

## Chapter 9: Applications to the Welsh Ministers

### INTRODUCTION

- 9.1 Applications for planning permission are generally made to, and considered by, the relevant planning authority. However, there are some circumstances in which applications may (or must) be made direct to the Welsh Ministers. These include:
- 1) where a planning authority has been designated as an “underperforming authority”;
  - 2) where an application has effects beyond the immediate locality; and
  - 3) in response to urgent applications for development by the Crown.
- 9.2 In our Consultation Paper, we made some proposals in relation to (1) and (2). These proposals were relatively minor, as a result of the recent legislative changes to the law in this area. We considered that it would be inappropriate to make proposals for significant reforms until the effects of these changes have been fully established.

### APPLICATIONS IN THE AREAS OF UNDERPERFORMING PLANNING AUTHORITIES

***We provisionally proposed that sections 62M to 62O of the TCPA 1990, enabling a planning application to be made directly to the Welsh Ministers in the area of an underperforming planning authority, should be restated in the new Planning Code, subject to appropriate adjustments to reflect our proposals in Chapters 7 and 8 (Consultation Question 9-1).***

- 9.3 Section 23 of the Planning (Wales) Act (P(W)A) 2015 provided applicants with the option to bypass the planning authority, where it had been designated as underperforming, subject to criteria determined by the Welsh Ministers and laid before the National Assembly.<sup>1</sup> This procedure is distinct from the call-in procedure, which is rarely used in practice; it enables the applicant to take the initiative, and may save delay.<sup>2</sup>
- 9.4 In the light of the provision’s infancy, we proposed that it should be restated in the Planning Code. Of the 33 consultees who responded to this question, 16 supported our provisional proposal. 17 disagreed.
- 9.5 The Planning Officers Society in Wales (POSW) and POSW South-East Wales disagreed with our proposal, as did 15 planning authorities and one individual consultee. Several authorities described sections 62M to 62O as unnecessary.

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<sup>1</sup> TCPA 1990, s 62N. The National Assembly has 21 days to resolve not to approve the document, after which the criteria will have satisfied each of the conditions set out in the TCPA 1990.

<sup>2</sup> Consultation Paper, paras 9.6 to 9.10.

Merthyr Tydfil CBC and Pembrokeshire NPA argued that applications could instead be called-in by the Welsh Ministers in circumstances where a problem had arisen with planning authorities. Pembrokeshire CC argued that the possibility of appealing on grounds of non-determination was sufficient to allow applicants to overcome underperforming planning authorities.

- 9.6 POSW South East Wales and Cardiff Council also considered the provision as unnecessary. They suggested instead provisions requiring planning authorities to return fees if an application is not determined within an agreed period. They describe this procedure as an “adequate sanction” likely to “encourage [planning authorities] to perform efficiently”.
- 9.7 We note the seriousness of the concerns expressed by those who disagreed with our proposal, who were almost entirely the planning authorities responsible for administering the system. They were concerned with the procedural and other problems they considered would arise where the Welsh Ministers assume the responsibilities of an authority, and pointed out that the longer-term aspects of a planning decision (such as the discharge of conditions, and enforcement) will require the planning authority’s participation eventually.
- 9.8 We do not consider relying on either call-in or appeal to be a sufficient replacement for the procedure under sections 62M to 62O of the TCPA 1990. Relying on call-in is unsatisfactory, as it requires an application to be considered by the authority before Ministers will act; and they are reluctant to call-in applications other than in exceptional circumstances. An appeal relies on waiting until the authority has refused the application, or has failed to make any decision. Both procedures are likely to delay projects, resulting in additional costs for developers, and neither are likely to relieve the pressures placed on a planning authority struggling to carry out its duties. Additionally, we do not consider them to be a “sanction”, but rather a means of ensuring that the development management process in a particular area does not come to a halt, where authorities break down.
- 9.9 The exceptional nature of this provision was emphasised by a number of the consultees who agreed with our proposal. The Royal Town Planning Institute (RTPI) argued that it should only be used as an “option of last resort”, while the Theatres Trust suggested that it should be accompanied by an attempt by Welsh Ministers to “[work] with ‘underperforming’ planning authorities to resolve any perceived shortcomings as quickly as possible”. Both consultees supported the proposal, suggesting that it could be a valuable provision in the right circumstances.
- 9.10 We agree that the existence of a power to assume temporarily the responsibilities of a planning authority can have value. Its introduction reflects a recently adopted policy of the Welsh Government; to abolish it would amount to a significant change of policy. We expect that the powers would only be exercised in extreme circumstances, and on a temporary basis, while the authority makes the changes necessary in order to allow it to resume normal operation.
- 9.11 Essentially, the responses disagreeing with our proposal represented the views of those who are not in favour of the law as it stands, and who understandably do not wish to see it carried forward into the new Bill. Whilst we understand such concerns, we do not consider that they have demonstrated any technical flaws to justify our

intervention to prevent the new procedure being rolled forward. Whether it is ever used in practice will of course be a matter to be considered in any future review of the legislation.

- 9.12 We therefore continue to recommend that the power to allow applicants to make planning applications direct to the Welsh Ministers in the area of an underperforming planning authority should be restated in the new Planning Code.

#### **Recommendation 9-1.**

**We recommend that sections 62M to 62O of the TCPA 1990, enabling a planning application to be made directly to the Welsh Ministers in the area of an underperforming planning authority should be restated in the Bill, subject to appropriate adjustments to reflect our recommendations in Chapters 7 and 8.**

### **DEVELOPMENTS OF NATIONAL SIGNIFICANCE**

- 9.13 Local planning authorities do not have responsibility for determining all applications for developments within their area.
- 9.14 Firstly, nationally significant infrastructure projects (“NSIPS”) in certain categories will be the subject of applications to the Secretary of State (not the Welsh Ministers) for “development consent”, rather than planning permission, under a procedure laid down in the Planning Act 2008, as amended by the Localism Act 2011.<sup>3</sup> A grant of development consent from the Secretary of State overrides the need for any other consent or permission from local planning authorities.<sup>4</sup>
- 9.15 Secondly, applications for planning permission for a project that is in any of a further twelve categories of “developments of national significance” (or “DNSs”) are to be made to the Welsh Ministers rather than to local planning authorities.<sup>5</sup> A list of these categories is in the Developments of National Significance (Specified Criteria and Prescribed Secondary Consents) (Wales) Regulations 2016.<sup>6</sup> These include various energy generating schemes, and development relating to airports, railways, reservoirs, and waste disposal.<sup>7</sup> The procedure for handling DNSs, following the legislative changes introduced by the Wales Act 2017 that came into force on 1 April

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<sup>3</sup> The five categories of projects are listed in Planning Act 2008, ss 15 to 17, 21 and 24, subject to amendments in the Wales Act 2017 that came into force on 1 April 2018 (see SI 2017/1179).

<sup>4</sup> Planning Act 2008, s 33.

<sup>5</sup> TCPA 1990, s 62(3).

<sup>6</sup> SI 2016/53

<sup>7</sup> Developments of National Significance (Specified Criteria and Prescribed Secondary Consents) (Wales) Regulations 2016, Reg 3(1).

2018, is currently the subject of a consultation exercise being carried out by the Welsh Government.<sup>8</sup>

- 9.16 The law in relation to NSIPs are beyond the scope of this review, and we made no proposals in relation to them in our Consultation Paper. We did, however, make a few proposals as to the law in relation to the DNS procedure. These are considered below.

### Pre-application consultation and services

***We provisionally proposed that the law relating to pre-application consultation and pre-application services in connection with developments of national significance should be reviewed and, where appropriate, clarified (Consultation Question 9-2).***

- 9.17 Section 17 of the P(W)A 2015 introduced a requirement for developers of DNSs to undertake a pre-application consultation. The consultation process includes the publicising of the proposed application in a way which is “likely to bring it to the attention of a majority of the persons who own or occupy premises in the vicinity of the land”.<sup>9</sup> Section 18 empowers Welsh Ministers to prescribe duties for themselves and local planning authorities to provide “pre-application services”.<sup>10</sup> These services include the provision of information about the planning history of the land, the development plan, and any planning obligations or considerations that are likely to be considered by them upon submission of the application.<sup>11</sup>
- 9.18 In our Consultation Paper, we suggested that there was some ambiguity as to the scope and application of both provisions, especially in relation to secondary consents. We noted that the duty as to consultation only applies to “applications for planning permission”, and suggested that it was unclear whether it also applies to applications for related secondary consents. For example, where a DNS relates to a site containing hazardous substances, it is unclear whether a developer would be required to consult the bodies that they would consult in order to obtain hazardous substances consent.
- 9.19 In relation to the provision of pre-application services, the duty applies only to applications made “under or by virtue” of Part 3 of the TCPA 1990.<sup>12</sup> In the Consultation Paper, we questioned the scope of that duty, querying whether it applies to applications for secondary consents where they are not automatically included along with the application for development consent itself.
- 9.20 Thirty of the 32 consultees responding to this question agreed that the law should be clarified. The Planning Inspectorate (PINS), who welcomed our proposal, described it as “support[ing] the provision of advice on secondary consents”, while Planning Aid

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<sup>8</sup> Welsh Government, *Changes to the consenting of infrastructure: Towards establishing a bespoke infrastructure consenting process in Wales*, 30 April 2018.

<sup>9</sup> TCPA 1990, ss 61Z, introduced by P(W)A 2015, s 17.

<sup>10</sup> TCPA 1990, ss 61Z1, 61Z2 introduced by P(W)A 2015, s 18.

<sup>11</sup> Reg 7, Developments of National Significance (Specified Criteria and Prescribed Secondary Consents) (Wales) Regulations 2016.

<sup>12</sup> TCPA 1990, 61Z1(4), inserted by P(W)A 2015, section 18.

Wales also expressed support, noting that it “would be pleased to be involved in any future review”.

- 9.21 Two consultees, SP Energy Networks and Natural Resources Wales, suggested that a potential review should be wider in its scope, and should cover the NSIP process and major developments. As noted above, review of the procedure as to NSIPs is beyond the scope of the current review, and the Welsh Government may decide to change the consenting process for major developments during the course of our suggested review.
- 9.22 The uncertainties we have identified above may be resolved as the changes introduced by the Planning (Wales) Act 2015 come fully into force. We suggest, however, that the relevant law might usefully be clarified – either in the course of drafting the new Planning Code or as part of any review of the DNS procedure emerging from the current consultation.

#### **Recommendation 9-2.**

**We recommend that the law relating to pre-application consultation and pre-application services in connection with developments of national significance should be reviewed and, where appropriate, clarified.**

#### **Assessors**

***We provisionally proposed that the power to appoint assessors to assist inspectors to determine DNS applications that are the subject of inquiries or hearings be extended to allow their appointment in connection with applications determined on the basis of written representations (Consultation Question 9-3).***

- 9.23 Applications for a DNS may proceed by way of written representations, hearings, inquiries, or a combination of all three, conducted by the Planning Inspectorate.<sup>13</sup> The result of these procedures is the production of a report, which is presented to the Welsh Ministers, leading to a “reasoned decision” by the Welsh Ministers. Schedule 4D to the TCPA 1990 provides Welsh Ministers with a power to appoint assessors to assist inspectors for hearings or inquiries. In our Consultation Paper, we suggested that there was no reason why this power should not be extended to include applications conducted by way of written representations.<sup>14</sup>
- 9.24 All 29 consultees unanimously agreed with this proposal. PINS described how assessors could be “as helpful in dealing quickly and correctly with matters raised in written representations as they would be during inquiries/hearings”. Sirius Planning also suggested that it could help “speed up the determination of applications”.

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<sup>13</sup> Department for Economy Skills and Natural Resources (Welsh Government), *Explanatory Memorandum to the Developments of National Significance (Specified Criteria and Prescribed Secondary Consents) (Amendment) (Wales) Regulations 2016* (2 February 2016) at para 6.21.

<sup>14</sup> Consultation Paper, para 9.28.

- 9.25 While the Law Society agreed with our proposal, they suggested that those appointed to assist should be called “experts” or “expert advisors”, as a term which most accurately describes the role in question. While we agree that the role of assessors is to provide assistance and information (rather than to independently assess the application in question), we consider that the term “assessors” is more commonly used in other contexts, and we do not recommend any change.

### **Recommendation 9-3**

**We recommend that the power to appoint assessors to assist inspectors to determine DNS applications that are the subject of inquiries or hearings should be extended to allow their appointment in connection with applications determined on the basis of written representations.**

### **Restatement in the Code**

***We provisionally proposed that sections 62D to 62L of the TCPA 1990 be restated in the new Planning Code, subject to appropriate adjustments to reflect our proposals in Chapters 7 and 8 (Consultation Question 9-4).***

- 9.26 As was noted in the introduction to this Chapter, the provisions which set out the procedure for DNS applications are set out under the P(W)A 2015. As such, they are of very recent origin. Problems arising from them have yet to emerge, and we are not minded to make any recommendations for change.
- 9.27 All 28 consultees agreed with this approach. The RTPI described the proposal as “reasonable” and suggested that the lack of widespread experience as to the “very recent legislation”. Only one consultee expressed concern. While PINS agreed with it in principle, they advised that “it is not clear exactly how proposals would alter the DNS application procedure”, and warned that “as the DNS system is a unique procedure, any changes in relation to the application process would have to be carefully considered”.
- 9.28 We agree, but do not consider that this proposal will affect the scope of the DNS application procedure. We are therefore minded to maintain it.

### **Recommendation 9-4.**

**We recommend that sections 62D to 62L of the TCPA 1990 should be restated in the new Planning Bill, subject to appropriate adjustments to reflect our proposals in Chapters 7 and 8.**

## PLANNING INQUIRY COMMISSIONS

***We provisionally proposed that section 101 of and Schedule 8 to the TCPA 1990 (planning inquiry commissions) should not be restated in the new Planning Code (Consultation Question 9-5).***

- 9.29 The TCPA 1968 established a planning inquiry commission to consider matters of “national or regional importance” or “technical or scientific aspects of [a] proposed development [which are] unfamiliar in character”.<sup>15</sup> Ministers have the power to constitute a commission, and refer to it applications for planning permission.<sup>16</sup>
- 9.30 We noted, both in our Scoping and Consultation Papers, that no commission had ever been established, the procedure had been subject to much criticism, and that there was no prospect of a commission being established in the future.<sup>17</sup> As a result, we suggested that provisions relating to planning inquiry commissions should not be restated in the new Planning Code.
- 9.31 All 29 consultees agreed with our proposal. The Law Society described the procedure as a “historical leftover”, while the National Grid suggested that the proposal “fits in well with the philosophy of planning simplification”.

### **Recommendation 9-5.**

**We recommend that section 101 of and Schedule 8 to the TCPA 1990 (planning inquiry commissions) should not be restated in the new Planning Bill.**

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<sup>15</sup> TCPA 1990, s 101(3).

<sup>16</sup> TCPA 1990, s 101.

<sup>17</sup> Scoping Paper, para 5.53; Consultation Paper, para 9.36.

