 SI 224.

60 T. Beresford, *We Plough the Fields: British Farming Today*, Penguin, 1975, pp 66-67. See para 19.

Consultation question 16-12.

We provisionally propose the amendment of Part 3 of and Schedule 5 to the Agriculture Act 1967 (rural development boards) and related legislation so that they apply in future only in relation to England and Scotland.

Do consultees agree?

Chapter 17: High Court challenges

INTRODUCTION

17.1 The normal means by which planning decisions can be challenged is by way of an appeal to the Welsh Ministers (considered in the first part of **Chapter 11**). However, decisions of the Welsh Ministers, and some decisions of planning authorities – notably the grant of planning permission – can be challenged by an application to the High Court. Such a challenge is in some cases by way of an application made under the provisions of Part 12 of the TCPA 1990; in other cases it will be by way of an application for judicial review, under Part 54 of the Civil Procedure Rules (CPR).

17.2 In this Chapter we consider those two procedures, to see whether there is scope for simplification. We also look briefly at the procedure to enable the correction of minor errors in decisions.

CHALLENGING VALIDITY OF DECISIONS

Statutory challenges

17.3 A person aggrieved by an order revoking or modifying a planning permission, or by a discontinuance order, a tree preservation order, or an order designating an area of special control of advertisements (or a costs order relating to any of those) may challenge it in the High Court by making an application under section 288(1)(a).[1] But the validity of such orders may not be challenged in any other proceedings;[2] that is, for example, a person being prosecuted for felling a tree protected by a tree preservation order may not challenge the validity of the order in the criminal proceedings.

17.4 A person aggrieved by certain decisions of the Welsh Ministers (and any related costs orders) may challenge them in the High Court by making an application under section 288(1)(b).[3] The decisions in question are:

(1) on an application called in by them for their decision, or an application for urgent Crown development;

(2) on an appeal (relating to applications for certificates of lawful development, planning permission, consent to display advertisements, or consent to carry out works to protected trees);

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1 TCPA 1990, ss 284(1)(g),(2), 288(1)(a), (4).

2 TCPA 1990, s 284(1)(e), (2).

3 TCPA 1990, ss 284(1)(g),(3), 288(1)(b), (4).

(3) to confirm or not to confirm a purchase notice, or to confirm a completion notice;

(4) in relation to an application for development of national significance (or for a secondary consent related to such development);

(5) to grant planning permission or to discharge a condition or limitation on a permission, following an appeal against an enforcement notice; or

(6) in relation to any direction under the regulations relating to advertisements.[4]

Here too, the validity of such decisions may not be challenged in any other proceedings.[5]

17.5 A person aggrieved by an order stopping up or diverting a highway (under section 247 or 248 of the TCPA 1990) or a footpath or bridleway (under section 257) may challenge it in the High Court by making an application under section 287, but not otherwise.[6]

17.6 The validity of the National Development Framework for Wales, a strategic or local development plan, and any revision of any of those, may be challenged by an application to the High Court under section 113(3) of the PCPA 2004, but not in any other legal proceedings.[7]

17.7 In each case, the challenge must be made on the grounds that:

(1) the decision was not within the relevant power under the relevant legislation, or

(2) a procedural requirement has not been complied with.[8]

17.8 Until relatively recently, there used to be an automatic right to make an application to the High Court under section 287 or 288. However, as a result of amendments made by the Criminal Justice and Courts Act 2015, such applications must now not be made without the permission of the Court.[9] The time limit for making such applications has always been six weeks from the date of the order or decision in question.[10]

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4 TCPA 1990, s 284(3)((h)(iii) also refers to certificates under regulations relating to advertisements or trees, but there are no such certificates in the current advertisements regulations , and neither certificates nor directions in the TCP (Tree Preservation) (England) Regulations 2012.

5 TCPA 1990, s 284(1)(f), (3).

6 TCPA 1990, ss 284(1)(c), (d), 287(1).

7 PCPA 2004, s 113(2).

8 TCPA 1990, ss 288(1), 287(2); PCPA 2004, s 113(3).

9 TCPA 1990, ss 288(4A), 287(2A); PCPA 2004, s 113(3A) – all inserted by Criminal Justice and Courts Act 2015, s 91, Sched 6, with effect from 26 October 2015 (SI 2015 No 1778).

10 See now TCPA 1990, ss 288(4B), 287(2B); PCPA 2004, s 113 (3B) – all inserted by Criminal Justice and Courts Act 2015, s 91, Sched 6. That time limit may not be extended (*Smith v East Elloe RDC* [1956] AC 736; *R v Secretary of State ex p Kent* [1990] 1 PLR 128.

17.9 An appeal to the High Court on a point of law may also be made, under section 289 of the TCPA 1990, against a decision of the Welsh Ministers on an appeal against:

(1) an enforcement notice[11];

(2) a tree replacement notice; or

(3) an unsightly land notice under section 215.[12]

Such appeals have always required the permission of the High Court.[13] And they must be made within 28 days of the decision in question (although that limit may be extended).[14]

17.10 Further statutory rights of appeal to the High Court against similar types of decisions are contained in sections 62 to 65 of the Listed Buildings Act 1990, section 22 of the Planning (Hazardous Substances) Act 1990, and section 55 of the Ancient Monuments and Archaeological Areas Act 1979. In almost all cases, there are similar procedural requirements[15], and similar provisions preventing challenges in the course of other proceedings.

17.11 It may be noted in passing that the House of Lords in *Boddington v British Transport Police* explicitly accepted that the provisions of the TCPA relating to enforcement were an example of a particular context in which an administrative act triggering consequences for the purposes of the criminal law was held not to be capable of challenge in criminal proceedings, but only by other proceedings:

> The Town and Country Planning Act 1990 contained an elaborate code including provision for appeals against [enforcement] notices, and that on the proper construction of section 179(1) of the Act all that was required to be proved in the criminal proceedings was that the notice issued by the local planning authority was formally valid.[16]

17.12 The same principle would apply in relation to challenges to planning decisions generally. That is, they may be challenged by an application to the High Court under Part 12 of the TCPA 1990, but not otherwise.

Challenge by way of judicial review

17.13 Other decisions made under the TCPA 1990, the PCPA 2004 and similar legislation cannot be challenged by the statutory procedures referred to above, but must be

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11 Other than a decision granting planning permission in response to an enforcement notice appeal, which must be brought within six weeks, under s 288.

12 TCPA 1990, s 289.

13 TCPA 1990, s 289(6).

14 Civil Procedure Rules ("CPR"), Part 52, Practice Direction para 22.6C(1).

15 The only exception is that the requirement for permission does not apply to appeals under the 1979 Act.

16 [1998] UKHL 13; [1999] 2 AC 143, per the Lord Chancellor at p 161, referring to the speech of Lord Hoffmann in *R v Wicks* [1998] AC 92 at p 120.

challenged by an application for judicial review under Part 54 of the Civil Procedure Rules ("CPR").

17.14 Decisions in this category include most decisions and orders by planning authorities, including in particular decisions to grant planning permission or other consents – so that challenges by third parties to the grant of permission must be by way of judicial review. Judicial review is also the appropriate procedure by which to challenge decisions taken by the Welsh Ministers in interim proceedings, or under informal arrangements, or as to whether to call in a planning application, or as to the procedure by which to determine an appeal or call-in, or to take no action. And it is appropriate for challenges to central and local government policy and procedure generally.

17.15 An application must also be brought under Part 54 where an applicant is seeking a mandatory, prohibitory or quashing order – that is, an order requiring a public body to do something, or to desist from doing something, or to quash a decision that it has made. And the Part 54 procedure may be used where the claim is for a declaration (a court order declaring the effect of the law in relation to a particular matter) in relation to a decision or other action by a public body under the planning Acts.[17]

17.16 A challenge under Part 54 has always required the permission of the High Court.[18] The position used to be that such a challenge had to be made "promptly, and in any event within three months". Since 2013, it must be made within six weeks.[19]

Comparison between the two procedures

17.17 Most Acts contain no special statutory procedure providing for a review of decisions by public authorities. There was no such special procedure, equivalent to section 288 of the TCPA 1990, in the TCPA 1947; and there is still no such procedure in the corresponding legislation applying to Northern Ireland. The statutory procedure that now exists in the 1990 Acts was first introduced in the TCPA 1959, in response to the recommendations of the *Committee on Administrative Tribunals and Inquiries* (the Franks Report) as to the perceived inadequacy of the judicial review system at that time.[20]

17.18 However, in the succeeding 50 years since the Franks Report, the judicial review system has been extensively developed, not least as a result of the changes made to the Rules of the Supreme Court in 1977 and the Supreme Court Act 1981. It is now widely recognised as a satisfactory mechanism for the review of administrative decisions.

17.19 Further, the distinctions between the statutory procedure under Part 12 of the TCPA 1990 and the judicial review procedure under Part 54 of the Civil Procedure Rules have now almost entirely disappeared. In particular, the Civil Procedure Rules were

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17 CPR, rr 54.2, 54.3.

18 CPR, r 54.4 (replacing Rules of the Supreme Court, Order 53, r 3, as amended in 1978).

19 CPR, r 54.5(5), inserted by SI 2013 No 1412. 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 (see CPR, r 54.5(A1), TCPA 1990, s 336).

20 TCPA 1959, s 31; see *Report of the Committee on Administrative Tribunals and Enquiries* (the Franks Report, 1957), Cmnd 218, para 359.

amended in 2013 so as to require all judicial review challenges under the planning Acts to be brought within six weeks – the same time limit for applications under Part 12; and Part 12 was itself amended by the Criminal Justice and Courts Act 2015 to require permission to be obtained for all High Court challenges.

17.20 Richard Harwood QC accordingly noted, in his book *Planning Permission*, that "there is an overwhelming case for legislative reform to deal with all planning challenges by judicial review, subject to statutory time limits where appropriate."[21]

17.21 In the Scoping Paper, we accordingly stated that we would consider whether Part 12 of the TCPA 1990 should continue to exist alongside judicial review.[22]

17.22 Only one consultee commented on this suggestion. The Planning and Environmental Bar Association (PEBA) agreed that there was a need to review the interrelationship between the two procedures:

> We share the Commission's view that, within the scope of this project, there is a need to review both the provisions of section 288 of the 1990 Act and the interrelationship between part 12 of the 1990 Act and the judicial review procedure. We note that the law on the exercise of judicial discretion in both statutory challenges to and applications for judicial review of planning decisions continues to be the subject of relatively frequent judicial commentary.

Procedure for challenges to validity of other planning decisions

17.23 By way of comparison, it is noticeable that sections 61N and 106C of the TCPA 1990 and sections 13 and 118 of the Planning Act 2008 contain a series of provisions relating to challenges to various categories of decisions and other matters. In each case, the provision is to the effect that:

> "a court may entertain proceedings for questioning [the relevant decision or other matter] only if –
>
> (a) the proceedings are brought by a claim for judicial review, and
>
> (b) the claim form is filed before the end of the period of six weeks beginning with the day after the day on which [the relevant decision was made or matter arose]."[23]

Possible simplification

17.24 We provisionally consider that it would be a significant improvement for there to be only one procedure by which to challenge all decisions under the Planning Bill – namely, judicial review. This could be achieved by introducing a provision along the lines of those noted in the previous paragraph, stating that all decisions of any public

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21 Harwood, *Planning Permission*, para 25.12.

22 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 5.91.

23 TCPA 1990, s 61N (neighbourhood development orders in England) and s 106C (planning obligations relating to development consent); Planning Act 2008, s 13 (national policy statements), s 118 (development consent orders) – all as amended by Criminal Justice and Courts Act 2015, s 92.

body under the Code (other than those where there is available a right of appeal to the Welsh Ministers[24]) – and all failures to make any such decision – may be challenged in the courts, but only by way of an application for judicial review.

17.25 Such a provision would prevent a collateral challenge being made to the validity of such a decision – for example, in the course of criminal proceedings – as at present.[25] It would also automatically introduce the procedures under Part 54 of the CPR.

17.26 The relevant time limits, to be prescribed in the Bill, would presumably continue to be six weeks in most cases. The only exceptions would be in relation to enforcement proceedings, where public policy decisions indicate that shorter time limits are desirable. As noted above[26], a four-week limit currently applies in the case of a challenge to a decision of the Welsh Ministers on an appeal against an enforcement notice[27], a tree replacement notice and an unsightly land notice. We provisionally consider that the same principle would apply equally to decisions to refuse a certificate of lawfulness of existing use or development.

17.27 Such a change would not lead to any alteration in the right of any person to apply to the courts to challenge the planning decisions and related actions of public bodies, but would mean that all such challenges would in future be brought under a single procedure. This is likely to require the approval of the UK Government department responsible for court procedures.

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24 Notably appeals against a notice that an application is invalid (under TCPA 1990, s 62ZA), the decision of a planning authority on a planning application (s 78), an enforcement notice (s 175); the decision on an application for a lawful development certificate (s 195) – or the corresponding provisions relating to listed buildings, conservation areas, advertisements and trees – or a tree replacement notice (s 203), and an unsightly land notice (s 217).

25 See **paras 17.10, 17.11** above.

26 See **para 17.9** above.

27 Other than a decision granting planning permission in response to an enforcement notice appeal.

Consultation question 17-1.

We provisionally propose that the provisions currently in 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 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.

Do consultees agree?

Cross-border applications

17.28 Section 286(1) of the TCPA 1990 prevents a challenge being made to a decision by a planning authority on the grounds that it should have been made by another authority. This might be relevant where an application relates to land crossing the border between the areas of two authorities, in which case the two authorities will reach an agreement as to which is to determine the application.

17.29 We thus consider that an equivalent provision should be included in the Code – possibly alongside the introductory provisions dealing with planning authorities generally.[28]

17.30 Section 286(2) need not be restated in the Code, as it only relates to England.

CORRECTION OF MINOR ERRORS

17.31 Under Part 5 of the PCPA 2004, where the Welsh Ministers or an inspector issue a decision under the planning Acts that contains a correctable error, they may correct the error if they are requested to do so by any person (under section 56(2)(a)) or if

[28] See **paras 5.131 to 5.137**.

they notify the applicant of their intention to do so (under section 56(2)(b)).[29] The procedure relates to a wide variety of decisions, notably those relating to various types of appeals.[30] This enables decision-makers to correct errors in a decision letter without having to go through the complex and expensive procedure of a High Court challenge. The procedure was designed to be used in connection with "obvious clerical errors … not material errors going to the substance of the decision."[31]

17.32 However, decision-makers may only take such action within the period allowed for a High Court challenge (normally six weeks from the date of the decision in question[32]). This has the disadvantage that where, as commonly occurs, a High Court challenge to such a decision is made just before the expiry of the relevant time-period, there is no scope for the decision-maker to respond by issuing a correction notice, so that the only option open to them may be to consent to judgment.

17.33 We provisionally consider that it would be appropriate to retain the existing provision whereby a request cannot be made (under section 56(2)(a)) and a notification cannot be given (under section 56(2)(b)) after the end of the statutory challenge period. However, there should be a period of, say,14 days within which the decision-maker can respond to such a request and the applicant can respond to such a notification. Once the request or notification has been made, the six-week time limit would be put on hold until either a response had been made or the 14-day for response had expired.

17.34 In addition, because the correction provisions are in the PCPA 2004, rather than in the planning Acts themselves, they may not be used to correct an error in the correction notice itself. That would be resolved if the provisions currently in Part 5 of the PCPA 2004 were to be brought into the Planning Bill, and the scope of the decisions that could be corrected were to be extended accordingly.

Consultation question 17-2.

We provisionally consider that the provisions of 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.

Do consultees agree?

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29 PCPA 2005, s, 56. It seems from the wording of s.57(1) that the two paragraphs of s. 56(2) are to be read disjunctively (that is, as if they were alternatives).

30 TCPA 2004, s.59(4).

31 Hansard, HL Debs, 5 February 2004, Vol 657, col 885.

32 See **para. 17.8** above.

Chapter 18: Miscellaneous and supplementary provisions

INTRODUCTION

18.1 This Chapter deals with a collection of miscellaneous provisions that relate to functions under the TCPA 1990 (and associated legislation) generally – as opposed to those relating only to the management of development, which were the subject of **Chapter 11**, or other specific functions. They fall into four broad categories.

18.2 First, the law in the preceding Chapters of this Consultation Paper broadly applies to development on any land in Wales, regardless of who owns the land and who is to carry out the development. But certain categories of land and development are treated slightly differently – notably those relating to statutory undertakers and the Crown (in Parts 11 and 13 of the TCPA 1990), local authorities and the Church of England (in Part 15).

18.3 Secondly, the planning system treats mining operations slightly differently from other forms of development (also in Part 15).

18.4 Thirdly, there are other miscellaneous and general provisions as to fees and charges for the performance of planning functions (in Part 14 of the TCPA 1990); as to inquiries and other proceedings (in Part 15); and as to the application of provisions in the Public Health Act for the purposes of various provisions of the TCPA 1990.

18.5 Finally, there are definitions of various terms used throughout the Act.

18.6 As with the provisions discussed in **Chapter 11**, most of those discussed in this Chapter will not be encountered often. But, here too, the relevant legislation (as it applies in Wales) must be fit for purpose, just as much as the legislation encountered more often in practice.

STATUTORY UNDERTAKERS

The definition of "statutory undertakers"

18.7 Part 11 of the TCPA 1990 deals with the application of planning law to the land and works of statutory undertakers – that is, in broad terms, bodies that undertake the provision of public services. They used to be thought of, and are still sometimes referred to, as "public bodies" or "public utilities", but some have now been partly or wholly privatised, and some have never been taken into public ownership.

18.8 The question of which bodies are "statutory undertakers" for the purpose of the Act is not particularly straightforward. The basic definition is in section 262 of the TCPA 1990, the wording of which is as follows:

(1) [bodies] authorised by any enactment to carry on any railway, light railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, pier or lighthouse undertaking or any undertaking for the supply of hydraulic power; and

(2) a relevant airport operator (within the meaning of Part 5 of the Airports Act 1986).[1]

18.9 For many (but not all) purposes, the Act provides that the following are also statutory undertakers in Wales:

(1) any gas transporter, water or sewerage undertaker[2];

(2) the Natural Resources Body for Wales[3];

(3) any universal postal service provider in connection with the provision of a universal postal service[4];

(4) the Civil Aviation Authority[5]; and

(5) a body that holds a licence under Chapter 1 of Part 1 of the Transport Act 2000 (air traffic control services).[6]

18.10 And the Act provides that providers of electricity services licensed under section 6 of the Electricity Act 1989 are also deemed to be statutory undertakers for various purposes under the TCPA 1990, depending on the extent of the powers conferred on them by their licence.[7]

18.11 For the purposes of the TCP General Permitted Development Order 1995, a statutory undertaker is defined as follows:

(1) a statutory undertaker as defined in section 262(1) of the TCPA 1990; and

(2) a universal service provider in connection with the provision of a universal postal service, the Civil Aviation Authority … the Natural Resources Body for

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1 TCPA 1990, s 262(1),(2). The only relevant airport in Wales is Cardiff Airport.

2 TCPA 1990, s 262(3),(4), amended by Utilities Act 2000, s 76.

3 TCPA 1990, s 262(3),(4), amended by Natural Resources Body for Wales (Functions) Order 2013 (SI No 755), Sched 2.

4 TCPA 1990, s 262(3),(4), amended by Postal Services Act 2000 (Consequential Modifications No. 1) Order 2001 (SI No 1149), Sched 1. See also TCPA 1990, s 262(5)(a),(b),(5B).

5 TCPA 1990, s 262(3),(4), amended by Transport Act 2000, Sched 5. See also TCPA 1990, s 262(5)(b).

6 TCPA 1990, s 262(3),(4), amended by Transport Act 2000, Sched 5. See also TCPA 1990, s 262(5)(b),(5A).

7 TCPA 1990, s 262(6),(7).

Wales, any water undertaker, any gas transporter, and any licence holder within the meaning of section 64(1) of the Electricity Act 1989.[8]

18.12 It will be appreciated that this is very similar (but not quite identical) to the combined effect of the definitions in section 262 of the TCPA 1990.[9] The differences are that providers of air traffic control services (licensed under the Transport Act 2000) and sewerage undertakers are statutory undertakers for most purposes under the Act, but not under the GPDO; providers of electricity services, and the services listed in **paragraph 18.9** above (other than air traffic control) are statutory undertakers for the purposes of the GPDO, but only for certain purposes under the TCPA 1990.

18.13 In addition, the GPDO automatically permits development not only by "statutory undertakers" (as defined in the previous paragraph), but also by drainage bodies, sewerage undertakers and electronic communications code operators, as well as "aviation development".[10]

The general position of statutory undertakers in planning law

18.14 Section 55(2)(c) of the TCPA 1990 provides that some minor works by statutory undertakers – for the purpose of inspecting or renewing any sewers, mains, pipes cables or other apparatus (including the breaking open of streets) – are not "development". They thus do not require planning permission, and do not even need to be permitted by the GPDO.

18.15 Secondly, as noted above, many other works by statutory undertakers – some relatively minor and some potentially quite significant – are permitted by various classes in Schedule 2 to the GPDO.[11] This usually applies only in relation to the operational land of the undertaker in question (see below). They can be the subject of article 4 directions[12] in particular cases, to ensure that they are only permitted (if at all) in response to a specific planning application, but where such a direction is made, compensation may be payable by the planning authority.[13]

18.16 Unless it is a condition of the permission in the GPDO that the statutory undertaker should notify the planning authority, it does not have to give any notice before carrying out work. However, if development is likely to have a significant local effect then, to

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8 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), Sched 1, and Natural Resources Body for Wales (Functions) Order 2013 (SI No 755), Sched 4.

9 See **paras 18.9 to 18.11**. Section 64 of the 1989 Act defines a licence as being a licence under s 6 of that Act; a licence holder for the purposes of the GPDO is thus the same as a licence holder for the purposes of s 262 of the TCPA 1990.

10 TCP (General Permitted Development) Order, Sched 2, Parts 14 to 18, 24, amended by SIs 1996 no 252, 1996 no 528, 2001 no 1149, 2003 no 2155, and 2013 No 755.

11 See **para 18.13**.

12 See **para 7.59.**

13 TCPA 1990, s 279(1)(a). Compensation is also payable in the event of the revocation or modification of a permission for such development that has been granted in response to a planning application (s 279(1)(b)). See also s 279(5)-(7) as to the entitlement to compensation; and ss 280-282 as to the assessment of compensation payable.

provide fair warning to persons likely to be affected (including other statutory undertakers), these should be discussed with the authority.[14]

18.17 Thirdly, planning applications for development by statutory undertakers are generally dealt with by planning authorities in the normal way. However, by virtue of section 266, the Welsh Ministers and the "appropriate minister" may issue a direction to the effect that particular matters are to be dealt with jointly by the Welsh Ministers and "the appropriate minister".[15] This can apply in relation to any of the following, insofar as they relate to development on operational land (or on land that is intended to become operational land):

(1) applications that are called in by the Welsh Ministers for their own decision;

(2) appeals;

(3) applications associated with enforcement appeals;

(4) modification and revocation orders; and

(5) discontinuance orders.[16]

18.18 The term "the appropriate minister" refers to the minister responsible for the field of activity in which the undertaking operates – for example, the Secretary of State for Transport in relation to a railway company.[17]

18.19 Such applications etc are rare, presumably due to the extensive permitted development rights enjoyed by statutory undertakers.

18.20 Applications for planning permission for development of national significance (DNS), or other applications for planning permission made directly to the Welsh Ministers[18], do not engage section 266, since section 266 applies only in relation to called-in applications and planning appeals after refusal by a planning authority. This means that applications for planning permission by statutory undertakers made directly to the Welsh Ministers are determined by them alone, with no involvement by other ministers; the appropriate minister only becomes involved where the application is made initially to the planning authority – which by definition will normally be in a less significant case.

18.21 Fourthly, where planning permission is granted for development by a statutory undertaker on its operational land, its consent is required before conditions can be imposed requiring the removal of permitted buildings, or the discontinuance of the

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14 See for example guidance issued by the Department for Communities and Local Government in England, in Planning Practice Guidance, para 13-068-20140306

15 TCPA 1990, s 266.

16 TCPA 1990, s 266, 269, 270. See also s 291.

17 TCPA 1990, s 265.

18 See **Chapter 9**.

permitted use.[19] This means that a temporary permission can only be granted with the consent of the undertaker.

Operational land

18.22 A number of the above provisions apply only in respect of development by statutory undertakers on operational land. Section 263 of the TCPA 1990 defines "operational land" as land which is used by the undertaker for the purpose of carrying on its undertaking, and in which an interest is held for that purpose.[20] But it excludes land which "is comparable rather with land in general" than with land used for statutory undertakings.[21] This exclusion refers to premises such as showrooms, offices, and employees' dwellings, even if they are used in some way for the undertaking. The legislation thus attempts to draw a distinction between land held by an undertaking for general purposes or for investment, and land actually used for carrying on the core activity of the statutory undertaker.

18.23 Further, section 264(3)-(6) provides that land will only be operational land if one or more of the following apply:

(1) it was held by the undertaker before 6 December 1968, and used then as operational land;

(2) it 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;

(3) it has been the subject of a grant of planning permission in response to an application for development for the purposes of the undertaker;

(4) it is the subject of a special development order or a local development order granting permission for such development;

(5) it is the subject of a private or local Act authorising such development; or

(6) such development has been authorised by a Government department under section 90 of the TCPA 1990.

18.24 The Act makes special provisions as to "operational land" in relation to:

(1) universal postal service providers[22];

(2) the Civil Aviation Authority[23]; and

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19 TCPA 1990, s 267.

20 TCPA 1990, s 263(1).

21 TCPA 1990, s 263(2).

22 TCPA 1990, s 263(2D),(2E),(3), amended by Postal Services Act 2000 (Consequential Modifications No. 1) Order 2001 (SI No 1149), Sched 1. And see TCPA 1990, s 264(7).

23 TCPA 1990, s 263(3),(4). And see TCPA 1990, s 264(8).

(3) bodies holding licences to provide air traffic control services.[24]

Responses to Scoping Paper

18.25 In our scoping paper, we suggested that the application of the TCPA 1990 to statutory undertakers should be covered in the first phase of the project. RWE Generation, Innogy Renewables and Persimmon Homes West Wales agreed.

18.26 We suggested clarifying the exclusion in relation to operational land contained in section 262 of the TCPA 1990.[25] Persimmon Homes West Wales thought that we should clarify the exclusion. The Planning and Environmental Bar Association (PEBA) was 'not so convinced' of the need for further legislative clarification in relation to operational land. National Grid commented on the clarification of the exception in the following terms:

> Statutory undertakers, including National Grid, should be involved in this review to ensure that the outcomes enable them to meet their statutory duties and do not undermine the development, operation and maintenance of essential infrastructure.

18.27 Welsh Water told us that the definition of statutory undertakers which we suggested in our scoping paper should be amended to include water and sewage undertakers as referred to in section 262(3) of the TCPA 1990.

Simplification

18.28 The application of planning law to statutory undertakers is of limited relevance to most users of the planning system; but to the undertakers themselves, and to others who interact with them (albeit in most cases relatively rarely) it is of considerable significance. There also seems to be a perennial tendency for governments, of all persuasions, to amend the administrative arrangements relating to the running of public services, with various sectors being brought into or taken out of public control, or reorganised, from time to time. This is reflected in the number of amendments that have been made to the primary and secondary legislation outlined so far – not all of which are readily discoverable from standard reference works.

18.29 It is also noticeable that the provisions of the GPDO 1995 dealing with statutory undertakers[26] take up a considerable proportion of its length, but are rarely encountered by most users of the GPDO.

18.30 On the other hand, the statutory provisions in question represent a modification to normal planning requirements that are applicable only to organisations specified by the UK Parliament, generally on a UK-wide basis. We recognise, therefore, that any reforms in this field could be problematic in that they might impact on areas that are outside the legislative competence of the Assembly.

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24 TCPA 1990, s 263(2A)-(2C), inserted by Transport Act 2000, s 37. And see TCPA 1990, s 264(8), amended by SI 2001 No 4050, Sched 1.

25 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 5.20 to 5.22.

26 See **paras 18.13, 18.15**.

18.31 Subject to that point, we provisionally consider that it would significantly simply the Code if the Bill were to:

(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 for which provisions); and

(2) provide in relation to each undertaker or category of undertaker what is to be regarded as "operational land"[27] and who is "the appropriate Minister".[28]

18.32 It might also be helpful if, when the GPDO is next updated, the provisions relating to development by statutory undertakers, the Crown, mineral operators, and other similar bodies[29], were in a separate order from those relating to development generally.

18.33 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. But such displays require consent (deemed or express) under the Advertisements Regulations, and are then deemed to be granted planning permission automatically (by section 222). We therefore provisionally consider that section 283 is otiose, and need not be restated in the Code.

Consultation question 18-1.

We provisionally propose 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 for which provisions); and**

(2) **provide for each undertaker or category of undertaker what is to be regarded as "operational land" and who is "the appropriate Minister".**

Do consultees agree?

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27 TCPA 1990, ss 263(1) and (2), and 264(1) to (4), (5) and (6); see **paras 18.22 to 18.24.**

28 TCPA 1990, ss 265(4); see **paras 18.17 to 18.19.**

29 Currently in 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).

Consultation question 18-2.

We provisionally propose that, when the GPDO is next updated, consideration should be given to separating those provisions relating to development by statutory undertakers, the Crown, mineral operators, and other similar bodies, from those relating to development generally.

Do consultees agree?

Consultation question 18-3.

We provisionally propose 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 Bill.

Do consultees agree?

Statutory undertakers that are local authorities

18.34 Section 316A relates to statutory undertakers that are planning authorities. It might be relevant in the case of, for example, a light railway or tramway run by a local authority.[30] The section makes provision for the application of certain provisions in the TCPA 1990 to the activities of such undertakers:

(1) sections 266 to 270 and 279(1), (5) and (6) (planning permission);[31] and

(2) section 283 (advertising) ,[32]

subject to such modifications as may be prescribed.

18.35 Section 316A was inserted by the Planning and Compensation Act 1991, and it appears that no regulations have ever been made under it. We provisionally consider that it is otiose, and need not be restated in the Bill.

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30 The Great Orme Tramway, for example, is run by the Conwy CBC, under powers in the Great Ormw Tramways Act 1898.

31 See **paras 18.17 to 18.21** above.

32 See **para 18.33** above.

Consultation question 18-4.

We provisionally propose 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.

Do consultees agree?

Other provisions in the TCPA 1990 relating to statutory undertakers

18.36 For completeness it should be noted that sections 271 to 274 of the TCPA 1990 relate to the rights of statutory undertakers in respect of land compulsorily purchased either under Part 9 of the TCPA 1990 or under the Listed Buildings Act 1990. Sections 275 to 278 relate primarily to the extension of the functions of statutory undertakers in respect of such land.

18.37 Sections 279(2) and (3) provide for a right to compensation where action is taken under sections 271 and 272. Sections 280 to 282 provide for the measure of such compensation.[33]

18.38 Given that the Planning Bill will not be including the provisions relating to acquisition of land, it seems appropriate that much of sections 271 to 281 should not be included in the Bill, and should remain in the TCPA 1990 applying to both England and Wales.[34]

APPLICATION OF THE CODE IN OTHER SPECIAL SITUATIONS

Local authorities

18.39 In principle, planning control applies to development carried out by local authorities, and to development carried out by others on land owned by local authorities, as it does to any other development. This leads to obvious potential for conflict of interest where an authority has (or is perceived to have) a financial stake in the outcome of a planning application affecting its land, but that is largely dealt with by the courts on a case-by-case basis.

18.40 In recognition of such concerns, the normal procedures as to the determination of planning applications are slightly modified where the planning authority is either the developer or the landowner. This is largely achieved by regulations made under powers in section 316 of the TCPA 1990, the current version of which was substituted

[33] Ss 280-282 are also applicable to compensation for the revocation of a planning permission that has been granted to a statutory undertaker (see **footnote 13**).

[34] See **para 3.114 to 3.118**.

by section 20 of the Planning and Compensation Act 1991 and more recently amended by the P(W)A 2015; the current regulations are the TCP General Regulations 1992.[35]

18.41 We are not aware of any outstanding problems with the operation of section 316 in practice, although it would be helpful if the 1992 Regulations were to be replaced with a new set of Regulations incorporating all the amendments made to them and applying specifically to practice and procedure in Wales.

18.42 We have already considered the position of local authorities that are statutory undertakers.[36]

The Crown

18.43 Until 7 June 2006, Crown land – that is, in short, land owned by Her Majesty or by a Government department – was exempt from planning controls. That was brought to an end by the PCPA 2004, which introduced section 292A of the TCPA 1990, providing simply that "this Act binds the Crown". That section, together with section 293 (which defines more precisely what is meant by "Crown land"), will need to be included in the Planning Bill.

18.44 There are in addition several other provisions in Part 13 of the TCPA that are still in force, applying (with modifications) the statutory provisions dealing with particular topics to Crown land and development by the Crown.

18.45 For example, section 298A, inserted by the PCPA 2004, deals with applications for certificates of lawful development (CLOPUDs and CLEUDs[37]) and applications for planning permission, and enables the Welsh Ministers to modify the normal procedures in relation to such applications insofar as they relate to Crown land. An equivalent provision will need to be included in the Code – possibly in the Part of it dealing with such applications.[38]

18.46 Section 293A relates to urgent Crown development, and will also need to be included – possibly in the Part of the Code dealing with planning applications generally.[39] And section 296A, dealing with enforcement in relation to the Crown, will need to be included – along with other provisions dealing with unauthorised development.[40]

18.47 We provisionally consider that it would be helpful for these few remaining provisions to be included in the Code along with the statutory provisions to which they relate, rather than as a separate Part.

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35 1992 SI 1492, amended in SIs 1992 No 1982, 1996 No 525, 1998 No 2800, 1999 No 1810, 1999 No 1892, 2011 No 1589, 2013 No 2145, 2015 No 807.

36 See **paras 18.34, 18.35**.

37 See **paras 7.83 to 7.97.**

38 See **Chapters 7 and 8**.

39 See **Chapter 8**.

40 See **Chapter 12**.

Property of the Church of England

18.48 Section 318 of the TCPA 1990 provides for the application of the Act to "ecclesiastical property" – that is, property owned by incumbents of Church of England parishes – and requires the relevant diocesan board of finance to be involved.

18.49 At the time of the disestablishment of the Church in Wales, every parish that was wholly in England or wholly in Wales was allocated to the appropriate national church. Parishes straddling the border were allocated to one or other, and dealt with accordingly.[41] As a result, there are a small number of parishes of the Church of England lying partly within Wales.[42] Section 318 therefore still applies to them, and will need to be restated in the new Bill (save for section 318(2), which relates to the acquisition of property under Part 9.

MINERALS

Relevant definitions

18.50 At the outset, we note that there are a number of interlocking definitions in the TCPA 1990 and the GPDO relating to mining and associated activities; and we have considered whether they could usefully be rationalised.

18.51 The starting point is section 336 of the TCPA 1990, which defines "minerals" to include all substances of a kind ordinarily worked for removal by underground or surface working, except that it does not include peat cut for purposes other than sale. It also defines "mineral-working deposit", as "any deposit of material remaining after minerals have been extracted from land or otherwise deriving from the carrying out of operations for the winning and working of minerals in, on or under land".

18.52 As to activities relating to minerals, the term most often used in the TCPA 1990 is "the winning and working of minerals".[43] Section 336 does not provide an exclusive definition of this, but states that it includes "the extraction of minerals from a mineral working deposit."

18.53 The term "mining operations" is not often used in the TCPA 1990.[44] This term too is not exhaustively defined in the Act; but section 55(4) states that it includes:

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41 Welsh Church Act 1914, s 9.

42 Within the Dioceses of Chester, Lichfield and Hereford.

43 TCPA 1990, ss.72(5), 91(4), Sch.5 (conditions); s.97(5),(6),116(1) (modification or revocation of permission); ss.102(8), 111(2), 189(1), Sch.9 (discontinuance); s. 315 (general provisions); s, 336 (definitions). Also s 58A (permission in principle) and Sch.1 (county matters) (both England only).

44 It is used in TCPA 1990, s 55(4) (definition of development), s 116 (compensation), and Sch. 9 ((prohibition of resumption of mineral working).

(1) the removal of material of any description from a mineral-working deposit, or a deposit of pulverised fuel ash or other furnace ash or clinker, or from a deposit of iron, steel or metallic slag; and

(2) the extraction of minerals from a disused railway embankment. [45]

18.54 In the Scoping Paper, we noted that "mining operations" is defined in the GPDO – as "the winning and working of minerals in, on or under land, whether by surface or underground working".[46] By virtue of the definition of "the winning and working of minerals" in the Act, this GPDO definition also includes the various operations referred to in section 55.

18.55 In view of the significant overlap of the two terms "mining operations" and "winning and working of minerals", we provisionally consider that it would be more appropriate for the Bill to be generally drafted solely by reference to one. The former term would seems to be the more appropriate, as being the one more commonly encountered in everyday language as well as being the term that has always been used in the definition if "development" in section 55. The term "mining operations" could then also be used in the new Bill wherever the term "the winning and working of minerals" occurs in the corresponding provision of the TCPA 1990, and the latter term would no longer be required in the Act other than possibly in the general definition of mining operations.

18.56 A single definition of "mining operations" could be included in the Bill, possibly at the start of the special provisions relating to minerals, 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). That definition would then automatically carry across to the GPDO, without any change in the substantive law.

18.57 Finally, the TCPA 1990 provides for the existence of a "minerals planning authority", which will be the county council in England (where there is one). But in Wales, with its unitary system of local government, that will simply be the planning authority (that is, the local authority or, in a national park, the national park authority).[47]

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45 TCPA 1990, s 55(4). "Minerals" are exhaustively defined at TCPA 1990, s 336.

46 TCP(GPD)O 1995, art 1(2).

47 It is noteworthy that the definition of "mineral planning authority" in the Sched 13 to the Environment Act 1995 refers simply to the "planning authority" in relation to Scotland. See also **para 5.151, Consultation question 5-13**.

Consultation question 18-5.

We provisionally propose 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.**

Do consultees agree?

Planning control over mining operations

18.58 It has long been recognised that mineral working is different from other forms of development in a number of respects:

(1) extraction can only take place where the mineral is found to occur;

(2) it is a time-limited use of land, even though it may occur over a very long period of time;

(3) an approved site may lie dormant for some years;

(4) while mineral working is under way, it can be very intrusive and environmentally harmful;

(5) once it has ceased, it may be followed by waste tipping, which can be even more environmentally challenging;

(6) the land eventually needs to be restored, at the expense of the mineral operator;

(7) a beneficial after-use must then be found.

18.59 In principle, planning law applies to the control of mining operations as to other forms of development. However, it has always been recognised that modifications will be required to deal with the problematic aspects of mining activity noted above, in particular the existence of permitted operations dating back many decades.

18.60 The report of the Stevens Committee on *Planning Control over Mineral Workings* made a number of recommendations, which were translated into the Town and

Country Planning (Minerals) Act 1981 and incorporated into mainstream planning legislation when it was consolidated in 1990. The TCPA 1990 was then amended by Schedule 1 to the Planning and Compensation Act 1991[48]; and Schedule 2 to that Act introduced a freestanding new procedure allowing for the review of minerals permissions granted in the period from 1943 to 1948.

18.61 The Environment Act 1995 then introduced a system requiring the review on a one-off basis of all minerals permissions granted between July 1948 and 22 February 1982, and a continuing review of all minerals permissions whenever granted.

Old mineral permissions

18.62 The procedure introduced by Schedule 2 to the Planning and Compensation Act 1991 required that permissions for minerals development granted by interim development orders in the period from 22 July 1943 to 30 June 1948 would cease to have effect unless they were registered by 25 March 1992. Following such registration, they would have to be subject to the imposition by the planning authority of new conditions, in line with modern environmental standards as to the operation of the site and its subsequent restoration and after-care, if they were to continue to have effect.

18.63 The time for registration of permissions under the scheme, and for the imposition of new conditions, has long passed.

18.64 Under the scheme imposed by Schedule 13 to the Environment Act 1995, permissions granted between 1 July 1948 and 22 February 1982[49] were to be reviewed and updated. The planning authority had to prepare by 31 January 1996 a list of all active minerals sites where permission had been granted between 1 July 1948 and 31 March 1969. By 31 October 1998, the authority had to prepare a list of all sites where permission had been granted between 1 April 1969 and 22 February 1982. In each case, an application for the approval of new conditions had to be submitted by the date specified in the list in relation to the site in question.

18.65 Here too, the time for applications to the planning authority for the initial review of old permissions has long since passed, save possibly in relation to dormant sites. It may be noted, however, that a permission for the use of dormant site cannot be re-activated unless it has been reviewed and updated, and no compensation is payable for the imposition of any revised or new conditions in such a case.

18.66 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 now in the distant past. But those registers, now long since prepared, will continue to be of relevance for the foreseeable future. Active sites included in the register are now subject to the requirement for periodic review, under 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.

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48 See TCPA 1990, ss 72(5), 91(4), 97, 100, 102(8), 105, 107, 116, 117, 189(1) and 336(1), and Sched 1.

49 Environment Act 1995, Sched 13. 22 February 1982 was the principal commencement date of the TCP (Minerals) Act 1981.

18.67 We thus provisionally consider that the provisions in 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.

Consultation question 18-6.

We provisionally consider 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.

Do consultees agree?

Continuing review of minerals permissions

18.68 Schedule 14 to the Environment Act 1995 introduced a new system requiring the continuous review of minerals permissions, to ensure that the conditions attached to them remain up-to-date, in line with current environmental standards. That review takes place every 15 years in Wales.

18.69 This may be the subject of a separate review in due course, but for the moment we consider that it should be retained in the Planning Code, possibly in a Schedule together with the provisions relating to the discontinuance of mineral working and the prohibition of its resumption (currently in Schedule 9 to the TCPA 1990).

Consultation question 18-7.

We provisionally propose 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).**

Do consultees agree?

Minerals regulations

18.70 Section 315 of the TCPA 1990 allows the Welsh Ministers to prescribe adaptations and modifications to the sections of the TCPA 1990 listed in Schedule 16, so as to relate them to the particular circumstances of minerals development.

18.71 The regulations currently in force are the TCP (Minerals) Regulations 1995.[50] These amend the TCPA 1990 by providing:

(1) that the term "use" of land (save in the context of discontinuance notices) does not include the use of land for the winning and working of minerals;

(2) an amendment to section 56 of the TCPA 1990 as to when development "begins" in the context of minerals; and

(3) an additional provision as to the compensation payable under section 107 for the revocation or modification of permission for mineral development.

18.72 The Regulations are not easy to understand. For example, it is not entirely clear what is the implication of the first of the above amendments in relation to sections 55 and 57, which provide the definition of "development" and govern the need for planning permission.

18.73 We provisionally consider that it would be more straightforward if the substance of the modifications to the TCPA 1990 set out in the 1995 Regulations were included in the Act itself. It is also worth noting that there have been no substantive amendments to the 1995 Regulations in the 22 years since they were made, which tends to suggest that there is no need for Ministers to have the flexibility to deal with these issues in subordinate legislation.

Consultation question 18-8.

We provisionally propose 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.

Do consultees agree?

FINANCIAL PROVISIONS

Fees

18.74 For many years now fees have been charged for most applications for planning permission and advertisements consent. When fees were first introduced, they were opposed by some, on the basis that planning control is an exercise undertaken in the interests of the good of the whole community, but the prevailing view was that fees should be paid by applicants to defray some or all of the cost of processing applications. Section 303 of the TCPA 1990, as originally enacted, thus provided that regulations could be made to enable planning authorities to charge a fee for any

[50] SI No 2863.

application under the Act (or any regulations under the Act) for permission, consent, approval, determination or certificate.[51]

18.75 The power has now been extended to enable the Welsh Ministers to make regulations to enable planning authorities to charge for the performance of "any function they have" – that is, presumably any of their functions under the Act.[52] That would include, for example, dealing with pre-application enquiries, making site inspections, and negotiating planning obligations. And the Welsh Ministers may also charge for performing their functions in relation to applications made to them.[53] Such regulations are currently to be approved by the Assembly under the affirmative resolution procedure.[54]

18.76 The regulations made under these powers have always made a number of exceptions to the general principle of charging for planning services – either arising from the nature of the land or development in question or due to the circumstances of the applicant.[55]

18.77 It has been suggested to us that it might be more convenient if levels of fees could be amended simply by the publication of the new rates on a web-site, which would be less onerous than making a statutory instrument. This would remove the power of the Assembly to scrutinise draft regulations.

18.78 On the other hand, the TCPA 1990 explicitly provides that the power of the Welsh Ministers to prescribe levels of fees is subject to section 303(10), which requires that the income to planning authorities and to the Welsh Ministers from the fees so charged does not exceed the cost of performing the relevant function.

18.79 We consider that the existence of a provision equivalent to section 303(10) provides an upper limit to the level of fees that may be charged, such that this suggestion raises no major issue of principle. Subject to that, this seems to be a reasonable suggestion.

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51 There is no corresponding power under the Listed Buildings Act 1990 to enable the Welsh Ministers to provide for fees to be payable for applications for LBC or CAC.

52 TCPA 1990, s 303, as substituted by Planning Act 2008, s.199 (in force in Wales since 8 August 2014).

53 TCPA 1990, s 303(1B),(1C), inserted by P(W)A 2015, Sch. 4, para 18. See **Chapter 9**.

54 TCPA 1990, s 303(8).

55 See in particular **paras 13.155 to 13.158** as to the charging of fees for applications for listed building consent.

Consultation question 18-9.

We provisionally propose 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.

Do consultees agree?

Disputes as to compensation

18.80 There are a number of provisions in the TCPA 1990 as to the determination by the Upper Tribunal of disputes as to the compensation payable in relation to various matters – 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).

18.81 Each of those provisions directly or indirectly applies section 4 of the Land Compensation Act 1961, subject to such modifications as may be prescribed by regulations. In each case, as far as we are aware, no such modifications have ever been prescribed.

18.82 We provisionally consider 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.

Consultation question 18-10.

We provisionally propose 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.

Do consultees agree?

INQUIRIES, HEARINGS AND OTHER PROCEEDINGS

General provisions

18.83 General provisions relating to inquiries, hearings and other proceedings in Wales – including those noted in **Chapter 11** as to the determination of procedure[56] – are to be found in in sections 303ZA, 319B, 320, 321, 321A, 321B, 322C, 323A of the TCPA 1990, and section 250(2),(3) of the Local Government Act 1972.[57] Many of these are now distinct from the corresponding provisions applying in England.

18.84 Rationalising the organisation of this material within the Bill would in itself be a significant improvement. However, although the relevant provisions are used in practice primarily in the context of planning appeals under section 78, it would be better for them to remain, as at present, in the part of the Bill dealing with miscellaneous and supplementary provisions, as they also relate to inquiries etc held for a variety of other purposes.

Expert evidence

18.85 Evidence at inquiries, hearings and other proceedings is usually not taken on oath; although it may be where there is a significant dispute as to fact[58].

18.86 However, it is becoming increasingly common practice for the statement (often referred to as a "proof of evidence") produced by a professional witness to contain a "statement of truth". The relevant RICS guidance note indicates that a written statement of evidence produced by a surveyor at planning appeals and similar proceedings should contain such a statement, the wording of which should be based on that in the Civil Procedure Rules applying to expert evidence, as follows:

> 'I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.'[59]

18.87 The guidance from the Planning Inspectorate on expert evidence also suggests that should be endorsed with a statement to that effect, and should accord with the requirements of any professional body of which the witness is a member.[60]

18.88 We provisionally consider that the inclusion of such a statement in expert evidence should be made a statutory requirement, rather than just a rule of good practice. The circumstances in which such a statement should be required, and the detailed form

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56 See **paras 11.14 to 11.20.**

57 Applied to LBC and CAC by Listed Buildings Act 1990, s 89.

58 Notably in the context of enforcement proceedings.

59 *Surveyors acting as expert witnesses*, RICS, January 2009, para 5.1(i), based on the wording in the Civil Procedure Rules, Practice Direction 35, para 3.3.

60 *Procedural Guide: Planning Appeals – England*, 5 August 2016, Para O.2.1 (a Procedure Guide for Wales is expected to be published later in 2017).

of wording, would best be included in secondary legislation, but the relevant powers in primary legislation should be wide enough to enable this to be achieved.

18.89 The Civil Procedure Rules also contain a requirement that a number of specific documents produced in connection with court proceedings should be accompanied by a statement of truth, to the effect that the person producing the document believes that the facts stated in it are true. We do not consider that it would be appropriate to introduce such a requirement in relation to planning proceedings, since many representations are made by unrepresented lay people.

Consultation question 18-11.

We provisionally propose that the Code should include a power to require that 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.

Do consultees agree?

Costs of parties

18.90 As to the costs of the parties to such proceedings, section 322C(6) simply provides that the Welsh Ministers may make orders as to the costs of the parties, and as to the party by whom they are to be paid. However, longstanding practice has made it plain that an award of costs is only made where:

(1) one party to an appeal has behaved unreasonably; and

(2) that unreasonable behaviour has led other parties to incur unnecessary or wasted expense.

18.91 This is distinct from the practice in court proceedings, where losing parties are generally required to pay for costs of the winners; and from compulsory purchase proceedings, where acquiring authorities are generally liable to pay the costs of those whose land is being acquired. The way in which the principles work in practice is contained in Welsh Government guidance.[61]

18.92 We consider that it would be preferable for this basic principle, which is uncontroversial and of long standing, to be enshrined on the face of the statute, as section 322C(6), providing merely a general power to award costs, is potentially misleading for those unfamiliar with the position in practice.

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61 *Development Management Manual* , Welsh Government, 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*). See in particular para 1.2 of the Annex.

Consultation question 18-12.

We provisionally propose 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:

(1) **one party to an appeal has behaved unreasonably; and**

(2) **that unreasonable behaviour has led other parties to incur unnecessary or wasted expense.**

Do consultees agree?

APPLICATION OF PROVISIONS IN THE PUBLIC HEALTH ACT 1936

18.93 Various provisions in the TCPA 1990 – section 178(3) (execution and costs of works required by enforcement notice), section 209(3) (works required by a tree replacement notice) and section 219 (works required by an unsightly land notice under section 215) – state that regulations made under the TCPA 1990 may provide that sections 276, 289 and 294 of the Public Health Act 1936 shall apply to works carried out by the planning authority to ensure compliance with the notice in question. Those powers have been exercised in the TCP General Regulations 1992.[62]

18.94 There are similar powers under the Listed Buildings Act 1990 for the Welsh Ministers to make regulations applying those sections of the 1936 Act in relation to works required by a listed building enforcement notice.[63] Those powers have been exercised in the Planning (Listed Buildings and Conservation Areas (Wales) Regulations 2012.[64]

18.95 Section 190 of the TCPA 1990 provides that section 276 of the 1936 Act (but not sections 289 and 294) shall apply to works executed by a local authority to secure compliance with a discontinuance notice – with no need for Regulations.

18.96 Most of the 1936 Act has been repealed. However, 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.

18.97 The relevant provisions in the 1936 Act between them only amount to five subsections, and seem to be perfectly sensible. We provisionally consider that they

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62 SI 1992 No 1492, reg.14, as amended by SI 1997 No 3006.

63 Listed Buildings Act 1990, s 42(3).

64 SI 2012/793, reg.15.

should simply be incorporated into the Planning Bill, to the extent that they are not incorporated already, without the need for secondary legislation.

Consultation question 18-13.

We provisionally propose that the Planning Code should incorporate provisions equivalent to those currently in:

(1) **section 276 of the Public Health Act 1936 (the powers 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.

Do consultees agree?

INTERPRETATION

18.98 Section 336 of the TCPA 1990 contains a number of definitions of key words and phrases used throughout the Act. Certain words and phrases – such as "development" and "purchase notice" – are defined in the part of the Act to which they most directly relate[65], and section 336 then simply refers to those definitions. Other terms – such as "listed building" and "gas transporter" – are the subject of definitions in other pieces of legislation, which are adopted for the purposes of the TCPA 1990.

18.99 Some pieces of secondary planning legislation, notably the GPDO, also contain substantial definition sections.

18.100 These definitions will obviously need to be carried over into the Planning Code. The approach of including the substantive definition of a term in the body of an Act – rather than merely in an interpretation section at the end – is helpful where the term is principally used in a particular context; and we have suggested that this is done in relation to "advertisement"[66], and possibly "tree".[67] We have also suggested that, as far as possible, the definitions in primary and secondary legislation are brought into line, and included within the primary legislation, so that they do not have to be

65 Respectively, TCPA 1990, ss 55, 137.

66 See **paras 14.11 to 14.20**.

67 See **para 15.22 to 15.26**.

repeated in secondary legislation. And we commend those techniques more generally.

18.101 In our Scoping Paper, we noted that the courts have defined some terms, but retaining flexibility through their insistence that the application of the law to the facts of individual cases is a matter for the relevant decision-maker. But we expressed the view that there is nevertheless some scope for codifying definitions settled in case law. We highlighted in particular the terms "curtilage", "engineering operations", "building" and "material planning considerations"; and we invited suggestions as to further terms that must usefully be defined or clarified in the new Code. In response, we received several suggestions, often without further comment, as to terms that could usefully be defined – including "abutting", "adjacent", "amenity", "dwellinghouse", and "highway". We have already considered the definition of "amenity", in the context of advertisements and trees.[68]

18.102 In the course of our work, we have become aware of terms whose meaning can sometimes be uncertain in practice – notably "local authority", "planning authority", "advertisement" and "tree".

18.103 We have considered many of these earlier in this Consultation Paper, in the relevant topic chapter. "Adjacent" and "abut" largely occur in the GPDO rather than in primary legislation. And the definition of "highway" in the TCPA 1990 is the same as in the Highways Act 1980; we consider that it would not be appropriate to amend that in the context of the present exercise.

18.104 In the context of the general interpretation section of the Bill, therefore, we now consider a few further terms, used throughout the Act – "dwellinghouse" and "dwelling"; "curtilage"; and "agriculture" and related expressions.

18.105 Save for the above points, we have not become aware of terms whose meaning needs to be clarified. But we invite suggestions from those responding to this Consultation Paper, particularly if accompanied by a suggested definition for the term in question.

Consultation question 18-14.

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?

[68] See **paras 14.91 to 14.92** and **15.29 to 15.38**.

DEFINITION OF "DWELLINGHOUSE" AND "DWELLING"

Definition of "dwellinghouse" in the TCPA 1990

18.106 The term "dwellinghouse" is not one used in everyday English. However, it is extensively found in planning legislation, but unfortunately not always with the same meaning. There are also a few references to a "dwelling".

18.107 In the TCPA 1990, it is first used in section 55(2)(d), which defines the term "development", so as to exclude (amongst other things) "the use of buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such." Section 55(3)(a) also provides that the use as two or more separate dwellinghouses of a building previously used as a single dwellinghouse involves a material change of use, which therefore generally requires planning permission.

18.108 Secondly, in Part 4 of the TCPA 1990, relating to entitlement to serve a blight notice, section 168 refers to a person occupying all or most of a hereditament "as a private dwelling".[69] Section 171 defines "agricultural unit" so as to include "any dwellinghouse or other building occupied by [the farmer]". And paragraph 19 of Schedule 13 refers to the inclusion in highway proposals of land that is or is within the curtilage of a "dwelling".

18.109 Thirdly, various enforcement provisions are modified in relation to residential property. Section 171B amends the time limit for enforcement action in relation to the change of use of any building to "use as a single dwellinghouse".[70] Sections 171F and 183 provides that temporary stop notices and stop notices may not be served to prohibit the use of any building as a dwellinghouse.[71] Sections 196A and 214B allow entry by authorised persons for enforcement purposes onto land, without a search warrant, but prohibit admission to any building used as a dwellinghouse without 24 hours' notice.[72]

18.110 Fourthly, Schedule 3 states that development not ranking for compensation in certain circumstances includes "the use as two or more separate dwellinghouses of a building that was used as a single dwellinghouse". And it includes the rebuilding of a dwellinghouse provided that its volume is not increased by more than ten per cent.

18.111 The term "dwellinghouse" is not defined in the general interpretation section of the TCPA 1990, nor specifically in relation to any of the above provisions. In relation to each of them, however, it seems from the context that "dwellinghouse" does, or at least should, include a flat, and a building that includes one or more flats. Thus, in section 55(2)(d), it would be odd if the use for domestic purposes of the land attached to a ground floor flat might amount to development, whereas the use of the land attached to a conventional family house would not. Section 55(3)(a) and Schedule 3

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69 TCPA 1990, s.168(3).

70 TCPA 1990, s. 171B(2), inserted by Planning and Compensation Act 1991, s.4.

71 TCPA 1990, s.171F(1), inserted by PCPA 2004, s.52; TCPA 1990, s.183(4), inserted by Planning and Compensation Act 1991, s. 9.

72 TCPA 1990, ss.196A(4), 214B(7), inserted by Planning and Compensation Act 1991, ss. 11, 23.

clearly envisage the splitting up of a single building into several "dwellinghouses". Section 171 envisages the use of a "building", which includes "part of a building" as a dwellinghouse. And sections 183, 196A and 214B all refer to a building used as a dwellinghouse, which would include a flat – and seem to be designed to prevent disruption of domestic occupation, which would apply to flats as much as to undivided houses.

Other references to "dwellinghouse" and "dwelling" in the TCPA 1990

18.112 It may also be noted that there are three recent amendments to the TCPA 1990, applying only in England, that refer to dwellinghouses and dwellings. Whilst any definition in the new Bill in Wales would not apply to these, we have briefly considered whether it might inadvertently cause any problems.

18.113 Sections 60(2B) of the TCPA[73] introduces a requirement to ensure that development permitted by a development order on land in England that is a dwelling house (or within the curtilage of one) does not have an unacceptable impact on the amenity of adjoining premises. "Dwelling house" is not there defined, but the context would seem to imply that it includes a flat as well as a house.

18.114 Secondly, section 106ZB (applying in England) defines "affordable housing" by reference to various categories of "new dwellings".[74] The definition of "new dwelling" explicitly relates to a building or a part of a building.

18.115 Sections 225C and 225F of the TCPA 1990 allow planning authorities in England to reclaim from property owners the expenses of removing unauthorised advertisements and graffiti from a building, but not where it is used as a flat or a dwellinghouse.[75] "Dwellinghouse" is defined in that context, only, inasmuch as it "does not include a building containing one or more flats, or a flat contained within such a building".[76] "Flat" is in turn defined as in the General Permitted Development Order.[77]. This means that the restriction on an authority being able to recover the cost of works applies where the building in question is a flat, or a house that has not been divided; but not where a house has been divided to create a separate flat in the basement or attic. The policy basis for that is unclear; but it does emphasise the need for precision.

References to "dwellinghouse" in secondary legislation

18.116 The term "dwellinghouse" is used in a number of pieces of secondary planning legislation.

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73 TCPA 1990, s. 60(2B), (2C), Inserted by Growth and Infrastructure Act 2013, s. 4. This appears to be the one example in the TCPA 1990 of the use of "dwelling house" (two words), rather than "dwellinghouse".

74 TCPA 1990, s.106ZB, to be inserted by Housing and Planning Act 2016, s. 159.

75 TCPA 1990, ss 225C(14), 225F(8), inserted by Localism Act 2011, s.127(2).

76 TCPA 1990, ss 225C(16), 225F(12), inserted by Localism Act 2011, s.127(2).

77 See **paras 18.118, 18.123**.

18.117 In some cases – notably the Fees Regulations and the EIA Regulations – "dwellinghouse" is defined to mean "a building or part of a building which is used as a single private dwelling and for no other purpose".[78]

18.118 More frequently – including in the General Permitted Development Order and Development Management Procedure Order – "dwellinghouse" excludes "a building containing one or more flats, or a flat contained within such a building.[79] And a flat is defined as "a separate and self-contained set of premises constructed or adapted for use as a dwelling and forming part of a building from some other part of which it is divided horizontally".

18.119 There is no definition of "dwellinghouse" in the Use Classes Order 1987, but it would seem that the first of these two definitions applies in article 3, which refers to "the use as a separate dwellinghouse of any part of the building". But Class C4 refers to the "use of a dwellinghouse … as a house in multiple occupation", which might relate more naturally to the second definition.

18.120 It will be readily appreciated that the two definitions of "dwellinghouse" are significantly different, not least in that the first includes a flat; and the second excludes a flat. The same Welsh word (*ty annedd*) is used in both cases.[80]

18.121 The result this discrepancy is that, for example, a semi-detached house that has been divided into two flats – a common occurrence in practice – is a dwellinghouse for the purpose of the first definition, but it is not a dwellinghouse for the purpose of the second one. As a result, the construction of a garden shed in the garden of the downstairs flat (or the erection of a dish aerial) is not permitted development, and therefore needs to be the subject of a planning application – whereas similar development associated with a physically identical house that has not been subdivided would be permitted automatically.[81] Further, the application necessary in the case of the flat is not a "householder application", and therefore does not benefit from the expedited appeals procedures available to development relating to a dwellinghouse.[82] However, because the Fees Regulations use the first definition, the application does benefit from reduced fees, whether or not the house has been subdivided.[83]

18.122 Nor is it always entirely clear how the relevant statutory provisions apply in the case of buildings containing flats above shops, holiday homes, caretakers' flats, and many

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78 TCP (Fees for Applications, Deemed Applications and Site Visits) (Wales) Regulations 2015 (SI 1522); TCP (Environmental Impact Assessment) (Wales) Regulations 2016 (SI 567), reg 2

79 DMPWO 2012 arts 2, 7, Sched 4; Developments of National Significance (Procedure) (Wales) Order 2016 (SI 55), Sched 5, para 1; TCP (Referred Applications and Appeals Procedure) (Wales) Regulations 2017 (SI No 544), reg 3; TCP (General Permitted Development) Order 1995, art 1. That definition is also used in the Building Regulations 2010 (SI 2214), art 2.

80 TCP (Environmental Impact Assessment) (Wales) Regulations 2017, reg 2(1); TCP (Development Management Procedure) (Wales) Order 2012, art 2(1)

81 Permitted development rights under GPDO 1995, Sched 2, Part 1 and Part 24 only apply to "dwellinghouses".

82 DMPWO 2012, art 26.

83 TCP (Fees for Applications, Deemed Applications and Site Visits) (Wales) Regulations 2015, reg 4(1).

other forms of residential accommodation. And the courts have explored some aspects of these problems on various occasions, with mixed results. This is an important issue, which would merit a much fuller examination, but one that is beyond the scope of this Consultation Paper.

18.123 In addition, the above definition of "flat" is unsatisfactory in the case of a house that has been divided so that the basement or the attic forms a separate residential unit. The remainder of such a house – which may be a substantial dwelling of several storeys – is divided from that basement or attic flat, and would therefore also be strictly within the definition of a "flat", even though it would not be classified as a flat for any other purpose.

Conclusion

18.124 For the purposes of all of the provisions of the TCPA 1990 that are in force in Wales[84] – the term "dwellinghouse" seems to be used to refer to a building or part of a building that is used as a single private dwelling and for no other purpose. That is, it relates to the residential use of the building or part, and is not dependant on the number of units in the building that are in such use. Given the inconsistent definitions of the term in secondary legislation, highlighted above, we provisionally consider that it would be helpful to make this clear in the interpretation section of the Bill.

18.125 Further, it might also be more in line with current usage of the English language if the English language version of the Bill were to use the term "dwelling" instead of "dwellinghouse". That would reflect the fact that the term is referring to a building or part of a building that is used in a particular way, rather than to a particular type of building. It would also be in line with recent Assembly Bills, where the term "dwelling" has generally been used.

18.126 Finally, we note that the Building Regulations includes the following definitions:

> *"dwelling"* includes a dwelling-house and a flat;
>
> *"dwelling-house"* does not include a flat or a building containing a flat.[85]

18.127 This seems to us to encapsulate succinctly the concepts we have been considering above, and we suggest that a definition along those lines would be appropriate for inclusion in the Bill. However, since the only occurrence of the word "dwellinghouse" would then be within the definition of "dwelling", it would appear that the definition of "dwelling" could simply be to the effect that it includes a house and a flat. A "house" and a "flat" would then be ordinary English words, not requiring a specific definition.

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84 See **paras 18.106 to 18.111**.

85 Building Regulations 2010, reg 2.

Consultation question 18-15.

We provisionally propose 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.**

Do consultees agree?

DEFINITION OF "CURTILAGE"

Use in planning and other legislation

18.128 The word "curtilage" is used in a number of places in the TCPA 1990. Firstly, there are references, noted above, to "the curtilage of a dwellinghouse" and "the curtilage of a dwelling".[86] And some of the provisions of the TCPA 1990 applying only in England, also noted above, refer to the curtilage of a dwellinghouse.[87] Secondly, there is a reference to the curtilage of land used by statutory undertakers for their works.[88]

18.129 Thirdly, "curtilage" has particular significance in the context of listed buildings, as section 1(5) of the Listed Buildings Act states that a "listed building" includes a pre-1948 structure in the curtilage of the building in the list.

18.130 Fourthly, more widely, the term "curtilage" appears more than 1,500 times in a wide variety of pieces of primary and secondary legislation.[89] A significant number of those, but by no means all, relate to planning.[90] And most references are to land "in the curtilage of" a building of a specified description.

18.131 So, for example, in the GPDO 1995, there are 128 references to "curtilage" – in general provisions, such as "curtilage of a building", "buildings within the same curtilage", "curtilage of the original building", "boundary of the curtilage of the premises", "curtilage of a listed building", and "curtilage of a protected building"; and

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86 TCPA 1990, s.55(2)(d) (see **para 18.107**); Sch.13, para.19 (see **para.18.108**).

87 TCPA 1990, s. 60(2B), (2C) (see **para 18.113**), ss 225C(14) and 225F(8) (see **para 18.115**).

88 TCPA 1990, Sched. 14, para 3(5),(7)

89 From the Pluralities Act 1838 to the Neighbourhood Planning Act 2017; and from the Industrial Training (Construction Board) Order 1964 to the Commons Act 2006 (Correction, Non-Registration or Mistaken Registration) (Wales) Regulations 2017. See, for example, *Dyer v Dorset CC* [1989] QB 346, CA (Housing Act 1980); *Methuen-Campbell v Walters* [1979] QB 525 (conveyancing);.

90 See *Sinclair-Lockhart's Trustees v Central Land Board* (1951|) 1 P&CR 195 at 204 (development charge); *Stephens v Cuckfield RDC* [1959] 1 QB 516 at p 526; upheld at [1960] 2 QB 373.

in more specific provisions, such as “curtilage of a dwellinghouse”, “curtilage of an existing industrial building or warehouse”, “curtilage of an existing school, college [etc]”, “curtilage of an operational Crown building”, “curtilage of an office building”, “curtilage of a shop”, and “curtilage of more than one stand-alone solar”. The courts have clarified that, in applying such provisions, it is necessary to consider what is the curtilage of the building in question at the date on which the proposed development is to be carried out; but what is the extent of the curtilage will be “quintessentially a matter of fact”.[91]

18.132 There appears to be no difference between the meaning of the term in primary and secondary legislation.

18.133 Planning policy documents sometimes refer to development being acceptable within the curtilage of existing buildings. *Planning Policy Wales*, for example, refers to the curtilage of previous development; and defines “curtilage” as “the area of land attached to a building”.[92]

Responses to the Scoping Paper

18.134 In the Scoping Paper, we noted that the word “curtilage” is not defined in statute; we expressed a preliminary view that such a definition would improve the transparency of the law. The majority of consultees who passed comment on whether a definition of curtilage should be included in the new Planning Bill agreed that it should.[93] For example, the Residential Landlords Association thought that the very fact that there is uncertainty in the law is a reason to codify principles so as to improve the current state of the law:

> We agree that the vexed issue of what is in the “curtilage” should be addressed. As it covers many different circumstances clearly it can only set down principles but anything would be an improvement on the current uncertainty around this issue. Non-exhaustive examples could be employed where appropriate.

18.135 RTPI Cymru noted that their members expressed support for the view that a definition of “curtilage” would improve the transparency of the law and would improve matters from an operational point of view. They noted the following:

> Defining a curtilage, in the absence of any clear statutory definition, is extremely complicated and difficult – both in dealing with residential curtilage issues in relation to permitted development and in dealing with defining the extent of listed building protection (i.e. including fixtures and buildings within the curtilage).

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91 *James v Secretary of State* [1991] 1 PLR 58; see also *Collins v Secretary of State* [1989] EGCS 15, *McAlpine v Secretary of State* [1995] 1 PLR 16; *Lowe v Secretary of State* [2003] 1 PLR 81.

92 PPW, Edition 9, November 2016, Figure 4.4; *Withers v Secretary of State* [2002] 4 PLR 102; *Wheeler v Secretary of State* [2002] 4 PLR 102.

93 Seven consultees commented on whether curtilage should be defined in the new Planning Code: five agreed and two disagreed.

18.136 Persimmon agreed that a definition of "curtilage" should be included but noted that there should be further consultation regarding its meaning and the date at which the meaning should apply, pointing out:

> The curtilage of a listed building should reflect the date the building was listed whereas the curtilage associated with a current planning application should be taken from the date the application was submitted.

18.137 Neath Port Talbot Council, Merthyr Tydfil County Borough Council, Planning Officers Society Wales (POSW) (South West Wales) also agreed that curtilage should be defined in the new Planning Bill.

18.138 However, we also received two responses suggesting we do not codify the definition of curtilage. The Planning Inspectorate thought that the matter of curtilage does not lend itself well to being set down in law, given that 'it is very much fact and degree'. Similarly, the Country Land and Business Association (CLA) also explained that producing a definition of curtilage is not desirable, given that the concept of curtilage in a rural context may be completely different to that of a curtilage in a more urban context. It noted that "it would depend on how this was done, and this may well apply to other codifications / definitions". It suggested that definitions such as this might be better addressed using guidance and referred to the recent Historic England guidance on listed building curtilage. According to the CLA:

> Curtilage undoubtedly causes confusion, but case law does often provide a degree of certainty, for example in making it clear that if building B is not and has never been ancillary to building A, then building B is unlikely to be in the curtilage of building A. In contrast, the approach suggested in 7.17 appears to be "here is a bullet-point list of about 10 factors, any of which might potentially be relevant in deciding this question, but the Code will not indicate either what each bullet point means in practice, or which factors might be more relevant in any particular case". That could be manifestly unhelpful and much worse than the current position. Any codification therefore needs to be carefully designed to increase certainty for all parties, not reduce it.

The term "curtilage" in case law

18.139 "Curtilage" is not a word in ordinary English usage; both it and its Welsh equivalent (*cwrtil*) occur only in legal contexts.[94] It encapsulates a relatively straightforward concept: the land reasonably closely associated for most purposes with a building. Simply to replace it with another term would not remove the problem, which is to define with precision which land is to be considered as being associated with the building at a particular date.

18.140 As to whether one structure (B) is in the curtilage of another principal building (A), the courts have considered this on many occasions; and they have thereby provided useful guidance that can be applied in other cases. Perhaps the most notable

[94] Both derive from the medieval French word *courtil*, meaning "small court".

decision is that of the Court of Appeal in *Attorney-General v Calderdale BC*,[95] which related to whether a structure was within the curtilage of a building in the list. The Court referred to a number of decisions showing that different facts might lead to different conclusions, and indeed that the same facts might lead to different judicial opinions.[96] However, it concluded that:

> Three factors had to be taken into account in deciding whether a structure (or object) was within the meaning of [section 1(5) of the Listed Buildings Act], whatever might be the strict conveyancing interpretation of the ancient and somewhat obscure word "curtilage". They are:
>
> (1) the physical 'layout' of the listed building and the structure;
>
> (2) their ownership, past and present; and
>
> (3) their use and function, past and present.[97]

18.141 And the courts have also confirmed that not all the land in the same ownership as the principal building will be included;[98] that some land in separate ownership may be included in certain cases;[99] and that not every building has a curtilage.[100]

18.142 The difficulty, as discovered by inspectors and judges in many cases, is applying any formula to a wide range of different factual situations. Thus, where a house adjoins a patio, which in turn adjoins a lawn, then a shrubbery, then a walled kitchen garden (now used for a swimming pool), then a paddock, then a woodland, where precisely is the boundary of the curtilage?

Conclusion

18.143 We provisionally consider that it would not be possibly to devise an exhaustive definition of the term "curtilage", applicable in every situation. Further, there seems to be no other word in current English that is a suitable synonym for it. However, we recognise that "curtilage" – unlike "dwelling" – is not a word that is in common use, and consider that it would be helpful to include a definition of it, to the effect that it is the land closely associated with a building. That is of course, on its own, not a precise definition; and it should be amplified by a provision to the effect that the question of

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95 (1982) 46 P & CR 399.

96 *Methuen-Campbell v Walters* [1979] QB 325; *Vestry of St Martin's in the Fields v Bird* [1985] 1 QB 428; and *Pilbrow v Vestry of the Parish of St Leonard Shoreditch* 1985] 1 QB 433.

97 [1983] JPL 310, AC, per Stephenson LJ. See also *Watson-Smyth v Secretary of State* [1992] JPL 451; *Skerritts of Nottingham Ltd v Secretary of State* [2001] QB 59, CA.

98 *Collins v Secretary of State* [1989] EGCS 15; *James v Secretary of State* [1991] 1 PLR 58; *Lowe v The First Secretary of State* [2003] 1 PLR 81.

99 *Calderdale* [1983] JPL 310, AC, CA.

100 *R (Hammerton) v London Underground Ltd* [2003] JPL 984.

whether one structure is within the curtilage of another is to be determined with regard to the three factors referred to in the *Calderdale* decision, noted above.[101]

18.144 That would not pre-empt the role of the courts in applying those basic principles to the facts of particular cases arising in the future, but it would at least establish the principles to be considered. And more detailed, non-statutory guidance could continue to be issued, as at present, showing how those principles might be applied in particular situations.

18.145 It would also be helpful to clarify the date at which the extent of a building's curtilage is to be considered. However, that would best be done in the context of the Historic Environment Code. We have accordingly already touched upon this briefly in **Chapter 13** of this Consultation Paper.[102]

Consultation question 18-16.

We provisionally consider that it would be helpful for the Bill to 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.**

Do consultees agree?

DEFINITION OF "AGRICULTURE" AND RELATED TERMS

"Agriculture" and "agricultural"

18.146 The terms "agriculture"[103] and "agricultural"[104] are defined comprehensively 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

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101 For a comparable provision, see Corporation Tax Act 2010, s.730C, inserted by Finance Act 2013, Sch.14.

102 See **paras 13-187 to 13.190**.

103 Used in TCPA 1990, ss 55, 147 and 315, Scheds 5 and 9.

104 Used (other than in terms such as "agricultural unit") in TCPA 1990, s 171.

other agricultural purposes, and *"agricultural"* shall be construed accordingly;

18.147 "Agricultural"[105] is also defined:

(1) in section 147 of the TCPA 1990, for the purposes of sections 145, 146 and 147 (purchase notices), and

(2) in section 171, for the purposes of Chapter 2 of Part 6 (blight notices).

18.148 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. Both section 147 and section 171 add that "references to the farming of land include references to the carrying on in relation to the land of any agricultural activities". Subject to that addition, the definitions of "agricultural" add nothing to that in section 336, and need not be included in the Bill.

18.149 Part 6 of Schedule 2 to the GPDO contains extensive references to "agriculture", but does not further define the term, save to include certain activities for certain purposes.

"Agricultural land"

18.150 Chapter 1 of Part 6 of the TCPA 1990 relates to the service of a purchase notice in respect of "agricultural land", where the claimant also has an interest in other agricultural land in the same unit. Section 147 imports the definition of "agricultural land" from section 109 of the 1947 Act, which is as follows:

> The expression *"agricultural land"* means land used for agriculture which is so used for the purposes of a trade or business, or which is designated by the Minister for the purposes of this subsection, and includes any land so designated as land which in the opinion of the Minister ought to be brought into use for agriculture:
>
> Provided that no designation under this subsection shall extend—
>
> (a) to land used as pleasure grounds, private gardens or allotment gardens, or
>
> (b) to land kept or preserved mainly or exclusively for the purposes of sport or recreation, except where the Minister is satisfied that its use for agriculture would not be inconsistent with its use for the said purposes and it is so stated in the designation.

18.151 It is not known whether the Minister has designated any or, if so, how much land under section 109. It would seem that the very specific definition of agricultural land in section 147 of the TCPA 1990 adds nothing to the general phrase "agricultural land", interpreted solely in light of the definition of "agriculture" considered above.

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[105] Used (other than in terms such as "agricultural unit") in TCPA 1990, s 171.

And the oblique reference to the scheme of Ministerial designation is likely to be confusing for users of the Bill.

18.152 Part 6 of Schedule 2 to the GPDO – which provides for permitted development rights for agricultural land – defines the term "agricultural land" as follows:

> Land which, before development permitted by this Part is carried out, is land in use for agriculture and which is so used for the purposes of a trade or business, and excludes any dwellinghouse or garden.

18.153 This is a slightly more specific definition than the general one indicated above, but we consider that it would be appropriate for the interpretation of both Part 6 of the Act and also Part 6 of Schedule 2 to the GPDO.

Other terms relating to agriculture

18.154 The term "agricultural unit" is used in a number of places in the TCPA 1990 in relation to purchase notices and blight notices.[106] It is defined, for both purposes, in section 171 of the TCPA 1990[107], as follows:

> land which is occupied as a unit for agricultural purposes, including any dwellinghouse or other building occupied by the same person for the purpose of farming the land.

18.155 The term is also used in a number of places in Part 6 of Schedule 2 to the GPDO – which provides for permitted development rights for agricultural land. That defines it in the same terms as in the Act, save that it also explicitly includes any dwelling on that land occupied by a farmworker.

18.156 It would seem that that the two definitions are seeking to refer to the same concept, and that it would be more satisfactory for the definition in the GPDO, or one broadly to the same effect, to be included in the Bill.

18.157 The terms "agricultural tenant" and "agricultural holding" are used only in section 65, and defined there (by reference to the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995). It would seem sensible for these to be included at along with the provisions currently in that section.

Conclusion

18.158 We provisionally consider that it would be of assistance to users of the Code for all of these related definitions – so far as they are still required – to be brought together in one place, probably within the general interpretation section of the Bill.

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[106] Used in TCPA 1990, ss 145, 149 to 151, 154, 155, 157, 158, 160 to 164, 166, 168, 171, and 307.

[107] TCPA 1990, s 147 imports the definition in s.171.

Consultation question 18-17.

We provisionally propose 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 propose that no further definitions of those terms be provided in relation to purchase notices and blight notices.

Do consultees agree?

MISCELLANEOUS PROVISIONS

18.159 Section 314 of the TCPA 1990 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. Given the existence of a unitary system of local government in Wales, this provision seems to be otiose.

18.160 Section 335 of the TCPA 1990 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. It appears to be obsolete.

18.161 Parts 1 and 2 of Schedule 16 to the TCPA 1990 relate to sections 314 and 315 of the Act; Part 3 relates to section 315 and 318; and Part 6 to section 318. In view of our consultation questions earlier in the Chapter,[108] we provisionally consider that the Schedule is otiose.

[108] See **paras 18.48, 18.49** (TCPA 1990, s 318 – ecclesiastical property), **paras 18.70 to 18.73** (s 315 – minerals regulations) and **para 18.159** (s 314 – county council expenses).

Consultation question 18-18.

We provisionally propose that the following provisions, which appear to be obsolete or redundant, should not be included in the Planning Code:

(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).**

Do consultees agree?

Consultation questions

CHAPTER 5. INTRODUCTORY PROVISIONS

Consultation question 5-1.

We provisionally propose that a provision should be included in the Bill, to the effect that a public body exercising any function under the Code:

(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 relevant considerations indicate otherwise.

Do consultees agree?

Consultation question 5-2.

We provisionally consider that;

(1) to attempt to define relevant or material considerations in the Planning Code would cause as many problems as it would solve; and

(2) the term “relevant considerations” would be more appropriate than “material considerations.”

Do consultees agree?

Consultation question 5-3.

We provisionally propose that a provision should be included in the Bill, to the effect that a public body exercising any function under the Code must have regard to any other relevant considerations. Do consultees agree?

Consultation question 5-4.

We provisionally propose that a provision or provisions should be included to the effect that:

(1) 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

(2) a body exercising functions under the Planning Code and the Historic Environment Code must have special regard to those matters;

(3) and that “historic 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.

Do consultees agree?

Consultation question 5-5.

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

(1) the relevant considerations, to which a public body must have regard (in accordance with Consultation question 5-3) when exercising any function under the Code, 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; and

(2) the duty to consider the effect 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.

Do consultees agree?

Consultation question 5-6.

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

(1) the relevant considerations, to which a public body must have regard (in accordance with Consultation question 5-3) when exercising any function under the Code, include the polices of the Welsh Government relating to the use and development of land, so far as they are relevant to the exercise of that function; and

(2) the consideration of 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.

Do consultees agree?

Consultation question 5-7.

We provisionally consider 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. Do consultees agree?

Consultation question 5-8.

We provisionally propose that a series of signpost provisions 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. Do consultees agree?

Consultation question 5-9.

We provisionally propose that section 53(2) of the Coal Industry Act 1994 (environmental duties in connection with planning) should be amended so that they no longer apply to Wales. Do consultees agree?

Consultation question 5-10.

In light of the previous proposals in this Chapter, we provisionally consider that there is no need for the Bill to contain a provision explaining the purpose of the planning system in Wales. Do consultees agree?

Consultation question 5-11.

We provisionally consider 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 does not prevent the Welsh Ministers appointing for a particular purpose a person other than an employee of the Planning Inspectorate. Do consultees agree, and if so which term do consultees think is most appropriate?

Consultation question 5-12.

We provisionally propose 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. Do consultees agree?

Consultation question 5-13.

We consider 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. Do consultees agree?

CHAPTER 6. FORMULATION OF THE DEVELOPMENT PLAN

Consultation question 6-1.

We provisionally consider that Part 6 of the PCPA 2004 (development plans), as amended by the P(W)A 2015, should 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. Do consultees agree?

Consultation question 6-2.

We provisionally propose that:

(1) the provisions currently in the Planning and Energy Act 2008 are not restated in the Bill;

(2) consideration is given in due course to:

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

Do consultees agree?

Consultation question 6-3.

In 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:

(1) is there 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?

(2) are the 2004 Regulations still required in relation to plans and programmes other than the NDF and development plans? or

(3) do the 2004 Regulations need amendment or simplification in any way?

Consultation question 6-4.

We provisionally propose that section 114 of the PCPA 2004 (responsibility for procedure at local plan inquiries) should not be restated in the Planning Bill. Do consultees agree?

Consultation question 6-5.

We consider 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. Do consultees agree?

CHAPTER 7. THE NEED FOR A PLANNING APPLICATION

Consultation question 7-1.

We provisionally propose that the power of the Welsh Ministers to remove certain categories of demolition from the scope of development, currently in TCPA 1990, s 55(4)(g), should not be restated in the new Bill, but that the same result should be achieved by the use of the GPDO. Do consultees agree?

Consultation question 7-2.

We provisionally propose 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 floorspace of a building, whether underground or otherwise, is development. Do consultees agree?

Consultation question 7-3.

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:

(1) the formation or laying out of means of access to a highway; and

(2) the placing or assembly of any tank in any part of any inland waters for the purpose of fish farming there.

We invite the views of consultees.

Consultation question 7-4.

We provisionally propose that there should be an explicit provision as to the approval of use classes regulations by the negative resolution procedure. Do consultees agree?

Consultation question 7-5.

We provisionally propose that section 55(3)(a) TCPA 1990 (intensification of dwellings as material change of use) should 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. Do consultees agree?

Consultation question 7-6.

We provisionally propose that section 55(2)(d) to (f) of the TCPA 1990 (activities not falling under development) 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 an order 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 order, of any part of the buildings or the other land, from that use to any other use within the same class.

Do consultees agree?

Consultation question 7-7.

We provisionally propose 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. Do consultees agree?

Consultation question 7-8.

We provisionally propose 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. Do consultees agree?

Consultation question 7-9.

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. Do consultees agree?

Consultation question 7-10.

We provisionally propose that sections 82 to 87 of and Schedule 7 to the TCPA (simplified planning zones) should not be restated in the new Planning Bill. Do consultees agree?

Consultation question 7-11.

We provisionally propose 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 light of general and local development orders, but not to enterprise zone or simplified planning zone schemes). Do consultees agree?

Consultation question 7-12.

We provisionally propose that a provision should be included to the effect that:

(1) an application for planning permission for an operation or change of use be assumed to include an application for a certificate of lawfulness of proposed use or development (CLOPUD) in relation to the operation or change of use; and

(2) an application for planning permission to retain an operation or change of use already carried out without permission is assumed to include an application for a certificate of lawfulness of existing use or development (CLEUD) in relation to the operation or change of use.

Do consultees agree?

CHAPTER 8. APPLICATIONS TO THE PLANNING AUTHORITY

Consultation question 8-1.

We provisionally consider that the law as to planning applications could be simplified, by:

(1) abolishing outline planning permission;

(2) requiring that every application for planning permission for development – whether that development is proposed, or is under way, or has been completed – being accompanied by plans, drawings and information sufficient to describe the proposed development;

(3) enabling the items to accompany applications to be prescribed in regulations, so as to include (so far as relevant) details of:

- the approximate location of all proposed buildings, routes and open spaces,
- the upper and lower limit for the height, width and length of each building proposed, and
- the area or areas where access points will be situated;

(4) an applicant being able 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) an authority being able (whether or not invited to do so) to grant permission subject to such conditions; and

(6) an authority being able to notify the applicant that it is unable to determine an application without further specified details being supplied.

Do consultees agree?

Consultation question 8-2.

We provisionally propose that section 327A of the TCPA 1990 – providing that planning authorities must not be entertain applications that do not comply with procedural requirements – should not be restated in the new Bill. Do consultees agree?

Consultation question 8-3.

We provisionally propose 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 new Bill. Do consultees agree?

Consultation question 8-4.

We provisionally propose that the requirements of section 65(2) of the TCPA 1990 and secondary legislation made under that provision as to

(1) the notification of planning applications to agricultural tenants and

(2) the notification of minerals applications

Should be clarified, to ensure that they are only drawn to the attention of applicants in relevant cases.

Do consultees agree?

Consultation question 8-5.

We provisionally propose that section 70A of the TCPA 1990 (power to decline similar applications) should be restated in the Planning Bill as its stands following amendment by PCPA 2004, the Planning Act 2008 and the P(W)A 2015. Do consultees agree?

Consultation question 8-6.

We provisionally propose that section 70B of the TCPA (designed to discourage or prevent twin-tracking) should not be restated in the Planning Bill. Do consultees agree?

Consultation question 8-7.

We provisionally consider that it would be helpful to include in the Bill a provision 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. Do consultees agree?

Consultation question 8-8.

We provisionally propose that the DMP(W)O 2012 should 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 the consideration of the application. Do consultees agree?

Consultation question 8-9.

We provisionally consider that the distinction between conditions and limitations attached to planning permissions should be minimised, either:

1) by defining the term “condition” so as to include “limitation”, or

2) by 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.

Do consultees agree?

Consultation question 8-10.

We provisionally propose that the provisions in the TCPA 1990 as to the imposition of conditions should be replaced in the Bill with 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.

Do consultees agree?

Consultation question 8-11.

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, 8-16 and 8-18.

Do consultees consider that the powers 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 should they be incorporated in Government guidance on the use of conditions?

Consultation question 8-12.

We provisionally propose that the Code should 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 shall not be carried before:

- a contract for the carrying out of some further specified development has been made; and

- planning permission has been granted for the development that is the subject of the contract.

Do consultees agree?

Consultation question 8-13.

We provisionally consider that it would be helpful:

(1) for a planning authority 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) for an applicant to have a 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) for an applicant to have, in either case, a right to appeal against such identification, without putting in jeopardy the substance of the condition itself.

Do consultees agree? Is there any other way in which the status of pre-commencement conditions could be clarified?

Consultation question 8-14.

We provisionally propose that the Bill makes plain:

(1) that development must be commenced by the date specified in any relevant condition;

(2) that any phases must be commenced by the date specified in any condition relevant to that phase; and

(3) that in the absence of any such condition the development must be commenced within five years of the grant of permission.

Do consultees agree?

Consultation question 8-15.

We provisionally propose that the Bill, or regulations under the Bill, should enable the imposition of conditions to the effect that the development or use of land under the control of the applicant (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. Do consultees agree?

Consultation question 8-16.

We provisionally propose 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 the buildings or works authorised by the permission be removed, or the authorised use be discontinued at the end of the period, and that works be carried out at that time for the reinstatement of land. Do consultees agree?

Consultation question 8-17.

We provisionally consider 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) time-limited permissions issued under what is now section 72(1)(a); and

(2) some time-limited permissions issued between 1960 and 1968.

Do consultees agree?

Consultation question 8-18.

We provisionally propose that the Bill, or regulations under the Bill, should 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.

Do consultees agree?

Consultation question 8-19.

We provisionally consider 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. Do consultees agree?

Consultation question 8-20.

We provisionally propose that a planning authority should 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. Do consultees agree?

Consultation question 8-21.

We provisionally propose that the Bill should clarify the existing law and procedures as to the approval of details required by:

(4) a condition of a permission granted by a development order;

(5) a requirement imposed by a planning authority following a notification of proposed works in a relevant category of development permitted by a development order.

Do consultees agree?

Consultation question 8-22.

We consider that it might be helpful for there to be 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. Do consultees agree?

Consultation question 8-23.

We provisionally consider 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 light of its assessment of the materiality of the proposed amendment.

We envisage 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.

Do consultees agree?

Consultation question 8-24.

We provisionally propose that the Planning Code should extend the scope of section 96A (approval of minor amendments) to include approvals of details. Do consultees agree?

Consultation question 8-25.

We provisionally propose that an expedited procedure should be available for the determination of an application to vary a permission where the implementation of the permitted development is under way. Do consultees agree?

Consultation question 8-26.

We provisionally propose that the Welsh Ministers should have powers:

(1) to make regulations requiring applications in a particular category to be notified to them, and

(2) 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.

Do consultees agree?

Consultation question 8-27.

We provisionally propose 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. Do consultees agree?

Consultation question 8-28.

We provisionally consider that the following provisions currently in the TCPA 1990 should be not restated in the Planning Bill, but that equivalent provisions be included in the DMP(W)O 2012 if considered necessary:

(1) section 71(3) (consultation as to caravan sites); and

(1) section 71ZB (notification of development before starting, and display of permission whist it is proceeding).

Do consultees agree?

Consultation question 8-29.

We provisionally propose 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) (referring to 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) of the TCPA 1990 (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).

Do consultees agree?

CHAPTER 9. APPLICATIONS TO THE WELSH MINISTERS

Consultation question 9-1.

We provisionally propose that sections 62M to 62O 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. Do consultees agree?

Consultation question 9-2.

We provisionally consider 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. Do consultees agree?

Consultation question 9-3.

We provisionally propose 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. Do consultees agree?

Consultation question 9-4.

We provisionally propose that sections 62D to 62L of the TCPA 1990 (DNS procedure) should be restated in the new Planning Code, subject to appropriate adjustments to reflect our proposals in Chapters 7 and 8. Do consultees agree?

Consultation question 9-5.

We provisionally propose that section 101 of and Schedule 8 to the TCPA 1990 (planning inquiry commissions) should not be restated in the new Planning Code. Do consultees agree?

CHAPTER 10. THE PROVISION OF INFRASTRUCTURE AND OTHER IMPROVEMENTS

Consultation question 10-1.

We provisionally consider 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 stand into the Planning Code, pending any more thoroughgoing review that may take place in due course. Do consultees agree?

Consultation question 10-2.

We provisionally propose that provisions relating to planning obligations, currently in sections 106 to 106B of the TCPA 1990, should be incorporated broadly as they stand into the Planning Code, pending any review that may take place in due course. Do consultees agree?

Consultation question 10-3.

We provisionally consider 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 Bill. Do consultees agree?

Consultation question 10-4.

We provisionally consider that it might be helpful for a provision to be included in the Bill 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. Do consultees agree?

Consultation question 10-5.

We provisionally consider that it would be helpful to make the enforcement of a planning obligation under section 106 of the TCPA 1990 more straightforward by including the breach of such an obligation within the definition of a breach of planning control. We invite the views of consultees, including as to the practicalities of such a proposal.

Consultation question 10-6.

Section 106(12) TCPA 1990 empowers the Welsh ministers to provide 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.

No such regulations have been made: does their absence cause a problem in practice?

Consultation question 10-7.

We provisionally propose that the use of standard clauses in planning obligations should be promoted in Welsh Government guidance. Do consultees agree?

Consultation question 10-8.

We provisionally consider 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. Do consultees agree in principle, and what should be the features of such a procedure?

Consultation question 10-9.

We provisionally consider that 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 to be provided (along the lines of section 106ZB of the TCPA 1990, introduced by section 159 of the 2016 Act with regard to obligations as they relate to the provision of affordable housing) might be useful.

Do consultees agree in principle, and what categories of benefits might most appropriately be subject to such a procedure?

Consultation question 10-10.

We provisionally propose that planning authorities should be able to enter into planning obligations to bind their own land in appropriate cases. Do consultees agree?

Consultation question 10-11.

We provisionally propose that a person proposing to enter into a contract for the purchase of land should 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. Do consultees agree?

CHAPTER 11. APPEALS AND OTHER SUPPLEMENTARY PROVISIONS

Consultation question 11-1.

We provisionally propose that the provision, currently 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. Do consultees agree?

Consultation question 11-2.

We provisionally propose that the Bill 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.

Do consultees agree?

Consultation question 11-3.

We provisionally propose that the power to appoint assessors to assist inspectors to determine appeals 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 applications determined on the basis of written representations.

Do consultees agree?

Consultation question 11-4.

We provisionally propose that the changes proposed in Consultation questions 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.

Do consultees agree?

Consultation question 11-5.

We provisionally propose that the legislation should state that, in a case where there has been an appeal to the Welsh Ministers, the start of the period within which a purchase notice can

be served is the date of the decision of the Welsh Ministers on the appeal. Do consultees agree?

Consultation question 11-6.

We provisionally propose that the Planning 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. Do consultees agree?

Consultation question 11-7.

We provisionally consider 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. Do consultees agree?

Consultation question 11-8.

We provisionally propose 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) be not restated in the Bill, in view of the parallel provisions in section 1 of the Road Traffic Regulation Act 1984. Do consultees agree?

Consultation question 11-9.

We provisionally propose that decisions relating to orders under section 252 of the TCPA 1990 (extinguishing rights of way) be generally made by inspectors rather than by the Welsh Ministers, subject to a power for the Welsh Ministers to make a direction to recover a particular case for their decision. Do consultees agree?

CHAPTER 12. UNAUTHORISED DEVELOPMENT

Consultation question 12-1.

We provisionally consider that the provisions currently in sections 171C and 330 of the TCPA 1990 could 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 is using it for any purpose, requiring the recipient to supply information as to:

(1) the interest in the land held by the recipient of the notice and by any other person of whom the recipient is aware;

(2) the use or uses of the land and when they began; and

(3) the operations and other activities now taking place of the land and when they began.

Where it appears that there has been a breach of planning control, such a notice may also:

(4) require the recipient to supply information as to:

- whether any uses or operations specified in the notice are being or have been carried out on the land;
- any person known to be using or have used the land or carried out any operations on it;
- any planning permission that may have been granted, and any conditions or limitations attached to such a permission; or
- any reasons why permission is not required for any particular use or operation; and

(5) request a meeting at which the recipient can discuss the matters referred to in the notice.

Do consultees agree?

Consultation question 12-2.

We provisionally propose 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. Do consultees agree?

Consultation question 12-3.

We provisionally consider that the law as to concealed breaches of planning control should remain as it is, subject to the common law principles developed *Welwyn Hatfield Council v Secretary of State* [2010] UKSC 15, [2011] 2 AC 304, and in particular that the "planning enforcement order" procedure, introduced by the Localism Act 2011, should not be included in the Bill. Do consultees agree?

Consultation question 12-4.

We provisionally propose either:

(1) that an enforcement warning notice can be served during the period of 4 or 10 years after which enforcement action cannot 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.

Do consultees agree and, if so, which option seems most appropriate?

Consultation question 12-5.

We provisionally propose 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 (defined so as to include a house and a flat). Do consultees agree?

Consultation question 12-6.

We provisionally propose 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 days (starting at the beginning of the day after the day on which it is displayed);

(3) the notice 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.

Do consultees agree?

Consultation question 12-7.

We provisionally propose that:

(1) 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);

(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.

Do consultees agree?

Consultation question 12-8.

We provisionally propose that the provisions relating to breach of condition notices, currently in section 187A 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 (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). Do consultees agree?

Consultation question 12-9.

We provisionally propose 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.

Do consultees agree?

Consultation question 12-10.

We provisionally propose 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. Do consultees agree?

Consultation question 12-11.

We provisionally propose 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. Do consultees agree?

Consultation question 12-12.

We provisionally propose 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 including ground (a) may do all or any of the following:

- 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.

Do consultees agree?

Consultation question 12-13.

We provisionally consider that ground (e) on which an appeal can be nade 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). Do consultees agree?

Consultation question 12-14.

We provisionally consider 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. Do consultees agree?

Consultation question 12-15.

We provisionally propose 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. Do consultees agree?

Consultation question 12-16.

We provisionally propose 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. Do consultees agree?

Consultation question 12-17.

We provisionally propose 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). Do consultees agree?

Consultation question 12-18.

We provisionally propose:

(1) that it be an offence to contravene a stop notice that has come into effect; and

(2) that it 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.

Do consultees agree?

Consultation question 12-19.

We provisionally propose that:

(1) 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.

Do consultees agree?

Consultation question 12-20.

We provisionally consider that where a stop notice is served by the Welsh Ministers under section 185, and subsequently quashed, any liability to compensation arising under section 186 should be payable by them and not by the planning authority. Do consultees agree?

Consultation question 12-21.

We provisionally propose that the offences under section 179(2) (breach of an enforcement notice) and section 179(5) (subsequent resumption of prohibited activity)to 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; and

Do consultees agree?

Consultation question 12-22.

We provisionally propose that section 172A of the TCPA (assurances as to non-prosecution for breach of an enforcement notice) should be amended so as:

(3) to enable an authority to give such an assurance simply by “giving notice” to the relevant person, rather than necessarily doing so by a letter; and

(4) to enable the authority 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.

Do consultees agree?

Consultation question 12-23.

We provisionally propose 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) planning permission following the issue of an enforcement notice, rather than following the service of a copy of the notice.

Do consultees agree?

Consultation question 12-24.

We provisionally propose 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. Do consultees agree?

Consultation question 12-25.

We provisionally propose that the offences of:

(1) reinstating or restoring buildings or works following compliance with an enforcement notice (under section 181(5) of the TCPA 1990); and

(2) failing to comply with a breach of condition notice (under section 187A(9) of the TCPA 1990);

should all 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. Do consultees agree?

Consultation question 12-26.

We provisionally propose 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. Do consultees agree?

CHAPTER 13. WORKS AFFECTING LISTED BUILDINGS AND CONSERVATION AREAS

Consultation question 13-1.

We provisionally propose that the control of works to historic assets could be simplified by:

(1) amending the definition of “development”, for which planning permission is required, to include “heritage development”, that is:

- the demolition of a listed building; or

- 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

- the demolition of a building in a conservation area;

(2) removing the requirement for listed building consent and conservation area consent to be obtained for such works; and

(3) implementing the additional measures outlined in Consultation questions 13-2 to 13-8 to ensure that the existing level of protection for historic assets would be maintained.

Do consultees agree?

Consultation question 13-2.

We provisionally propose that the power to make general and local development orders should be extended to enable the grant of planning permission by order for heritage development. Do consultees agree?

Consultation question 13-3.

We provisionally propose that heritage partnership agreements should be capable of granting planning permission by order for heritage development in such categories as may be prescribed. Do consultees agree?

Consultation question 13-4.

We provisionally consider 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. Do consultees agree?

Consultation question 13-5.

We provisionally consider 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 exercise their powers not to include it in the list.

Do consultees agree?

Consultation question 13-6.

We provisionally propose that the Bill should include provisions to the effect that:

(1) the carrying out without planning permission (or in breach of a condition or limitation attached to permission) of heritage development – defined along the lines indicated in Consultation question 13-1 – be a criminal offence, punishable

- on summary conviction by imprisonment for a term not exceeding six months or a fine or both; or

- on summary conviction by imprisonment for a term not exceeding two years or a fine or both; and

(2) 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.

Do consultees agree?

Consultation question 13-7.

We provisionally propose that the Bill should 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. Do consultees agree?

Consultation question 13-8.

We provisionally propose that the Bill should 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 Planning (Listed Buildings and Conservation Areas) Act 1990;

(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.

(3) in determining an enforcement appeal relating to a building subject to a building preservation order, they may exercise their powers not to include it in the list.

Do consultees agree?

Consultation question 13-9.

We provisionally consider that planning permission should not be unified with scheduled monument consent. Do consultees agree?

Consultation question 13-10.

We provisionally consider that the definition of "listed building" should be clarified by making it clear that the definition 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; and

(2) in any other case, at the date on which the building was first included in the list.

Do consultees agree?

Consultation question 13-11.

We provisionally propose 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. Do consultees agree?

CHAPTER 14. OUTDOOR ADVERTISING

Consultation question 14-1.

We provisionally propose that the definition of "advertisement" in the TCPA 1990 should be clarified, and included in the Bill alongside other provisions relating to advertising. Do consultees agree?

Consultation question 14-2.

We provisionally that the reference to the display of advertisements currently included in the statutory definition of "advertisement" in the TCPA 1990 could be omitted. Do consultees agree?

Consultation question 14-3.

We provisionally propose that the word "land" is used in place of "site" and "sites", to be included:

(1) in the provision of the Bill relating to the control of advertisements; and

(2) in the Regulations when they are next updated.

Do consultees agree?

Consultation question 14-4.

We provisionally propose that a definition of "person displaying an advertisement" in the TCPA 1990 be included in the Bill 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.

Do consultees agree?

Consultation question 14-5.

We provisionally propose 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.

Do consultees agree?

Consultation question 14-6.

We provisionally propose 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 law;

(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.

Do consultees agree?

Consultation question 14-7.

We provisionally propose that deemed consent under the Advertisements Regulations should be granted for a display of advertisements that has the benefit of planning permission. Do consultees agree?

Consultation question 14-8.

We provisionally propose 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;

(2) deemed consent be granted for the display of an advertisement on 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.

Do consultees agree?

Consultation question 14-9.

We provisionally propose 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 Consultation question 14-6.

Do consultees agree? And what might be the resources implications of this proposal?

Consultation question 14-10.

We provisionally propose that what is now 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 a site that has been used for that purpose for ten years, rather than by reference to a fixed date (currently 1 April 1974).

Do consultees agree?

Consultation question 14-11.

We provisionally propose that the power (currently in section 224(1), (2) TCPA 1990) for the Welsh Ministers to include in Regulations provisions similar to those governing enforcement notices should not be restated in the Bill. Do consultees agree?

Consultation question 14-12.

We provisionally propose that the powers currently in section 225 of the TCPA 1990 (removal of unauthorised posters and placards) and in section 43 of the Dyfed Act 1987 (removal of

other unauthorised advertisements) should be replaced with a new single procedure allowing the removal of any unauthorised advertisements, subject to

(1) no advertisement being removed 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, as under section 225B of the TCPA 1990 – 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 as under section 225K.

Do consultees agree? What are the likely resource implications of this proposal?

Consultation question 14-13.

We provisionally propose that the maximum sentence on conviction for unauthorised advertising should be increased to an unlimited fine, in line with other offences under the TCPA 1990 and the Listed Buildings Act 1990. Do consultees agree?

Consultation question 14-14.

We provisionally propose that it be made clear on the face of the Bill, rather than (as at present) in the Regulations, that all functions under the Code relating to advertising should be exercised in the interests of amenity and public safety. Do consultees agree?

Consultation question 14-15.

We provisionally propose that the provisions in section 220 of the TCPA 1990 relating to advisory committees and tribunals should not be included in the Bill. Do consultees agree?

Consultation question 14-16.

We provisionally propose that the provisions in section 221(1)(b), (2) of the TCPA 1990 relating to experimental areas be not included in the Bill. Do consultees agree?

Consultation question 14-17.

It appears 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 is no longer of any practical utility, and should be not included in the Bill. Do consultees agree?

CHAPTER 15. WORKS TO PROTECTED TREES

Consultation question 15-1.

We provisionally consider 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.

Do consultees agree? If they do not, what definitions would be appropriate?

Consultation question 15-2.

We provisionally propose that the Bill should provide;

(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.

Do consultees agree?

Consultation question 15-3.

We provisionally propose:

(1) that the Bill makes 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.

Do consultees agree?

Consultation question 15-4.

We provisionally propose that it should be clarified that the making of 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. Do consultees agree?

Consultation question 15-5.

We provisionally consider that there would be no benefit in bringing works to trees within the scope of development requiring planning permission. Do consultees agree?

Consultation question 15-6.

We provisionally consider 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 consider that the exemption 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). Do consultees agree?

Consultation question 15-7.

We provisionally consider 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. Do consultees agree?

Consultation question 15-8.

We provisionally propose that a new exemption from consent under tree preservation regulations 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

(1) a requirement under section 206 of the TCPA 1990 or

(2) a condition of a planning permission or a consent to fell another tree.

Do consultees agree?

Consultation question 15-9.

We provisionally propose 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.

Do consultees agree? And what might be the resource implications of this proposal?

Consultation question 15-10.

We provisionally propose that planning authorities should be required to acknowledge applications for consent under the trees regulations. Do consultees agree?

Consultation question 15-11.

We provisionally propose 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). Do consultees agree?

Consultation question 15-12.

We provisionally propose that there should be an explicit power enabling a planning authority to waive or relax a replacement notice. Do consultees agree?

Consultation question 15-13.

Section 209 of the TCPA 1990 provides for regulations be made enabling a planning authority to recover any expenses it has incurred in making and enforcing a tree replacement notice; but no such regulations have yet been made. Would such powers be helpful in ensuring that replacement trees are planted in appropriate cases?

Consultation question 15-14.

We provisionally propose that the scope of the matters prohibited by a tree preservation order should be extended to include the causing of harm to tree:

(1) intentionally; or

(2) recklessly (for example, by the raising or lowering of soil levels around the base of a tree, or the grazing of animals in woodlands).

Do consultees agree?

Consultation question 15-15.

We provisionally propose 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. Do consultees agree?

Consultation question 15-16.

We provisionally consider 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

(3) 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, did not know, and could not reasonably have been expected to know, of its existence.

Do consultees agree?

Consultation question 15-17.

We provisionally consider 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 (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.

Do consultees agree?

CHAPTER 16. IMPROVEMENT REGENERATION AND RENEWAL

Consultation question 16-1.

We provisionally propose that the Bill should be drafted so as to make clear that a notice under what is now section 215 of the TCPA 1990, requiring land to be properly maintained, can be issued 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.

Do consultees agree?

Consultation question 16-2.

We provisionally propose 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 once lawful, but are no longer lawful. Do consultees agree?

Consultation question 16-3.

We provisionally propose that a notice under the provision in the new Code replacing section 215 TCPA 1990 (time of notice taking effect):

(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 deemed to be displaying the advertisement in question; and

(3) should contain a notice as to the rights of any recipient to appeal against it.

Do consultees agree?

Consultation question 16-4.

We provisionally propose that the Bill should make it clear that all appeals against section 217 notices (appeals) are normally to be determined by inspectors, in line with consultation question 11-3. Do consultees agree?

Consultation question 16-5.

We provisionally propose that the new Planning Code could 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, 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; and

(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.

Do consultees agree?

Consultation question 16-6.

We provisionally propose that the new Planning Bill should include powers, equivalent to those currently available under section 89(1) of the National Parks and Access to the Countryside Act 1949, 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, using compulsory powers or by agreement.

Do consultees agree?

Consultation question 16-7.

We provisionally propose that the Bill 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.

Do consultees agree?

Consultation question 16-8.

We provisionally propose the amendment of:

(1) Part 18 of and Schedules 32 to the Local Government, Planning and Land Act 1980 (enterprise zones), and

(2) the provisions relating to enterprise zones in the TCPA 1990 and related legislation,

so that they apply in future only in relation to England. Do consultees agree?

Consultation question 16-9.

We provisionally propose the amendment of:

(1) the New Towns Act 1981, and

(2) 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 apply in future only in relation to England. Do consultees agree?

Consultation question 16-10.

We provisionally propose 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 apply in future only in relation to England. Do consultees agree?

Consultation question 16-11.

We provisionally propose 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 apply in future only in relation to England. Do consultees agree?

Consultation question 16-12.

We provisionally propose the amendment of Part 3 of and Schedule 5 to the Agriculture Act 1967 (rural development boards) and related legislation so that they apply in future only in relation to England and Scotland. Do consultees agree?

CHAPTER 17. HIGH COURT CHALLENGES

Consultation question 17-1.

We provisionally propose that the provisions currently in 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 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,

(3) beginning with the day after the day on which the relevant decision was made.

Do consultees agree?

Consultation question 17-2.

We provisionally consider that the provisions of 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. Do consultees agree?

CHAPTER 18. MISSCELLANEOUS AND SUPPLEMENTARY PROVISIONS

Consultation question 18-1.

We provisionally propose 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 for which provisions); and

(2) provide for each undertaker or category of undertaker what is to be regarded as "operational land" and who is "the appropriate Minister".

Do consultees agree?

Consultation question 18-2.

We provisionally propose that, when the GPDO is next updated, consideration should be given to separating those provisions relating to development by statutory undertakers, the Crown, mineral operators, and other similar bodies, from those relating to development generally. Do consultees agree?

Consultation question 18-3.

We provisionally propose that sections 283 and 316A of the TCPA 1990 (relating to the display of advertisements on the operational land of statutory undertakers and local authorities that are statutory undertakers) should not be restated in the Code. Do consultees agree?

Consultation question 18-4.

We provisionally propose 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) should not be restated in the Bill. Do consultees agree?

Consultation question 18-5.

We provisionally propose 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.

Do consultees agree?

Consultation question 18-6.

We provisionally consider 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. Do consultees agree?

Consultation question 18-7.

We provisionally propose 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).

Do consultees agree?

Consultation question 18-8.

We provisionally propose 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. Do consultees agree?

Consultation question 18-9.

We provisionally propose 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. Do consultees agree?

Consultation question 18-10.

We provisionally propose that there should be 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. Do consultees agree?

Consultation question 18-11.

We provisionally propose that the Code should include a power to require that 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. Do consultees agree?

Consultation question 18-12.

We provisionally propose 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:

(1) one party to an appeal has behaved unreasonably; and

(2) that unreasonable behaviour has led other parties to incur unnecessary or wasted expense.

Do consultees agree?

Consultation question 18-13.

We provisionally propose that the Planning Code should incorporate provisions equivalent to those currently in:

(1) section 276 of the Public Health Act 1936 (the powers 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. Do consultees agree?

Consultation question 18-14.

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 18-15.

We provisionally propose 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, and a definition of the term "flat". Do consultees agree?

Consultation question 18-16.

We provisionally consider that it would be helpful for the Bill to 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 one structure is within the "curtilage" of a building is to be determined with regard to:

(1) the physical 'layout' of the building and the structure;

(2) their ownership, past and present; and

(3) their use and function, past and present.

Do consultees agree?

Consultation question 18-17.

We provisionally propose that the interpretation section of the Bill 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 propose that no further definitions of those terms be provided in relation to purchase notices and blight notices. Do consultees agree?

Consultation question 18-18.

We provisionally propose that the following provisions, which appear to be obsolete or redundant, should not be included in the Planning Code:

(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).

Do consultees agree?

Appendix A: Responses to Scoping Paper

INTRODUCTION

A.1 The following bodies and individuals have submitted responses to the Scoping Paper or have met with the Commission to discuss its contents:

Welsh Government

Cadw Welsh Government

Office of Legislative Counsel

Department of Communities and Local Government

Northern Ireland Government

Planning Inspectorate (PINS)

Planning Officers Society Wales (POSW) – North Wales

Planning Officers Society Wales (POSW) – South West Wales

Planning Officers Society Wales (POSW) South East Wales

Cardiff Council

Merthyr Tydfil County Borough Council

Monmouthshire County Council

Neath Port Talbot Borough Council

Newport County Borough Council

Rhondda Cynon Taf County Borough Council

Torfaen County Borough Council

The three national park authorities

Churchstoke Community Council

Gwersyllt Community Council

Llandrinio & Arddleen Community Council

Llanelli Town Council

Newtown and Llanllwchaiarn Town Council

Penstrowed Community Council

Welsh St Donats Community Council

Public Services Ombudsman for Wales

Association of HM District Judges (Wales Circuit)

Canal and River Trust (Glandwr Cymru)
The Coal Authority
Health and Safety Executive
Innogy Renewables UK
National Grid
Natural Resources Wales (NRW)
The four Welsh police forces
RWE Generation UK
Welsh Water (Dwr Cymru)

Bar Council
Institute of Historic Building Conservation (IHBC)
Law Society (Planning and Environmental Law Committee)
Planning and Environmental Bar Association (PEBA)
Royal Institution of Chartered Surveyors (RICS)
Royal Society of Architects in Wales (RSAW)
Royal Town Planning Institute (RTPI) Cymru
UK Environmental Law Association (UKELA)

Planning Aid Wales
Town and Country Planning Association (TCPA)
Wales Planning Consultants Forum (WPCF)

British Property Federation (BPF)
Campaign for Real Ale (CAMRA)
Community Housing Cymru
Country Landowners Association (CLA)
Home Builders Federation (HBF)
National Farmers Union (NFU) Cymru
Persimmon Homes West Wales
Residential Landlords Association

Ancient Monuments Society (AMS)

Civic Trust Cymru

Council for British Archaeology (CBA)

Society for the Protection of Ancient Buildings (SPAB)

National Trust Wales

Theatres Trust

Wales Heritage Group

Woodland Trust and Ancient Tree Forum

Dr Ashley Bowes, Barrister

Dr Allen Firth, Conservation and heritage consultant

Mr Martin Goodall, Solicitor, LARTPI

Mr Richard Harwood OBE, QC

Mr Nigel Hewitson, Assoc IHBC, Solicitor

Mr Adrian Penfold OBE, MRTPI, FRICS

Ms Leonora Rozee OBE, MRTPI

Mr Elfed Williams, FRICS, MRTPI

A.2 Formal responses from those who submitted them are available on the Law Commission's website at www.lawcom.gov.uk/planning-law-in-wales, along with a full analysis of the consultations.

A.3 We are very grateful to all those who assisted in the previous stage of this project; and we look forward to receiving further responses to this Consultation Paper.

Appendix B: Supporting material

Table B-1:
Principal pieces of planning legislation currently applying in Wales or England or both

		As first enacted		*As currently in force*	
		Sections	*Scheds*	*Sections*	*Scheds*
Town and Country Planning Act 1990					
Part 1.	Planning authorities	9		17	
Part 2.	Development plans	45		0	
Part 3.	Control over development	61		123	
Part 4.	Compensation for effects of certain orders, notices etc	12		10	
Part 5.	Compensation for restrictions on new development in limited cases	18		0	
Part 6.	Rights of owners etc to require purchase of interests	35		40	
Part 7.	Enforcement	25		44	
Part 8.	Special controls	29		61	
Part 9.	Acquisition and appropriation of land for planning purposes etc	21		21	
Part 10.	Highways	15		15	
Part 11.	Statutory undertakers	22		22	
Part 12.	Validity	9		8	
Part 13.	Application of Act to Crown land	10		8	
Part 14.	Financial provisions	12		13	
Part 15.	Miscellaneous and general	23		36	
		337	17	408	22
Planning (Listed Buildings and Conservation Areas) Act 1990					
Part 1.	Works to listed buildings	49	4	65	7
Part 2.	Works in conservation areas	6		6	
Part 3.	General	13		23	
Planning and Compulsory Purchase Act 2004		67	4	91	7
Planning Act 2008		22		25	
		494	**25**	**618**	**34**

Table B-2.

Primary legislation applying solely in Wales that can be repealed as part of the present exercise

	New Towns and Urban Development Corporations Act 1985	Schedule 2
(2)	Town and Country Planning Act 1990	10A, 23A to 23C, 27A, 28A, 61Z to 61Z2, to 62ZD, 62D to 62S, 71ZA, 71ZB, 100A, 164A, 173ZA, 319ZA to 319ZB, 319B, 32 322C, 323A, Schedule 1A, Schedule 2, P 1A,
(3)	Planning (Listed Buildings and Conservation Areas) Act 1990	Sections 6A, 26L, 26M, 88E
(4)	Local Government (Wales) Act 1994	Sections 18 to 20, Schedules 4 to 6
(5)	Planning and Compulsory Purchase Act 2004	Section 48, Part 6
(6)	Planning Act 2008	Part 10
(7)	Planning (Wales) Act 2015	The whole Act
(8)	Historic Environment (Wales) Act 2016	The whole Act

Table B-3.

Apparently redundant primary legislation that can be repealed as part of the present exercise insofar as it applies in Wales

	Town Development Act 1952	The whole Act
(2)	Agricultural Land (Removal of Surface Soil) Act 1952	The whole Act
(3)	Town and Country Planning Act 1954	The whole Act
(4)	Town and Country Planning Act 1962	The whole Act
(5)	Town and Country Planning Act 1963	The whole Act
(6)	Housing and Planning Act 1986	Sections 40, 48, 49, 55
(7)	Regional Development Agencies Act 1998	The whole Act

Table B-4.

Primary legislation that will no longer apply in Wales, but which will continue to apply in England

	National Parks and Access to the Countryside Act 1949	Section 89
(2)	Historic Buildings and Ancient Monuments Act 1953	The whole Act
(3)	Civic Amenities Act 1967	The whole Act
(4)	Ancient Monuments and Archaeological Areas Act 1979	The whole Act
(5)	Local Government, Planning and Land Act 1980	Parts 15, 16, 17, 18; Schedules 25 to 32
(6)	New Towns Act 1981	The whole Act
(7)	New Towns and Urban Development Corporations Act 1985	Schedule 2
(8)	Housing and Planning Act 1986	Part 3; Section 40; Schedule 1
(9)	Housing Act 1988	Part 3; Schedules 7 to 10
(10)	Town and Country Planning Act 1990	The whole Act except Part 9, ss 271-282
(11)	Planning (Listed Buildings and Conservation Areas) Act 1990	The whole Act
(12)	Planning (Consequential Provisions) Act 1990	The whole Act
(13)	Planning and Compensation Act 1991	Part I, Schedules 1 to 7
(14)	Leasehold Reform, Housing and Urban Development Act 1993	Sections 177 to 182
(15)	Environment Act 1995	Sections 96, 97, Schedules 13, 14.
(16)	Planning and Compulsory Purchase Act 2004	Parts 4, 5; Part 7, Chapter 1; Schedules 1 to 4, 6
(17)	Planning-gain Supplement (Preparations) Act 2007	The whole Act
(18)	Planning Act 2008	Part 9, Chapter 2; Part 11; Schedules 7, 8, 11
(19)	Localism Act 2011	Part 6, Chapter 2
(20)	Criminal Justice and Courts Act 2015	Sections 91, 92, Schedule 16

Table B-5.

Primary legislation relating to planning but not applying in Wales

Mineral Workings Acts 1951 and 1981	The whole Act	Ironstone working in central England
National Heritage Act 1983	Sections 32 to 38	English Heritage
Planning and Compensation Act 1991	Part 4	Land compensation in Scotland
National Heritage Act 2002	The whole Act	English Heritage (amends 1983 Act)
Sustainable Communities Act 2007	The whole Act	Sustainable communities in England
Housing and Regeneration Act 2008	Part 1	Homes and Communities Agency
Local Democracy, Economic Development and Construction Act 2009	Parts 4 to 6	Regional strategies; economic prosperity
Localism Act 2011	Part 5, Chapter 3; Part 6; Part 8, Chapter 2; Schedules 8 to 12, 21, 22	Assets of community value; miscellaneous planning matters; mayoral development corporations
Growth and Infrastructure Act 2013	First part (sections 1 to 17), Schedules 1 to 4	Miscellaneous planning matters in England
Enterprise and Regulatory Reform Act 2013	Sections 60, 61, 63, Schedules 16, 17	Heritage planning in England
Housing and Planning Act 2016	Part 6	Miscellaneous planning matters in England
Neighbourhood Planning Act 2017	Part 1	Miscellaneous planning matters in England

Table B-6.

Primary legislation relating to the countryside, access and rights of way

National Parks and Access to the Countryside Act 1949	The whole Act except section 89
Forestry Act 1967	Sections 8A, 37 to 40, 43, 46, 48 to 51, 49, Schedules 4 to 7
Agriculture Act 1967	Part 3, Schedule 5
Countryside Act 1968	The whole Act
Wildlife and Countryside Act 1981	Part 2, 3; Schedules 10A to 16
Wildlife and Countryside (Amendment) Act 1985	Sections 3, 4
Wildlife and Countryside (Service of Notices) Act 1985	The whole Act
Environment Act 1995	Part 3; Schedules 7 to 12
Countryside and Rights of Way Act 2000	Parts 1, 2, 4; sections 75 to 77, 79, Schedules 1 to 5, 9, 11 to 15
Natural Environment and Rural Communities Act 2006	Parts 2 to 6
Commons Act 2006	Sections 1(b), 2(2), 3(2), 15 to 15C