

Chapter 11: Appeals and other supplementary provisions

INTRODUCTION

- 11.1 In the previous Chapters of this Report, we discussed the need for applications to the planning authority for planning permission, the submission of such applications, and their determination. In this Chapter we consider a number of other issues relevant to development management, in particular appeals against a decision made by a planning authority.
- 11.2 As we noted in the Consultation Paper, the appeals system is of great importance in practice – partly because it provides an important means of redress for those feeling aggrieved by particular planning decisions, and partly because it provides a mechanism by which the decisions of different planning authorities can be harmonised (both with Welsh Government policy, and with each other).
- 11.3 We also discuss briefly the revocation or modification of planning permission, the discontinuance of permitted development, the service of purchase notices, and procedures relating to highways affected by development. None of these issues are likely to be encountered by applicants or developers on a regular basis, but they will occur from time to time.
- 11.4 In this Chapter we do not make any recommendations for substantive reform. In particular we do not deal with the suggestion from several consultees that there should be a right for third parties to appeal against the grant of planning permission by a planning authority. We consider that that would amount to a fundamental change to the system, and as such is a matter falling outside our terms of reference. We have, however, made a few suggestions as to the legal and procedural mechanisms underlying each set of provisions.

APPEALS IN CONNECTION WITH PLANNING APPLICATIONS

- 11.5 The Town and Country Planning Act (TCPA) 1990 provides applicants with a number of rights to appeal to the Welsh Ministers against various decisions by planning authorities. In particular, an appeal may be made where an application for planning permission has been refused,¹ where an authority has failed to make any decision within the specified time,² or where an application to approve reserved matters has been refused.³

¹ TCPA 1990, s 78(1)(a), (2).

² TCPA 1990, s 78(2).

³ TCPA 1990, s 78(1)(b). For a comprehensive list of grounds of appeal, see our Consultation Paper, paras 11.7 – 11.9.

We provisionally proposed that the provision in section 79(1) of the TCPA 1990, as to the powers of the Welsh Ministers on an appeal, should be amended so as to make it plain that they are required to consider the application afresh – as opposed to having a power to do so, as at present (Consultation Question 11-1).

11.6 Section 79(1) of the TCPA 1990 empowers the Welsh Ministers (or in practice, inspectors acting on their behalf) to determine an appeal. Under the provision, they may allow or dismiss the appeal, or reverse or vary any part of the planning authority's decision, and “*may deal with the application as if it had been made to them in the first instance*”.⁴

11.7 In our Consultation Paper, we suggested that those determining an appeal (whether the Welsh Ministers or an inspector on their behalf) invariably do consider the application afresh, and we provisionally considered that it might be clearer if that was made an explicit duty on the face of the statute.

11.8 We received 37 responses to this suggestion, 31 of which were in agreement. The UK Environmental Law Association suggested that it would add clarity to the appeals procedure, “[ensuring] that all parties, including those who wish to oppose development...fully understand this process”. Andrew Ferguson also agreed with the proposal, suggesting that would “ensure that comments/issues raised are addressed at appeal irrespective of whether the planning authority considers them to be acceptable”.

11.9 Four consultees disagreed with our proposal. Sirius Planning suggested the proposal would have adverse effects on the appeals process generally. They argued that

The appeal process would be quicker, and greater certainty for the appellant if, generally, appeals related to the LPA reasons for refusal or matters listed as being in dispute in a statement of common ground. This would save cost and time in an already overstretched appeal system.

11.10 Significantly, the Planning Inspectorate (“PINS”) pointed out that

Inspectors may consider an appeal proposal ‘de novo’ (afresh) but in practice the Inspector’s starting point will be the LPA’s reason(s) for refusal (in non-determination cases there are usually putative reason(s) for refusal). If Inspectors consider there are substantive matters that would be determinative but which are not the subject of a reason for refusal they will raise and consider them, but such occurrences are rare.

The Act as currently worded allows Inspectors the necessary flexibility to go beyond main issues if required. Reasons for refusal should be clear, precise and comprehensive and, unless evidence indicates otherwise, Inspectors should be entitled to assume that all other aspects of a development have been considered thoroughly by the LPA and deemed to be acceptable. To require all matters to be considered afresh is likely to result in unnecessary duplication of the work carried out by the LPA at application stage. It would also increase the time and cost of appeals to both the PINS and LPAs, as

⁴ TCPA 1990, s 79(1) (emphasis added).

LPAs would need, in their statements of case, to justify why elements are acceptable as well as justify the reasons for refusal.

Further, the Courts have established that Inspectors do not have to address all material considerations in their decisions. If cases were required to be considered afresh, this would require them to address all material considerations. The discretion allowed currently to elevate considerations if necessary, is appropriate.

- 11.11 We had sought to provide additional certainty to applicants by clarifying the starting point of the appeals procedure. However, we accept the points made by PINS, and recognise that the proposed amendment might unnecessarily limit inspectors' discretion to consider, or to refuse to consider, issues arising in the course of an appeal. We therefore do not make any recommendation for change.

Recommendation 11-1.

We recommend that section 79(1) of the TCPA 1990 should be incorporated in the Planning Bill broadly without amendment.

Determination of appeals by inspectors

We provisionally proposed that the Code should make it clear that all appeals (including those relating to development proposals by statutory undertakers) are to be determined by inspectors or examiners, save for (1) those in categories that have been prescribed for determination by Welsh Ministers; and (2) those that have been specifically recovered by them (in case-specific directions) for their determination (Consultation Question 11-2).

- 11.12 The vast majority of appeals are determined by a person appointed by (and usually but not always employed by) PINS, rather than the Welsh Ministers themselves.
- 11.13 Inspectors are empowered to decide appeals by virtue of Schedule 6 to the TCPA 1990, which provides the Ministers with the power to designate classes of appeals which may be delegated to inspectors.⁵ At present, these classes include appeals under 78 of the TCPA 1990, appeals against enforcement notices, and appeals against refusals to give decisions on applications for certificates of lawfulness of existing or proposed use or development.⁶
- 11.14 We noted in our Consultation Paper that the current statutory framework regarding the powers of inspectors to decide appeals was unnecessarily complex. We suggested that inspectors should be presumed to be responsible for determining appeals, except in circumstances where the Welsh Ministers have prescribed for themselves the responsibility for determining a category or case-specific appeal. By

⁵ TCPA 1990, Sched 6, para 1.

⁶ TCP (Determination of Appeals by Appointed Persons) (Prescribed Classes) (Wales) Regulations 2015 (SI 1822), reg 3.

reversing the presumption, the categories of appeals which could be determined by inspectors would be made clearer.

- 11.15 We received 33 responses to this proposal, of which 32 consultees agreed. The Royal Town Planning Institute (“RTPI”) suggested that the proposal would “provide clarity”, a sentiment that was mirrored in the responses of several other consultees, including the Law Society, Rhondda Cynon Taf CBC and the Planning Officers’ Society of South Wales, all of whom agreed with our proposal.
- 11.16 Only one consultee, PINS, disagreed with the proposal, on the grounds that they considered the change to be “unnecessary”. In the light of the overwhelming support for the proposal, however, we consider that the simplification of the law is desirable. It would not change the substance of what occurs in practice, but it would make the law correspond more closely with what occurs.

Recommendation 11-2.

We recommend that the Bill should clarify that all appeals (including those relating to development proposals by statutory undertakers) are to be determined by inspectors, except for:

- (1) those in categories that have been prescribed for determination by Welsh Ministers; and**
- (2) those that have been recovered by Welsh Ministers (in case-specific directions) for their determination.**

Assessors

We provisionally proposed that the power to appoint assessors to assist inspectors to determine appeals that are the subject of inquiries or hearings (1) be widened so as to be exercisable by inspectors as well as by the Welsh Ministers; and (2) be extended to allow the use of assessors in connection with applications determined on the basis of written representations (Consultation Question 11-3).

- 11.17 Paragraph 6 of Schedule 6 to the TCPA 1990 empowers the Welsh Ministers to appoint an assessor to “to sit with the appointed person at the hearing or inquiry to advise him on any matters arising, notwithstanding that the appointed person is to determine the appeal”.
- 11.18 In our Consultation Paper, we suggested that this power should be broadened in two respects:
- 1) to allow inspectors to appoint assessors directly; and
 - 2) to allow assessors to assist with written representations.⁷

⁷ Consultation Paper, paras 11.32 – 11.34.

- 11.19 We received 34 responses to this proposal, 32 of which agreed. Allan Archer, an independent planning consultant, described it as a “logical and sensible” proposal. The RTPI “welcomed” the proposal, suggesting that it would “ensure that a more robust decision is made” and would “speed up the appeal process”. PINS was in favour.
- 11.20 Some consultees expressed concerns about the potential consequences of the power. The RTPI noted the necessity of ensuring that the position of inspector was not weakened as a result, and that this would undermine the “rigorous and transparent” nature of the appeals process. We agree that it would be undesirable to relegate the role of an inspector to that of an “overseer”, but suggest that, by retaining the provision’s explicit qualification that “the appointed person [inspector] is to determine the appeal”, this concern would not materialise.⁸
- 11.21 Keith Bush QC, who neither agreed nor disagreed with the proposal, suggested that inspectors should have the permission of Welsh Ministers to exercise the power to appoint, as the Ministers would be responsible for funding the exercise. While it is important not to burden the Welsh Ministers financially, we consider that a requirement to obtain permission before making appointments would place a significant restriction on the power, making it largely superfluous.
- 11.22 In relation to assessors’ capacity to assist with written representations, we consider it irrational to limit the scope of assessors’ work to include only work relating to hearings or inquiries.⁹ As before, no consultees disagreed with this proposal and we consider it should be retained.

Recommendation 11-3.

We recommend that the power to appoint assessors to assist inspectors to determine appeals and other proceedings that are the subject of inquiries or hearings:

- (1) should be widened so as to be exercisable by inspectors as well as by the Welsh Ministers; and**
- (2) should be extended to allow the use of assessors in connection with such proceedings determined on the basis of written representations.**

⁸ Note that the “appointed person” refers to the inspector.

⁹ See also **para 9.24**.

OTHER TYPES OF APPEAL

We provisionally proposed that the changes proposed in consultation questions 11-1 to 11-3 should apply equally to appeals against enforcement notices; appeals relating to decisions relating to applications for listed building consent or conservation area consent, express consent for the display of advertisements, and consent for the carrying out of works to protected trees; and appeals against listed building and conservation area enforcement notices, advertisements discontinuance notices, tree replacement notices, and notices relating to unsightly land. (Consultation Question 11-4).

- 11.23 Consultation questions 11-1 to 11-3 referred specifically to appeals relating to planning applications. But rights of appeal also exist in relation to enforcement notices,¹⁰ applications for listed building consent or conservation area consent,¹¹ express consent for the display of advertisements,¹² and consent for the carrying out of works to protected trees.¹³
- 11.24 We suggested in our Consultation Paper that the changes proposed in those questions (relating to general planning appeals) should apply equally to in relation to each of the specialised types of appeal noted above.
- 11.25 Of 26 consultees who responded to this proposal, 25 agreed, largely without comment. The Theatres Trust expressed support on the grounds that it would ensure that applications relating to listed building consent and conservation area consent were “treated with equal significance to any other application”. The RTPI also agreed, suggesting that the proposal would bring “clarity and consistency” to the appeals process.
- 11.26 Only one consultee, the Country Land and Business Association (“CLA”), disagreed. It argued that the change would undermine the “need to keep existing flexibility” in relation to the appeals process.
- 11.27 We do not consider the recommendations 11-1 to 11-3 to be overly inflexible, as they largely relate to the procedural aspects of an appeal, which we consider to require sufficient certainty for the benefit of applicants, authorities and inspectors alike. For this reason, we have decided to maintain the proposal.

¹⁰ TCPA 1990, s 174(1); see Chapter 12.

¹¹ Listed Buildings Act 1990, s 20; see Chapter 13.

¹² TCPA 1990, s 220; see Chapter 14.

¹³ TCPA 1990, ss 78, 198(3)(c); see Chapter 15.

Recommendation 11-4.

Subject to our recommendations in Chapter 13 relating to listed buildings and conservation areas, we recommend that the changes proposed in recommendations 11-1 to 11-3 should apply equally to:

- (1) appeals against enforcement notices;**
- (2) appeals relating to decisions relating to applications for listed building consent or conservation area consent, express consent for the display of advertisements, and consent for the carrying out of works to protected trees; and**
- (3) appeals against listed building and conservation area enforcement notices, advertisements discontinuance notices, tree replacement notices, and notices relating to unsightly land.**

MODIFICATION AND REVOCATION OF PERMISSION; AND DISCONTINUANCE NOTICES

- 11.28 Planning permission, once granted, may be implemented at any time until the expiry of the period stated within it – which will normally be five years.¹⁴ A planning authority may itself occasionally wish to vary a permission, or to revoke it altogether.¹⁵
- 11.29 The exercise of this power to modify or revoke a permission, without the co-operation of those entitled to the benefit of the permission, is unsurprisingly subject to a right by those affected to receive compensation.¹⁶ For that reason, it is rarely used in practice.
- 11.30 Similarly, once a permission has been fully implemented, it cannot be modified or revoked. However, circumstances may have changed since it was granted, such that the building that has now been lawfully erected, or the use of land that is now taking place, is no longer appropriate. In such situations, the planning authority may serve a discontinuance order requiring the building to be removed or the use brought to an end.¹⁷

¹⁴ TCPA 1990, s 91, amended by PWA 2015, s 35; see para 11.xxx. The same is true of listed building consent and conservation area consent (Listed Buildings Act 1990, s 18.).

¹⁵ TCPA 1990, ss 97 to 99. There is a similar suite of provisions in the Listed Buildings Act 1990 enabling the planning authority or the Welsh Ministers to modify or revoke LBC or CAC (ss 23 to 26, 28; applied to CAC by s 74(3)).

¹⁶ TCPA 1990, ss 107 to 113.

¹⁷ TCPA 1990, ss 102 – 104.

- 11.31 As with the power to modify or revoke a permission, the service of a discontinuance order will usually require the payment of compensation.¹⁸ For that reason, this procedure too is rarely used in practice, but may be useful where circumstances have changed.
- 11.32 In our Consultation Paper, we considered that these provisions did not appear to require any technical reforms. No consultee suggested otherwise.

PURCHASE NOTICES

- 11.33 Where planning permission has been refused, or a modification or revocation notice or a discontinuance order has been served,¹⁹ the land involved can be rendered incapable of any reasonably beneficial use. In such circumstances, the owner of the land is able to compel the planning authority to purchase the land at market value, by serving a purchase notice upon it.²⁰ The authority must serve a response notice, stating that it is willing to comply with the notice; or that another local authority or statutory undertaker has agreed to comply with it; or that it has referred the matter to the Welsh Ministers.²¹
- 11.34 We noted that the meaning of the phrase “incapable of beneficial use” has given rise to considerable litigation over the years. However, we considered that its meaning in any case will vary according to the circumstances, and we did not propose a definition. We note that no consultee suggested a definition, either in response to that observation or in response to Consultation Question 18-14 (our request for suggestions as to terms that should be defined).

Serving a purchase notice

We provisionally proposed that the legislation should provide that, in a case where there has been an appeal to the Welsh Ministers, the period within which a purchase notice can be served should run from the date of the decision of the Welsh Ministers on the appeal (Consultation Question 11-5).

- 11.35 A purchase notice must be served within 12 months of the relevant decision by the planning authority or the Welsh Ministers.²² We noted in the Consultation Paper that there was confusion as to whether, in a case which is the subject of an appeal, this period runs from the date on which the planning authority made its decision, or the date of the decision by the Welsh Ministers.²³ We proposed that the period within

¹⁸ TCPA 1990, s 115.

¹⁹ Consultation Paper, paras 11.41 – 11.49.

²⁰ TCPA 1990, s 137.

²¹ TCPA 1990, s 139.

²² TCP General Regulations 1992, reg 12.

²³ Consultation Paper, para 11.55.

which a purchase notice may be served should start on the date on which the Welsh Ministers had decided an appeal.²⁴

- 11.36 All 25 consultees who responded to this question agreed, mostly without comment. Lawyers in Local Government and Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services agreed that the proposal “would clarify” the procedure, but suggested that a wider review of the purchase notice procedure should be undertaken – although without specifying the basis for such a review. We consider that to be beyond the scope of the present exercise, but note that this specific recommendation does not preclude such a review from occurring in the future.

Recommendation 11-5.

We recommend that the Bill should provide that, in a case where there has been an appeal to the Welsh Ministers, the period within which a purchase notice can be served runs from the date of the decision of the Welsh Ministers on the appeal.

We provisionally proposed that the Planning Code should clarify that a purchase notice may not be amended, but that a second or subsequent notice served in relation to a single decision should be deemed to supersede any earlier such notice (Consultation Question 11-6).

- 11.37 In our Consultation Paper, we cited the Court of Appeal’s decision in *Herefordshire Council v White*.²⁵ In that case, Dyson LJ held that there was no right to amend a purchase notice once it had been served; but that an owner who serves a second purchase notice will be taken to have impliedly withdrawn any earlier notice.²⁶
- 11.38 We proposed the Bill should state this principle expressly, to provide clarity for applicants. All of the 23 consultees who responded to this question agreed, with Lawyers in Local Government again noting that it would provide clarification.

Recommendation 11-6.

We recommend that the Planning Code should clarify that a purchase notice may not be amended, but that a second or subsequent notice served in relation to a single decision should be deemed to supersede any earlier such notice.

²⁴ Consultation Paper, para 11.54.

²⁵ Consultation Paper, para 11.56.

²⁶ [2008] 1 WLR 954, CA, at [33].

HIGHWAYS AFFECTED BY DEVELOPMENT

We provisionally considered that it would not be appropriate to bring together the powers currently in section 247, 248, 253 to 257 of the TCPA 1990 (relating to highways affected by development) and those in section 116, 118 and 119 of the Highways Act 1980 (Consultation Question 11-7).

- 11.39 For developments relating to highways, or which require the stopping up or the diverting of highways, works can be authorised under two separate procedures.
- 11.40 Orders made under the TCPA 1990 are made by the Welsh Ministers, either in anticipation of, or by virtue of a grant of planning permission.²⁷ They can relate either to a highway or to another public path,²⁸ and can be made in the context of land acquired by compulsory purchase or to be used for the purposes of installing electronic communications apparatus, such as telephone cables.²⁹
- 11.41 Authorisation for stopping up or diverting highways (or other types of public path) may also be made by order of a magistrate under the Highways Act 1980, where they consider that the highway is unnecessary, or can be diverted so as to make the highways “nearer or more commodious to the public”.³⁰
- 11.42 We suggested that, despite the overlap between the two procedures in terms of subject matter, it would not be beneficial to integrate them. We noted that the two sets of orders perform different functions and are made pursuant to different procedures and in different forums.³¹
- 11.43 Of the 23 consultees who responded to this proposal, all but three agreed. The Home Builders Federation supported it, describing the current framework as “providing flexibility to use the most appropriate method”. The RTPI also argued that “each [procedure] covers separate requirements” and thus agreed with the proposal not to merge them.
- 11.44 Three consultees disagreed, arguing that the existence of two separate mechanisms was overly complex for developers. The Law Society provided an example of a situation where funding for a major development project was put at risk where a magistrate “unversed in the intricacies of highway planning” had declined the necessary highway order.
- 11.45 We agree that the procedural requirements should be clarified for prospective developers. However, this need not necessarily require the integration of the two procedures. Problems of the kind described by the Law Society could equally be resolved by the provision of additional guidance by the Welsh Government.

²⁷ TCPA 1990, ss 253 and 247. Note that section 253 only allows the Welsh Ministers to authorise draft orders in anticipation of planning permission, and is contingent upon the grant of the relevant permission.

²⁸ Including footpaths, bridleways and restricted byways (TCPA 1990, s 257).

²⁹ TCPA 1990, ss 254, 255 and 257.

³⁰ Highways Act 1980, s 116.

³¹ Consultation Paper, para 11.63.

11.46 We therefore remain of the view that there should be no change to the law.

Recommendation 11-7.

We recommend that the powers currently in section 247, 248, 253 to 257 of the TCPA 1990 (relating to highways affected by development) should be restated in the Planning Bill, but those in section 116, 118 and 119 of the Highways Act 1980 should not.

Orders under section 249 of the TCPA 1990

We provisionally proposed that sections 249 and 250 of the TCPA 1990 (relating to orders extinguishing the right to use vehicles on a highway, in conjunction with a proposal for the improvement of the amenity of an area) should not be restated in the Bill, in view of the parallel provisions in section 1 of the Road Traffic Regulation Act 1984 (Consultation Question 11-8).

- 11.47 Section 249(1) of the TCPA 1990 provides the Welsh Ministers (upon application of the planning authority) with the power to extinguish any rights which persons may have to use vehicles on a highway that is neither a trunk road, nor a principal road, if this is required by a proposal to “improve the amenity of part of its area”.³² There is a right to compensation for “any depreciation in the value of [the] interest...directly attributable to the order and any other loss or damage”.³³ That enables an authority to pedestrianise a highway – for example, in a town or village centre.
- 11.48 We suggested in our Consultation Paper that this provision substantially overlapped with section 1 of the Road Traffic Regulation Act 1984, which provides authorities with a general power to make an order preventing or limiting or facilitating the passage of persons or vehicles using the road.³⁴ That power may also be used “for preserving or improving the amenities of the area”
- 11.49 We observed that the procedure under the 1984 Act was of greater value to authorities, as it does not require the payment of compensation. Additionally, duties arising under the Active Travel (Wales) Act 2013, which sets out a duty for the Welsh Ministers and local authorities to “take reasonable steps to enhance the provision made for walkers and cyclists” only applies to powers exercised under the 1984 Act, but not to those under the 1990 Act.³⁵
- 11.50 All 24 responding consultees supported this proposal. We continue to recommend that sections 249 and 250 not be restated in the Planning Code.

³² TCPA 1990, s 249(1)(a).

³³ TCPA 1990, s 250(1).

³⁴ Road Traffic Regulation Act 1984, s 1(1).

³⁵ Active Travel (Wales) Act 2013, s 9.

Recommendation 11-8.

We recommend that sections 249 and 250 of the TCPA 1990 (relating to orders extinguishing the right to use vehicles on a highway, in conjunction with a proposal for the improvement of the amenity of an area) should not be restated in the Bill, in view of the parallel provisions in section 1 of the Road Traffic Regulation Act 1984.

Other provisions in the TCPA 1990 relating to highways

We provisionally proposed that decisions relating to orders under section 252 of the TCPA 1990 be generally made by inspectors rather than by the Welsh Ministers, subject to a power for Welsh Ministers to make a direction to recover a particular case for their decision (Consultation Question 11-9).

- 11.51 Sections 251 and 258 of the TCPA 1990 allow for the extinguishment of public rights of way and paths over land that has been acquired for planning purposes (under Part 9). In the Consultation Paper, we made no proposals in relation to those provisions, since we anticipated that the provisions in Part 9 would not be included in the Bill. However, as explained earlier, we now recommend that it should be included³⁶, and we accordingly recommend that sections 251 and 258 should also be included.³⁷
- 11.52 Section 252 of the TCPA 1990 sets out the process which must be undertaken by the Welsh Ministers when proposing to make an order under sections 247, 248 and 251 of the TCPA 1990. They must publicise the order in the local newspaper and set out a period within which the public may object. Schedule 14 provides a parallel code for the making of orders relating to footpaths and bridleways.
- 11.53 We did not make any proposals to amend the substance of the procedure set out in section 252 and Schedule 14, but suggested that decisions could be made by inspectors, rather than by the Welsh Ministers themselves, noting that inspectors now decide almost all appeals.³⁸ The Welsh Ministers would still have power to make a direction recovering a particular case for their decision.
- 11.54 All 24 responding consultees agreed with this proposal.

Recommendation 11-9.

We recommend that decisions relating to orders under section 252 and Schedule 14 of the TCPA 1990 should generally be made by inspectors rather than by the Welsh Ministers, subject to a power for them to make a direction to recover a particular case for their decision.

³⁶ See paras 16.98 to 16.111.

³⁷ See Recommendation 16-14.

³⁸ See Recommendation 11-2.