

Chapter 12: Unauthorised Development

INTRODUCTION

- 12.1 In Chapter 12 of our Consultation Paper we highlighted the principle that a breach of planning control is not a criminal offence, but non-compliance with subsequent enforcement action usually is.¹ We also noted that, in some cases, development that has been carried out without the necessary planning permission may be perfectly acceptable in policy terms, or at least could be made acceptable following remedial work.² However, in other cases, the planning authority (and the local community) may simply wish the offending development to be removed without further ado.
- 12.2 It is important that planning authorities have the right tools to ensure that the required works – whether to remedy the effects of the unauthorised development or simply to remove it – are in fact undertaken. These tools are largely to be found in Part 7 of the Town and Country Planning Act (TCPA) 1990.
- 12.3 As in other areas of the planning system, the existing rules and procedures relating to planning enforcement represent a fine balance between competing legitimate interests. We did not wish our proposed reforms to upset that balance. Accordingly, the reforms we suggested in the Consultation Paper were minor and technical, and were designed to introduce a measure of consistency, clarity and simplicity to the existing law – and to ensure that it operated effectively – without making radical changes.
- 12.4 Despite having stated this to be our approach, we received a number of general comments that expressed a desire to strengthen the enforcement system, dissuade retrospective planning applications and punish planning offenders more harshly.³ Given the aims and scope of this project, we do not discuss these suggestions here. They are summarised in our analysis of consultation responses, published separately from this report.
- 12.5 We have received comments in response to our consultation questions as to enforcement from a variety of different consultees, with a range of different interests, the great majority of whom were agreed with our approach; National Grid, for example, described our proposals as “measured and appropriate”. We consider that this vindicates our intentionally measured approach to the reform of planning enforcement in Wales.
- 12.6 Other consultees emphasised the need for greater resources to be made available to implement the various procedures.

¹ Consultation Paper, para 12.3.

² Consultation Paper, para 12.2.

³ For example, one consultee suggested that making a retrospective planning application should be a criminal offence incurring a custodial sentence.

PRELIMINARY PROCEDURE

We provisionally proposed that the provisions currently in sections 171C and 330 of the TCPA 1990 be conflated into a single power for the Welsh Ministers or a planning authority to serve a “planning information notice” on the owner and occupier of land or any person who is carrying out operations or other activities on the land or using it for any purpose, requiring the recipient to supply information as to the land and its existing use. Where it appears that there has been a breach of planning control, such a notice may also require further information as to matters specified, and may request a meeting at which the recipient can discuss the matters referred to in the notice (Consultation Question 12-1).

- 12.7 In our Consultation Paper, we noted that a planning authority may first become aware of a suspected breach of planning control on the basis of inaccurate or incomplete information.⁴ Following the receipt of such information, an authority’s first step is often to serve a planning contravention notice (PCN) under section 171C of the TCPA 1990, through which an authority can request information related to the suspected breach. Alternatively, the planning authority has a more general power to issue a notice under section 330, seeking information as to the land and its existing use. Such information may assist the authority to decide whether to serve a notice under the Act, and in what terms.⁵
- 12.8 We noted that both information-gathering powers may require information as to the interest in the land held by the recipient of the notice and by any other person, the use of the land and when it began, and the time when activities now taking place on the land began.
- 12.9 A PCN may in addition:
- 1) require information about persons carrying out “operations” (insofar as they are distinct from “activities”);
 - 2) require details of any planning permission that has been granted, or reasons why permission is believed not to be required; and
 - 3) invite the recipient to attend a meeting to discuss the matter with the authority.⁶
- 12.10 We suggested that it was confusing to have two overlapping information-gathering powers, observing that the additional powers to obtain information under a PCN are potentially intrusive (and possibly in breach of the right to peaceful enjoyment of property).⁷ We suggested combining the two powers.
- 12.11 Of the 33 consultees responding to this question, 26 supported the proposal, one agreed subject to conditions, and three supplied equivocal responses. Consultees

⁴ Consultation Paper, para 12.12.

⁵ Consultation Paper, para 12.13.

⁶ TCPA 1990, s 171C(3)(d), (4)

⁷ Consultation Paper, para 12.18.

who responded to this question were all in agreement with the general proposal to merge the two powers into a single power. However, concerns were raised about two aspects of the recommendation – the proposed scope of the new power, and the name of the new notice. Liam Jones of the National Association of Planning Enforcement (“NAPE”) also drew attention to the powers of local authorities to obtain information under section 16 of the Local Government (Miscellaneous Provisions) Act 1976.

12.12 We have reviewed the three powers carefully. As to the persons on whom a notice may be served, all three refer to an occupier of the land; all refer to the owner (or any person with an interest in the land); the 1976 Act refers to any person authorised to manage the land; and section 171C refers to any person carrying out operations on the land or using it for any purpose. We consider that the new power should refer to all of those – although of course it would empower, but not require, the authority to involve any of them.

12.13 As to the information that can be required, we have mentioned above the features of a PCN additional to those of a notice under section 330. We consider that these may perfectly reasonably be requested in any case, and not just in one relating to enforcement – noting, again, that they will often not be needed. On further reflection we doubt that they will ever involve a breach of the right of the recipients to the peaceful enjoyment of their property; at all events, the risk of that being so in an extreme case is not sufficiently great to warrant expressly qualifying the statutory power.

12.14 Two consultees, Allan Archer (an independent planning consultant), and Blaenau Gwent CBC, argued that our proposed name ‘planning information notice’ would not impress on recipients the gravity of the situation and the importance of providing the requested information; unlike the existing term ‘planning contravention notice.’ Allan Archer noted that:

One of the benefits of the s171C provisions is that it sits in the Enforcement section of the Act and is called a Planning Contravention Notice which clearly highlights for the recipient the nature of the planning authority’s interest and the possibility of future enforcement action – I’d suggest that it would be beneficial if these advantages were not lost in the placement of this new provision in the Code and the naming and wording of the notice served in cases which correspond to those subject currently to s171C.

12.15 Blaenau Gwent CBC commented in similar terms.

12.16 We agree. The name of the new notice is a matter of drafting. Some legislation refers to “information notices”, some to “information orders”; and the Data Protection Act 2018 to both. If it were considered desirable to emphasise the seriousness of the new procedure, it would be possible to use a term such as *planning information order* (PIO), instead of the term we originally suggested, ‘planning information notice’. In our view the new term would to some extent reflect both the seriousness of the old PCN, and the fact that the notice is essentially information-gathering and not necessarily related to enforcement. But either term could be used.

- 12.17 It is, however, important that the definition of “taking enforcement action”, currently in section 171A(2) of the TCPA 1990, should be restated in amended form to include the service of a planning information order or notice, in place of the current reference to the service of a PCN, as this has implications for time limits within which further action can be taken.

Recommendation 12-1.

We recommend that the provisions currently in sections 171C and 330 of the TCPA 1990 should be combined into a single power for the Welsh Ministers or a planning authority to serve a “planning information order” (or “planning information notice”) on anyone who owns or occupies the land, anyone who has an interest in it, any person who is carrying out operations or other activities on the land or is using it for any purpose, and anyone who is authorised to manage it. The power should be exercisable where the Welsh Ministers or the authority believe that there may have been a breach of planning control, or where the information is needed to make any order, issue, or to serve a notice or any other document under the Act.

The order-making power should include the features mentioned in section 171C(3) (information required to be supplied) and 171C(4) (offer of a meeting to discuss); and where it is believed that there may have been a breach of control, the order must contain the information specified in section 171C(5) (as to possible enforcement action).

ENTERING PROPERTY FOR ENFORCEMENT PURPOSES

We provisionally proposed that the restriction on entering property for enforcement purposes only after giving 24 hours’ notice, currently in section 196A(4) of the TCPA 1990, should be clarified to ensure that it applies in relation to all property in use as a dwelling (Consultation Question 12-2).

- 12.18 In our Consultation Paper we briefly discussed the power under section 196A of the TCPA 1990 for anyone authorised by a planning authority to gain entry to land to investigate a suspected breach of planning control.⁸ We noted that section 196A provided that in the case of a dwellinghouse, 24 hours’ notice should be given.⁹ We recommended that the better term would be ‘dwelling,’ which would include a flat, a mobile home or a houseboat.¹⁰
- 12.19 All of the 30 consultees who responded to this question agreed with our provisional proposal.
- 12.20 Newport City Council suggested that “the term dwelling should include ... or associated buildings.” Richard White further suggested that “it should also state

⁸ Consultation Paper, para 12.21.

⁹ Consultation Paper, para 12.21.

¹⁰ Consultation Paper, para 18-106 to 18-127; and see **Recommendation 18-15.**

clearly that it applies to any land surrounding the ‘dwelling’”, including “buildings used in connection to a dwelling”. We are not convinced of this, as a dwelling may very well be connected to commercial property. As long as the boundary between the dwelling and the non-dwelling is respected, we do not think that (for example) the restriction should apply to a shop located directly below a flat in the same ownership.

Recommendation 12-2.

We recommend that the restriction on entering property for enforcement purposes only after giving 24 hours’ notice, currently in section 196A(4) of the TCPA 1990, should be clarified to ensure that it applies in relation to any property in use as a dwelling.

CONCEALED BREACHES OF PLANNING CONTROL

We provisionally proposed that the law as to concealed breaches of planning control should remain as it is, subject to the common law principles developed in *Welwyn Hatfield Council v Secretary of State*, and in particular that the “planning enforcement order” procedure, introduced by the Localism Act 2011, should not be included in the Bill (Consultation Question 12-3).

- 12.21 In our Consultation Paper we discussed the period of time after which unauthorised development becomes immune from enforcement action, and thus “lawful”.¹¹
- 12.22 We highlighted the case of *Welwyn Hatfield Council v Secretary of State and Beesley*.¹² In that case, the Supreme Court held that in exceptional circumstances dishonest conduct could preclude an applicant from being granted a certificate of lawfulness following the expiry of the statutory enforcement period.¹³
- 12.23 In England, provisions relating to concealed breaches of planning control have subsequently been introduced – as sections 171BA to 171BC of the TCPA 1990.¹⁴ Under these provisions, a planning authority can apply to a magistrates’ court for a “planning enforcement order” (PEO), which extends the time limit within which action can be taken.¹⁵
- 12.24 We provisionally suggested that it was unhelpful to have two overlapping procedures, one statutory and one at common law. We also suggested that the PEO procedure was problematic for several reasons.¹⁶ We therefore suggested that the PEO

¹¹ Consultation Paper, para 12.22.

¹² *Welwyn Hatfield Council v Secretary of State and Beesley* [2010] UKSC 15, [2011] 2 AC 304.

¹³ Consultation Paper, para 12.24. The applicant in *Welwyn Hatfield* had disguised his house as a barn to avoid planning enforcement for four years.

¹⁴ Consultation Paper, para 12.25.

¹⁵ Consultation Paper, para 12.25.

¹⁶ Consultation Paper, para 12.31.

procedure should not be included in the new Code, whereas *Welwyn* should continue to apply as an (uncodified) common law principle.

12.25 We received 30 responses to this consultation question, of which 27 were in agreement, two were equivocal, and one disagreed.

12.26 Most consultees agreed with our proposal not to adopt the PEO procedure. The Royal Town Planning Institute (RTPI) stated that there was “little point” in adopting it. Liam Jones of NAPE suggested that “the PEO procedure will be problematic if introduced in Wales.” Of the consultees who responded, only the Institute of Historic Building Conservation (IHBC) suggested that the PEO procedure should be adopted:

An alternative remedy to the concerns about Planning Enforcement Orders would be to provide for them in the new Bill, but with clarification on those areas of concern, i.e. placing a limit on the time extension for which LPAs can apply, and a facility to challenge the certificate issued by the LPA as to the date on which the breach came to its attention. Lack of training for magistrates is hardly a reason for weakening the law.

12.27 We agree that an amended PEO procedure, in combination with appropriate training for magistrates, would result in a significantly improved system compared to that which currently operates in England. However, it would not overcome the complications arising from two separate procedures. On balance, we still consider the *Welwyn Hatfield* principle to be preferable, as did most of our consultees.

12.28 Several consultees suggested that the principle in *Welwyn* should be codified in the statute. We are sympathetic to this position, given the difficulties that could arise from it not being made obvious to a reader of the statute. However, the case was decided fairly recently. Despite our view that it sets out a sensible rule, we believe that it would be premature to codify that rule at this stage, given the possibility of future clarifications that may best be developed by the courts. We stated at the outset of this project that we only intend to codify case law that has been established and relied on for a significant period of time.¹⁷

12.29 It might seem that it would be appropriate to refer explicitly to *Welwyn Hatfield* in the statute. However, experience with criminal law reform has led us to the view that this will rarely if ever be appropriate. This is because a named case could in the future be overruled, distinguished or otherwise modified by the courts, nullifying the reference to it.

12.30 We also share the view expressed by Lord Brown of Eaton-under-Heywood in *Welwyn*:

I simply do not accept that amending legislation is required before this salutary principle of public policy can ever be invoked. I do recognise, however, that, as

¹⁷ Consultation Paper, paras 4.54 – 4.56.

matters presently stand, it should only be invoked in highly exceptional circumstances.¹⁸

- 12.31 We consider that it would be difficult if not impossible to codify satisfactorily the circumstances in which the *Welwyn* principle could be invoked, give that each such case will by definition be “highly exceptional”.
- 12.32 Not stating the *Welwyn Hatfield* principle in the new Act creates a risk that a reader will not be aware of it. We suggest that this risk will be mitigated by clear references to the *Welwyn Hatfield* principle in Government guidance on enforcement.

Recommendation 12-3.

We recommend that:

- (1) Welsh Government guidance should draw clear attention to the common law principle highlighted in *Welwyn Hatfield Council v Secretary of State* [2010] UKSC 15, [2011] 2 AC 304; and**
- (2) the “planning enforcement order” procedure, introduced in England by the Localism Act 2011, should not be included in the Bill.**

ENFORCEMENT WARNING NOTICES

We provisionally proposed that section 173ZA should be amended, to prevent the period for enforcement action being extended indefinitely, so as to provide either: (1) that an enforcement warning notice can be served during the period of 4 or 10 years within which enforcement action can be taken, but that the service of such a notice does not extend that period; or (2) that where an enforcement warning notice has been served, the period for taking other enforcement action starts on the date on which the notice was served (Consultation Question 12-4).

- 12.33 In our Consultation Paper, we noted that Section 173ZA of the TCPA 1990, introduced by the P(W)A 2015, enables a planning authority to issue an enforcement warning notice (EWN). This is appropriate where development appears to have been carried out without planning permission, but there is a reasonable prospect that, if an application were to be made, permission would be granted. Where this applies, the authority may issue a notice informing recipients that further enforcement action may be taken if a planning application is not received within a specified period.¹⁹
- 12.34 We also noted that section 173ZA(5) of the TCPA 1990 provides that issuing an enforcement warning notice “does not affect any other power” exercisable in relation to any breach of planning control. Section 171B(4)(b) permits the taking of further enforcement action within four years of previous enforcement action – which, under

¹⁸ [2011] 2 AC 304, at [84].

¹⁹ Consultation Paper, para 12.34.

section 171A(2)(aa), includes serving an enforcement warning notice. The result is that an authority could extend the time for other forms of enforcement action indefinitely simply by serving a stream of notices.²⁰

12.35 We suggested two possible options:

- 1) not restating section 171A(2)(aa) in the Bill, so that the service of an enforcement warning notice could take place during the period (of four or ten years) within which other enforcement action is possible, but could not extend that period; or
- 2) amending s 173ZA(5) so that that, where an enforcement warning notice has been served, the period for taking further enforcement action starts on the date on which the notice was served.

12.36 Thirty-two consultees responded to this question. Six clearly favoured the first option and 21 were clearly in favour of the second.

12.37 Those in favour of the first option highlighted the need for certainty in respect of enforcement time limits. The Mineral Products Association stated that “we support the proposals to ensure breaches of planning control are not extended indefinitely.” The Central Association of Agricultural Valuers said that “we do not believe that an enforcement warning notice should extend beyond the enforcement period.”

12.38 Those in favour of the second option found it advantageous to planning authorities, while providing certainty in the form of a fixed time limit. Carmarthenshire CC suggested that the option “provides far more clarity re timescales.” POSW, Monmouthshire CC, Ceredigion CC, Carmarthenshire CC, Neath Port Talbot CBC, Pembrokeshire Coast NPA and National Parks Wales all noted that “option 2 is the most clear, practical and appropriate option.” The Law Society and Huw Williams (Geldards LLP) saw practical difficulties with the first option if a warning notice was served towards the end of the four or ten-year period, as the time limit could pass while a planning application was being determined.

12.39 On reflection, we agree that the second option is preferable. It is a compromise between the current position which allows indefinite extension, and the position that time limits should be strictly adhered to.

12.40 However, we are persuaded that, without clarification of our provisional proposal, there may be a risk of indefinite extensions of time limits by local authorities who fail to address the alleged breach. We therefore suggest that it should be clear from the wording of the new provision that the power cannot be used to create what is in effect an indefinite extension.

12.41 Torfaen CBC expressed concern that the second option may restrict the “second bite” provision in section 171B(4)(b) of the TCPA 1990, which allows an authority to take “further” enforcement action within 4 years of previous enforcement action in respect of the same breach. Others made a similar point. The example given by Torfaen was where an enforcement notice is served within the 4-year period following the service

²⁰ Consultation Paper, para 12.35.

of the EWN, but is subsequently found to be defective at appeal. Torfaen suggested that it would be important to retain the right to issue a new corrected enforcement notice within a 4-year period. We are confident that our recommendation will not adversely affect or replace the general “second bite” provision in section 171B(4)(b), which we recommend should be restated in the Bill in its current form.

Recommendation 12-4.

We recommend that section 173ZA of the TCPA 1990 should be restated in an amended form such that, where an enforcement warning notice has been issued, the period for taking other enforcement action starts on the date on which the notice was served, but that the time limit cannot be extended further by the issuing of additional enforcement warning notices in relation to the same matter.

TEMPORARY STOP NOTICES

12.42 In our Consultation Paper we highlighted the fact that where there has been a breach of planning control, and the planning authority is contemplating further action, it may issue a “temporary stop notice” (“TSN”), under section 171E of the TCPA 1990 (introduced by the PCPA 2004).²¹ The effect of such a notice is to require the offending activity to cease immediately.²² The notice expires after 28 days, with the expectation that during that period the authority will have taken some other form of enforcement action. Non-compliance with a TSN is an offence, punishable by a fine.

We provisionally proposed that the restriction on issuing a temporary stop notice, currently in section 171F(1)(a) of the TCPA 1990, be clarified to ensure that it applies in relation to any dwelling (defined so as to include a house and a flat) (Consultation Question 12-5).

12.43 We noted that by virtue of Section 171F, the power to issue a TSN under section 171F is not available to prohibit the use of any building (which would include a part of a building²³) as a “dwellinghouse”.²⁴ We provisionally proposed that the position should be clarified to make it clear that a TSN should not prohibit the use of any building, or part of a building, as a dwelling – not just as a dwellinghouse.²⁵

12.44 All of the 31 consultees who responded to this question were in agreement. The RTPI told us that the proposal “appears logical.” Carmarthenshire CC noted that “this makes clear the restriction in relation to all types of dwelling houses.” Rhondda Cynon Taf CBC said that “there should be clarity to ensure that a temporary stop notice applies in relation to any dwelling.”

²¹ Consultation Paper, para 12.38.

²² TCPA 1990, s 171E(3), inserted by PCPA 2004, s 52.

²³ TCPA 1990, s 336.

²⁴ TCPA 1990, s 171F(1)(a).

²⁵ See **Recommendation 18-15.**

Recommendation 12-5.

We recommend that the restriction on issuing a temporary stop notice, currently in section 171F(1)(a) of the TCPA 1990, should be clarified to ensure that it applies in relation to any dwelling.

We provisionally proposed that: (1) a temporary stop notice (TSN) should come into effect at the time on the date stated in it, which will normally be when a notice is displayed on the land in question; (2) it should remain in effect for 28 days (starting at the beginning of the day after the day on which it is displayed); (3) the notice should be displayed on the land, as near as possible to the place at which the activity to which it relates is occurring, stating that a TSN has been issued, summarising the effect of the TSN, and stating the address (and, if applicable, the website) at which a full copy of the TSN can be inspected; (4) the authority should have a power (but not a duty) to serve copies of the TSN on the owner and occupier of the land and on others as may seem appropriate (Consultation Question 12-6).

12.45 We noted in our Consultation Paper that by virtue of section 171E(5) of the TCPA 1990, a planning authority that has issued a TSN must display a copy of it (and a statement of its effect and the penalties for non-compliance) on the land to which it relates. The authority may also serve “the notice” on

- 1) the person who it thinks is carrying out the activity that constitutes the breach of planning control,
- 2) the person who it thinks has an interest in the land, or
- 3) the person who it thinks is the occupier of the land.²⁶

12.46 It will be noted that this does not refer to the person who is the owner, occupier etc; merely the person who seems to be.

12.47 We noted the requirement to display a site notice refers only to “the land” on which the offending activity is occurring. This could cause problems in the case of a large area of land, for example in a rural area, if a notice were displayed at a point on the land that was far from where the activity was actually taking place. It also seems unhelpful for the planning authority to be required to display on the land a copy of the TSN itself, as the notice may be several pages long, and may be phrased in technical language.²⁷

12.48 We also noted that a TSN has effect “from the time” it is first displayed, which presumably means that it takes effect immediately after the start of the display – although it is not clear what happens if the notice is itself displayed, but without the

²⁶ Consultation Paper, para 12.46.

²⁷ Consultation Paper, para 12.48.

required statement of its effect.²⁸ The notice is effective for a period of 28 days starting “on” the *day* it is displayed, but it is not clear whether that period starts (and finishes) at the precise time on which the notice is displayed, or at the start or end of the day.²⁹ This contrasts with section 173(8), which provides that an enforcement notice takes effect “on” the *date* specified within it – which means at the start of that day.

- 12.49 We provisionally proposed that a notice should come into effect at the time and date stated within it, which will normally be when it is displayed on the land in question.³⁰ It should then remain in effect for a period of 28 days starting at the beginning of the day following the day on which it is displayed. That display should be on the land, as near as possible to the place at which the activity is occurring, and should include a notice stating that a TSN has been issued, summarising the effect of the notice, including the date on which it comes into effect, and stating the addresses (both a physical location and, where available, a website) at which full copies of the notice can be inspected.
- 12.50 Of 33 consultees who responded to this question, 30 agreed with our provisional proposal.
- 12.51 Pembrey and Burry Port Town Council believed that our proposal “would make stop notices more effective.” Allan Archer said the proposal “would provide clarification of the issues identified and should be supported.” The RTPI said that that the changes would be “acceptable.”
- 12.52 There was some disagreement as to whether there should be a duty to serve a copy of the temporary stop notice on the owner of the land, if known. The Canal & River trust considered “that any formal notice should always be served on both the owner and the occupier.” The Home Builders Federation suggested that “the requirement to serve the notice on the owner, if known, should be a requirement ‘duty’ as it is the owner who is required to respond to the notice.
- 12.53 By contrast, the Planning and Environmental Bar Association (PEBA) agreed that “the authority should have a power rather than a duty to serve copies of the TSN” as “it is important to avoid circumstances in which an owner/occupier could become aware of a temporary stop notice before it has been displayed” – as this could allow an occupier or landowner to instigate breaches of planning control (such as bringing caravans onto the land), without criminal sanction. Newport CC noted that “ownership of some land is difficult to ascertain particularly when it is not registered.”
- 12.54 On balance, we do not think it desirable to turn the existing power to notify into a statutory duty to do so. We noted in the Consultation Paper that it will be easier to secure a conviction for non-compliance if the existence of the notice has been widely publicised.³¹ A prudent authority will notify the owner of the land, if known, following the display of the notice. We consider that this best practice should be reflected in Government guidance. However, we are persuaded by PEBA’s point that creating a

²⁸ Consultation Paper, para 12.49; TCPA 1990, s 171E(6).

²⁹ TCPA 1990, s 171E(7).

³⁰ Consultation Paper, para 12.50.

³¹ Consultation Paper, para 12.51.

duty to inform the owner would increase the risk of situations where an owner is made aware of a TSN before it is displayed and comes into effect. Furthermore, the persons most directly affected by the notice are those on the land carrying out the activity in question, who will be made aware of the notice through its display.

Recommendation 12-6.

We recommend that:

- (1) a temporary stop notice (TSN) should come into effect at the time and date stated in it, which will normally be when a notice is displayed on the land in question;**
- (2) it should then remain in effect for 28 full days (starting at the beginning of the day after the day on which it is displayed);**
- (3) the notice to be displayed on the land, as near as possible to the place at which the activity to which it relates is occurring, should:**
 - state that a TSN has been issued;**
 - summarise the effect of the TSN; and**
 - state the address (and, if applicable, the website) at which a full copy of the TSN can be inspected;**
- (4) the authority should have a power (but not a duty) to serve copies of the TSN on the owner and occupier of the land and on others as may seem appropriate; and**
- (5) Welsh Government guidance should emphasise that, following the display of the notice, copies of the TSN should be served within a reasonable time on the owner and occupier of the land, if either are known to the planning authority.**

We provisionally proposed: (1) that it should be an offence to contravene a temporary stop notice that has come into effect (rather than one that has been served on the accused or displayed on the site); and (2) that it should be a defence to a charge of such an offence to prove that the accused had not been served with a copy of the notice, and did not know, and could not reasonably have been expected to know, of its existence (Consultation Question 12-7).

12.55 We noted in our Consultation Paper that under section 171G(1) of the TCPA 1990 it is an offence for a person to contravene a TSN that has been served on him or her,

or that has been displayed on the land.³² We identified two problems with this provision:

- 1) a person served with a notice may be prosecuted for non-compliance even if a notice is not displayed on the land; and
- 2) a person not served with a notice may be able to avoid prosecution even if a notice has been obviously displayed on the land.

12.56 We provisionally proposed that the offence under section 171G should relate to the contravention of a notice that has come into effect, rather than one of which a copy has been served or displayed on the land.³³

12.57 Responses to this question were received from 33 consultees, of whom 30 agreed, and two disagreed – in all cases, largely without comment.

Recommendation 12-7.

We recommend that:

- (1) it should be an offence to contravene a temporary stop notice that has come into effect (rather than, as at present, one that has been served on the accused or displayed on the site);**
- (2) it should be a defence to a charge of such an offence to prove that the accused**
 - had not been served with a copy of the notice; and**
 - did not know, and could not reasonably have been expected to know, of the existence of the notice.**

BREACH OF CONDITION NOTICES

We provisionally proposed that the provisions relating to breach of condition notices, currently in section 187A of the TCPA 1990, be amended so that a notice is to be “issued”, to come into force on the date stated in it, with copies being served on those apparently responsible for the breach (rather than, as present, a separate notice being served on each such person, coming into force on a date specified by reference to the date of service) (Consultation Question 12-8).

12.58 In our Consultation Paper, we discussed breach of condition notices (BCNs) under section 187A of the TCPA 1990, which can be issued if planning permission has been granted but a condition of that permission has been breached by the developer.³⁴ We

³² Consultation Paper, para 12.55.

³³ Consultation Paper, para 12.56.

³⁴ Consultation Paper, paras 12.58 – 12.59.

noted the main benefit of BCNs compared to enforcement notices is that there is no right of appeal in respect of the former, so that it is not permissible to challenge the merits of a condition (the reasoning behind this being that a condition should be been challenged when it is first imposed, not once the development is being carried out).

- 12.59 We noted that, at present, a breach of condition notice must be served on any person who has carried out or is carrying out the development, or anyone having control of the land.³⁵ The notice takes effect immediately, but the time for compliance is the end of a period of at least 28 days starting on the date it is served.³⁶ This contrasts with the provisions as to an enforcement notice relating to a breach of conditions, which require the notice to be “issued”, with copies to be served as required.
- 12.60 We also noted that there is no requirement for a copy of a breach of condition notice to be displayed on or near the land. This may be unsatisfactory where there are two or more people associated with a breach, leading to separate notices being served on each, possibly on different dates, resulting in differing times for compliance for each person involved.
- 12.61 We provisionally proposed to bring the timing provisions relating to breach of condition notices in line with those relating to enforcement notices, by requiring a notice to be “issued”, and to come into force on the date specified in the notice.³⁷ Copies could then be served – not necessarily on the same date – on those whom the authority considered appropriate.
- 12.62 All 31 responding consultees agreed.
- 12.63 The Law Society noted “the desirability of adopting as far as possible a common approach to the service and coming into effect of notices related to the enforcement of planning control.” The RTPI said that “this proposal appears to be a logical approach.” Liam Jones of NAPE said that “bringing [breach of condition notices] in line with enforcement notices would avoid any confusion in relation to different notices being issued.”
- 12.64 The Mineral Products Association suggested that there should be a right of appeal against a breach of condition notice for specific developments on the basis that “some developments may last for many years and circumstance may change. Conditions may therefore become out of date.” Whilst we are sympathetic with this view, we consider that the remedy lies with an application to vary the permission, rather than simply unilaterally breaching the condition.

Recommendation 12-8.

We recommend that the provisions relating to breach of condition notices, currently in section 187A of the TCPA 1990, should be restated in an amended form such that a notice is to be “issued”, to come into force on the date stated in it, with copies

³⁵ Consultation Paper, para 12.59.

³⁶ TCPA 1990, s 187A(7).

³⁷ Consultation Paper, para 12.62.

being served on those apparently responsible for the breach (rather than, as present, a separate notice being served on each such person, coming into force on a date specified by reference to the date of service).

ENFORCEMENT NOTICES

Content of enforcement notice and accompanying note

We provisionally proposed that an enforcement notice should be required to specify (1) the steps that the authority requires to be taken, or the activities that are to cease, in order to achieve, wholly or partly, all or any of the purposes set out in section 173(4) of the TCPA 1990; and (2) which one or more of those purposes it considers will be achieved by taking those steps (Consultation Question 12-9).

12.65 In our Consultation Paper we noted that the most commonly encountered form of enforcement action is the issue of an enforcement notice.³⁸ An enforcement notice is a notice that states the matters that appear to the planning authority to constitute a breach of planning control, and specify the steps that the authority requires to be taken or the activities it requires to cease.

12.66 We have mentioned that section 173(3) of the TCPA 1990 requires an enforcement notice to specify the steps that are to be taken, or the activities that are to cease, “in order to achieve, wholly or partly, any of the following purposes”. The purposes are:

- 1) remedying the breach
 - by making any development comply with the terms (including conditions or limitations) of any planning permission which has been granted in respect of the land,
 - by discontinuing any use of land, or
 - by restoring the land to its condition before the breach took place³⁹; and
- 2) remedying any injury to amenity which has been caused by the breach.⁴⁰

12.67 We noted that in *Oxfordshire CC v Wyatt Bros (Oxford) Ltd*, the Court of Appeal held that a planning authority could require steps for both of the specified purposes, so that the word “or” at the end of section 173(4)(a) should be read as “and/or”.⁴¹

³⁸ Consultation Paper, para 12.66.

³⁹ TCPA 1990, s 173(3)(a); indents added to improve clarity.

⁴⁰ TCPA 1990, s 173(3)(b).

⁴¹ *Oxfordshire CC v Wyatt Bros (Oxford) Ltd* [2005] EWHC 2402 (QB); Consultation Paper, para 12.71; Scoping Paper, paras 5.25 to 5.27.

- 12.68 We provisionally proposed that section 173(3) be amended to require that a notice should specify:
- 1) the steps that the authority requires to be taken [etc] in order to achieve, wholly or partly, one or more of the purposes set out in section 173(4); and
 - 2) which one or more of those purposes it considers will be achieved by taking those steps.
- 12.69 Of 31 consultees responded to this proposal, 21 were in agreement, three were equivocal and seven disagreed.
- 12.70 Several consultees highlighted the increased clarity that would result from the proposal. The RTPI stated that the proposal “will provide better clarification” to enforcement notices. Rhondda Cynon Taf CBC noted that the proposed amendments “will make it clearer as to the requirements that can be specified in an enforcement notice.”
- 12.71 However, a significant number of consultees questioned the value of the proposal and asked what problem it was intended to remedy. Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services and Lawyers in Local Government noted that the proposal “does not introduce any practical difference in terms of the effect of a notice”. Torfaen CBC found it “not entirely clear what purpose this would serve.” The Canal & River trust suggested that our proposal “would not be helpful to anyone who is served with an enforcement notice.” Liam Jones of NAPE noted that
- [We] can see the benefit of inclusion of the words ‘all or any’ as set out in (1) but don’t consider that LPAs should need to further say which one or more of the purposes it considers will be achieved by taking those steps as set out in (2) – The reasons for serving the enforcement notice will set out why the LPA has taken action.
- 12.72 There was also concern among consultees that the proposal would result in a new ground of appeal based on the stated purpose. The Planning Inspectorate (PINS) questioned whether the proposal “would have implications for appealing a notice.”
- 12.73 On reflection, we agree that our provisional proposal would not change the existing requirements in substance, but might produce unintended consequences. By reformulating the requirements to state the purpose of enforcement action we did not intend to allow a new avenue for appeal on the basis of that purpose. However, we accept that the suggested new provision, as formulated, could have been interpreted as imposing a new or more onerous requirement on planning authorities. At the very least, a new statutory formulation may have invited questions about whether a new requirement was intended.
- 12.74 To avoid the possibility of unprofitable litigation on this point, we now recommend that section 173(4) of the TCPA 1990 be included in the Bill as it is currently written, but suitably amended to incorporate the gloss on its meaning highlighted by the court in *Oxfordshire CC v Wyatt Bros (Oxford) Ltd*.

Recommendation 12-9.

We recommend that section 173(4) of the TCPA 1990 should be restated in an amended form to make it clear that a local authority can require steps to be taken in respect of both of the specified purposes, as set out in *Oxfordshire CC v Wyatt Bros (Oxford) Ltd* [2005] EWHC 2402 (QB).

We provisionally proposed that there should be an explicit provision in the Bill, incorporating the principle in *Murfitt v Secretary of State* and subsequent cases, to the effect that, where an enforcement notice is served alleging the making of a material change of use of land, the notice may require that certain works be removed in addition to the cessation of the unauthorised use, provided that those works were integral to the making of the material change of use (Consultation Question 12-10).

- 12.75 Under the *Murfitt* principle, an enforcement notice can validly require the removal of any incidental operational development where it forms part of the development being enforced against.⁴² This principle was qualified in the case of *Bowring v Secretary of State*, where the court held that the incidental development must be “integral to or part and parcel of” the development in question – although it went on to note that that would not be sufficient if the works had been undertaken for a different, and lawful, use and could be used for that other, lawful use even if the unauthorised use ceased.⁴³
- 12.76 We provisionally proposed that the *Murfitt* principle should be codified in the Bill. All of the 28 consultees who responded to the question agreed.
- 12.77 There were few additional comments in respect of the proposal. POSW, Monmouthshire CC, Ceredigion CC, Pembrokeshire Coast NPA and National Parks Wales all told us that they “welcome this inclusion.”
- 12.78 PINS, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services and Lawyers in Local Government all variously suggested that the “integral” requirement set out in *Bowring* should be expanded to include operational development that has:
- 1) facilitated the change of use, or
 - 2) is ancillary to it, or
 - 3) relates to the subsequent operation of the new use.
- 12.79 In consequence, related operational development that may be lawful if undertaken for a different purpose could not be the subject of an enforcement notice.

⁴² *Murfitt v Secretary of State* (1980) 40 P&CR 254.

⁴³ *Bowring v Secretary of State* [2013] EWHC 1115 (Admin); [2013] JPL 1417.

- 12.80 We agree that it would be desirable to amend our provisional proposal so as to widen the principle established in *Murfitt* in accordance with the decision in *Bowring*.

Recommendation 12-10.

We recommend that there should be an explicit provision in the Bill, incorporating the principle in *Murfitt v Secretary of State* and *Bowring v Secretary of State*, to the effect that, where an enforcement notice is served alleging the making of a material change of use of land, the notice may require that certain works be removed in addition to the cessation of the unauthorised use, provided that those works were carried out at or after the time of the making of the material change of use and were integral to the making of the change or the subsequent operation of the new use.

We provisionally proposed that the relevant regulations should require that the explanatory note accompanying an enforcement notice should include a statement (in line with the principle in *Mansi v Elstree RDC*) to the effect that the notice does not restrict the rights of any person to carry out without a planning application any development that could have been so carried out immediately prior to the issue of the notice (Consultation Question 12-11).

- 12.81 Under the *Mansi* principle, an enforcement notice must not seek to restrict the owner of land from using it in any way in which the land could have been used lawfully up until the issue of the notice. In the *Mansi* case itself, an enforcement notice was issued in relation to the selling of off-site horticultural produce at a greenhouse. However, the notice required the cessation of all retail sales. The court held that the notice should be amended to allow the sale of on-site produce, which had been permitted before the notice was issued.⁴⁴
- 12.82 We recommended that the *Mansi* principle be recognised in the Code, but in the explanatory note to accompany the enforcement notice, envisaged by section 173(10), rather than in the notice itself.⁴⁵
- 12.83 Of the 29 consultees who responded to the question. 22 were in agreement, three were equivocal, and three disagreed.
- 12.84 Newport CC agreed on the basis that the statement which we proposed should be in every enforcement notice was a “standard statement.” Rhondda Cynon Taf CBC said that such a statement “would provide clarity to the recipient of an enforcement notice.” The RTPI agreed as “this situation often arises during enforcement notice appeals.” However, it cautioned that “the drafting of the note is an important factor, to ensure it is fully understood by the recipient.”

⁴⁴ *Mansi v Elstree RDC* (1964) 16 P&CR 153, per Widgery J at p 161.

⁴⁵ See SI 2017/530, reg 7.

- 12.85 Cardiff Council likewise noted that “a simple explanatory note may be useful but it should not confuse the recipient of the Notice to the effect that a previous use may continue on land which could also be unauthorised”.
- 12.86 Caerphilly CBC and POSW South East Wales disagreed with the proposal because “this may make the notice, which is complex enough for members of the public, more confusing.” Torfaen CBC disagreed on the basis that “the recipient of a notice would then expect the authority to tell them what they could have done without the need for planning permission.”
- 12.87 We consider that the benefits of including a reference to the *Mansi* principle in the matters to be included in the note to accompany an enforcement notice are that it would clarify the effect of the notice in some cases. On the other hand, in many cases the principle will be irrelevant – and in some cases a notice of the kind envisaged might be more confusing than helpful. We also note that the Welsh Government will shortly be reviewing Circular 24/97, *Enforcing Planning Control*, and incorporating update guidance in the Development Management Manual. On balance, therefore, we consider that it may be more appropriate to incorporate advice on *Mansi* in the Manual.

Recommendation 12-11.

We recommend that Welsh Government guidance should explain the implications of the principle in *Mansi v Elstree RDC*, to the effect that an enforcement notice does not restrict the rights of any person to carry out without a planning application any development that could have been carried out lawfully immediately prior to the issue of the notice.

Appeal against an enforcement notice

We provisionally proposed that the Bill should omit section 177(5) and (6) of the TCPA 1990, relating to the application for planning permission deemed to have been made by an appellant relying on ground (a) in section 174(2). Instead, it should provide that the Welsh Ministers on determining an appeal including ground (a) may grant planning permission for any or all of the matters that are alleged to have constitutes a breach of control; discharge the condition that is alleged to have been breached; or issue a certificate of lawfulness, insofar as they determine that the matters alleged by the notice to constitute a breach of control were in fact lawful (Consultation Question 12-12).

- 12.88 The recipient of a copy of an enforcement notice may appeal to the Welsh Ministers on the grounds specified in section 174(2) of the TCPA 1990.⁴⁶ We noted in our Consultation Paper that one of the most important grounds in practice is ground (a) – “in respect of any breach of planning control which may be constituted by the

⁴⁶ Consultation Paper, para 12.95.

matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged”.⁴⁷

- 12.89 Section 177(5) of the TCPA 1990 provides that where an appeal relies on ground (a) the appellant is “deemed to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control.” This is known as the “deemed application.”
- 12.90 However, the Welsh Ministers may grant planning permission on the determination of an appeal under section 174 in any event.⁴⁸ Section 177(6) states that any permission granted by the Welsh Ministers shall be treated as a grant of the deemed application.
- 12.91 We were not aware of a compelling reason as to why a deemed application is necessary in the light of the Welsh Ministers’ powers to grant permission on appeal. We therefore provisionally proposed that section 177(5) and 177(6) of the TCPA 1990 should not be included in the Code.
- 12.92 Of the 28 consultees responded to this question, 23 were in agreement, three were equivocal, and two disagreed.
- 12.93 Several stakeholders suggested that the proposal would clarify the role of the Welsh Ministers and make the appeal process more straightforward. The Law Society described our provisional proposal as a “welcome simplification.” PEBA agreed on the basis that “it is not proposed to remove the requirement to pay a fee.”
- 12.94 Those who answered ‘no’ to our consultation question did not appear to challenge the substance of the provisional proposal. The CLA disagreed on the basis that the proposal amounted to removing ground (a), which was not our intention. Newport CC expressed concern that our reform might lead to the possibility of unauthorised developments being granted permission in response to a ground (a) appeal; but that is already the position.
- 12.95 PINS suggested that it would be clearer to limit the scope of action of Welsh Ministers determining an appeal including ground (a) to those elements of the alleged breach that are the subject of the ground (a) appeal rather than any or all of the breaches alleged. So for example, if a notice alleges two breaches, X and Y, an appeal may be made in relation to X on ground (a) (permission should be granted), and in relation to Y on ground (c) (no breach of planning control). The suggestion was that the inspector determining the appeal should not have power to allow the appeal on ground (a) in relation to the matters alleged to constitute breach Y – as there may have been no evidence from the authority as to the planning merits of those matters.
- 12.96 We agree with that concern, and consider that the power of the inspector to grant planning permission or to discharge any condition or limitation – currently in section 177(1)(a) and (b) – should be limited to those matters that formed the subject of any appeal on ground (a). Similarly, the ability to grant a certificate of lawfulness under

⁴⁷ Consultation Paper, para 12.95.

⁴⁸ TCPA 1990, s 177(1)(a).

section 177(1)(c) should be limited to those matters that formed the subject of an appeal under (c) or (d) (no breach of control; or no enforcement action possible).

Recommendation 12-12.

We recommend that that the Bill:

- (1) should omit section 177(5) and (6) of the TCPA 1990, relating to the application for planning permission deemed to have been made by an appellant relying on ground (a) in section 174(2) (permission ought to be granted for any matter stated in the enforcement notice as constituting a breach of control); and**
- (2) should provide instead that the Welsh Ministers, on determining an appeal under section 174, may do all or any of the following:**
 - in relation to any of the matters that form the basis of an appeal under ground (a), grant planning permission or discharge any condition or limitation that is alleged to have been breached;**
 - in relation to any of the matters that form the basis of an appeal under ground (c) or (d), issue a certificate of lawfulness, insofar as they determine that those matters were in fact lawful.**

We provisionally proposed that ground (e) on which an appeal can be made against an enforcement notice (under section 174 of the TCPA 1990) should refer to copies of the notice not having been served as required by section 172(2) (which refers to service on owners and occupiers etc) rather than as required by section 172 (which also refers to time limits for service) (Consultation Question 12-13).

- 12.97 Section 174(2)(e) of the TCPA 1990 allows the recipient of an enforcement notice to appeal on the ground that copies of the notice were not served as required by section 172. Section 172(3) includes the requirement that the service of the notice shall take place not more than 28 days after its date of issue, and not less than 28 days before the date specified in it as the date on which it is to take effect.
- 12.98 Under section 285(1) of the TCPA 1990, the validity of an enforcement notice may not be challenged in relation to a ground under Part 7 of the Act (which includes all the grounds in section 174(2)), other than through the statutory appeal process in Part 7 itself.
- 12.99 In our Consultation Paper we noted that, because of this interaction, the recipient of an enforcement notice might be unable to challenge its validity in the courts on the basis that a copy had been served out of time, leaving a period in which to appeal that was shorter, possibly much shorter, than envisaged by the scheme of the Act. However, in *R (Stern) v Horsham DC*, the court found that, despite the wording of the

statute, it should be possible to apply to the court under section 285 to quash a notice that had been served out of time.⁴⁹

- 12.100 We provisionally proposed that the problem could be remedied by amending section 174(2)(e) of the TCPA 1990, so that it referred to section 172(2) rather than section 172 more broadly. This would put time limits for service of enforcement notices outside the scope of the statutory appeal procedure.
- 12.101 Of 27 consultees who responded to this question, 26 agreed without further comment.
- 12.102 Torfaen CBC disagreed on the basis that allowing recipients to apply for judicial review of an out-of-time enforcement notice in addition to the statutory appeal procedure would amount to an unnecessary waste of time, resources and money for all parties. We reject that concern, as the basis of the decision in *Stern* was that, in the situation of a notice being served out of time, the statutory appeal (to the Welsh Ministers) would be inadequate.

Recommendation 12-13.

We recommend that ground (e) on which an appeal can be made against an enforcement notice (under section 174 of the TCPA 1990) should refer to copies of the notice not having been served as required by the provision restating section 172(2) (which refers to service on owners and occupiers etc) rather than as required by the provision restating section 172 as a whole (which also refers to time limits for service).

We provisionally considered that section 174(4) of the TCPA 1990 (requirements as to the statement to be submitted with appeal against an enforcement notice) should be amended so as not to duplicate the requirements of the relevant secondary legislation (Consultation Question 12-14).

- 12.103 In our Consultation Paper we noted that under section 174(4) of the TCPA 1990 a person appealing against an enforcement notice must submit a statement
- 1) specifying the grounds of appeal that are being relied on; and
 - 2) giving such further information as may be prescribed by regulations.⁵⁰
- 12.104 Under the relevant regulations the statement should specify the grounds of appeal being relied on, the facts relied on, and the case being put forward in relation to each ground.⁵¹

⁴⁹ [2013] EWHC 1460 (Admin), [2013] PTSR 1502.

⁵⁰ Consultation Paper, para 12.105.

⁵¹ 2017 SI 530, reg 8(1)(a).

- 12.105 Given this duplication, we provisionally proposed that all that is needed in the primary legislation is a requirement that a person making an appeal must provide information and details as prescribed in secondary legislation.
- 12.106 25 consultees responded to this question. No consultee disagreed or added substantial further comments. Allan Archer described it as a “sensible amendment.”

Recommendation 12-14.

We recommend that section 174(4) of the TCPA 1990 (requirements as to the statement to be submitted with appeal against an enforcement notice) should be amended so that it does not duplicate the requirements of the relevant secondary legislation.

High Court challenge to an enforcement notice

We provisionally proposed that there be included in the part of the Code dealing with enforcement a provision equivalent to section 285(1) and (2), to the effect that an enforcement notice is not to be challenged, other than by way of an appeal to the Welsh Ministers, on any of the grounds on which such an appeal could have been brought (Consultation Question 12-15).

- 12.107 We noted in our Consultation Paper that it is possible to challenge a decision of the Welsh Ministers to grant planning permission in response to an enforcement appeal by way of an application to the High Court under section 288 of the TCPA 1990. It is also possible to challenge any other decision of the Welsh Ministers on such an appeal by way of an application under section 289 of the TCPA 1990.⁵²
- 12.108 In Chapter 17 of our Consultation Paper, we proposed that the statutory procedure under sections 288 and 289 of the TCPA 1990 should not be restated in the Bill, but should be replaced by an application to the High Court for judicial review, under Part 54 of the Civil Procedure Rules.⁵³
- 12.109 However, in Chapter 12 we proposed that the Bill should still contain a provision equivalent to sections 285(1) and (2) of the TCPA 1990, which state that an enforcement notice is not to be challenged by a person on whom a copy of the notice was served, other than by way of an appeal to the Welsh Ministers, on any of the grounds on which such an appeal could have been brought.⁵⁴
- 12.110 Twenty-nine consultees responded to this question. No consultee disagreed or added substantive further comment. Carmarthenshire CC stated that the proposal “clarifies [the] appeals process.”

⁵² Consultation Paper, para 12.111.

⁵³ Consultation Paper, Consultation Question 17-1.

⁵⁴ Consultation Paper, para 12.112.

Recommendation 12-15.

We recommend that there should be included in the part of the Bill dealing with enforcement a provision equivalent to section 285(1) and (2) of the TCPA 1990, to the effect that an enforcement notice is not to be challenged, other than by way of an appeal to the Welsh Ministers, on any of the grounds on which such an appeal could have been brought.

STOP NOTICES

Service of a notice

12.111 An enforcement notice will not come into effect immediately, and will usually allow time for compliance.⁵⁵ The service of such a notice, on its own, may therefore be inadequate when it is desirable that an unauthorised activity ceases immediately. Where this is the case, a planning authority may therefore issue a “stop notice” requiring the recipient to halt the activity immediately.⁵⁶ We provisionally proposed three changes relating to the service and coming into effect of stop notices.

We provisionally proposed that the restriction on issuing a stop notice, currently in section 183(4) of the TCPA 1990, should be clarified to ensure that it applies in relation to any building in use as a dwelling (Consultation Question 12-16).

12.112 First, we noted that, as with temporary stop notices, the power to serve a stop notice is not available to bring to an end the use of any building as a dwelling house.⁵⁷ Here too, we provisionally consider that this should be clarified to make plain that it applies to any part of a building in use as a dwelling.

12.113 None of the 30 responding consultees disagreed. The RPTI noted that such a change would “provide continuity.” Rhondda Cynon Taf CBC said it would “provide clarity.”

Recommendation 12-16.

We recommend that the restriction on issuing a stop notice, currently in section 183(4) of the TCPA 1990, should be clarified to ensure that it applies in relation to any building in use as a dwelling.

⁵⁵ Consultation Paper, para 12.113.

⁵⁶ Consultation Paper, para 12.114.

⁵⁷ TCPA 1990, s 183(4). See **paras 12.43, 12.44.**

We provisionally proposed that the provisions relating to stop notices, currently in section 184 of the TCPA 1990, should be amended so that a notice is to be “issued”, to come into force on the date stated in it, with copies being served on those apparently responsible for the breach of control (rather than, as present, a separate notice being served on each such person, coming into force on a date specified by reference to the date of service) (Consultation Question 12-17).

- 12.114 Secondly, we noted that, by virtue of section 183(5), a planning authority does not “issue” a stop notice, but “serves” it on any person who appears to have an interest in the land to which it relates, or to be engaged in the activity being prohibited by the notice. And it may display a site notice on “the land”, although it does not have to.
- 12.115 As with a breach of condition notice, we provisionally considered that a notice should come into effect on the date stated within it. There should then be a duty for the authority to serve copies of the stop notice on the owner and occupier of the land. Copies of the stop notice may then be served on others – and a notice may be displayed on site – as may seem appropriate.⁵⁸
- 12.116 Of the 29 consultees who responded to this proposal, 28 agreed.
- 12.117 PEBA reiterated the caveat in relation to its response to Consultation Question 12-6 (temporary stop notices), to the effect that it would be important for the power to serve copies of a notice to be discretionary.⁵⁹
- 12.118 The RPTI agreed “in principle” but questioned whether there was a need to change the wording as “there appears to be very little wrong” with the existing procedure. However, we consider that it would be more straightforward for the service requirements for stop notices to mirror as closely as possible those relating to enforcement notices – not least since a stop notice will always be served alongside an enforcement notice. Uniform requirements would therefore simplify the system, and consequently reduce the risk of error on both sides.
- 12.119 In the Consultation Paper, we noted that the power to display a notice on “the land” could be problematic in the case of a large rural site, if a notice were to be displayed at a point on the land that was some distance from where the offending activity was actually taking place.⁶⁰ This point was not mentioned in the Consultation Question, and none of the consultees picked it up; but we have amended our recommendation to incorporate it.

⁵⁸ Consultation Paper, para 12.119.

⁵⁹ See **para 12.53**.

⁶⁰ Consultation Paper, para 12.117.

Recommendation 12-17.

We recommend that the provisions relating to stop notices, currently in section 184 of the TCPA 1990, should be restated in an amended form such that a notice is to be “issued”, to come into force on the date stated in it, with copies being served on those apparently responsible for the breach of control (rather than, as present, a separate notice being served on each such person, coming into force on a date specified by reference to the date of service); and where a notice is to be displayed on the land, it is to be as close as reasonably possible to the location at which the offending activity is occurring.

We provisionally proposed: (1) that it should be an offence to contravene a stop notice that has come into effect; and (2) that it should be a defence to a charge of such an offence to prove that the accused had not been served with a copy of the stop notice, and did not know, and could not reasonably have been expected to know, of the existence of the notice (Consultation Question 12-18).

- 12.120 Following on from the previous recommendation, we proposed that the offence under section 187(1) should relate to the contravention of a notice that has come into effect, rather than one that has been served. But a person charged with such an offence would still have the defence available under section 187(3) – save that the reference to the service of the notice would need to be amended to refer to the service of a copy of the notice.⁶¹
- 12.121 Of the 31 consultees responding to the third proposal, the vast majority agreed, with only one equivocal response. Carmarthenshire CC and Rhondda Cynon Taf CBC both stated that the proposals “provide clarity.” The RTPi and PEBA both agreed, but subject to the caveats raised in connection with Consultation Question 12-17.⁶²
- 12.122 Newport CC argued that the suggested defence to a charge of non-compliance with a stop notice should be removed entirely. However, it is difficult to see how it could be fair to punish someone for failing to comply with a notice of which they knew nothing.
- 12.123 Michael Kiely noted that full stop notices were underutilised as the risk of compensation was too high, compared to temporary stop notices. This concern was echoed by the Law Society. It is certainly true that there has been a general decline in the use of stop notices in recent years, as we highlighted in our Consultation Paper.⁶³ However, as Huw Williams noted, the question of whether the current system is properly balanced is outside the scope of a technical law reform exercise such as this.

⁶¹ Consultation Paper, para 12.120.

⁶² See **paras 12.117, 12.118.**

⁶³ Consultation Paper, para 12.115.

Recommendation 12-18.

We recommend that:

- (1) it should be an offence to contravene a stop notice that has come into effect; and**
- (2) it should be a defence to a charge of such an offence to prove that the accused**
 - had not been served with a copy of the stop notice, and**
 - did not know, and could not reasonably have been expected to know, of the existence of the notice.**

Stop notices: other proposals

We provisionally proposed: (1) that a stop notice should cease to have effect when the planning authority makes a decision to that effect; and (2) that such a decision should be publicised as soon as possible after it has been made, by the display of a suitable site notice and the notification of all those who were notified of the original notice. (Consultation Question 12-19)

- 12.124 We noted in our Consultation Paper that under section 184(4) of the TCPA 1990, a stop notice will cease to have effect when the associated enforcement notice is withdrawn or quashed, or when the time for compliance with that notice expires. But a stop notice will also cease to have effect where the planning authority decides to withdraw it (either along with the linked enforcement notice, or otherwise).
- 12.125 In the latter case, the authority must notify all those who were served with the original stop notice (or notified of its service) that it has withdrawn it. The notice will cease to have effect when the first of those people receives the notice of withdrawal.⁶⁴ We provisionally proposed that it would make more sense for a stop notice to cease to have effect immediately following the planning authority's decision, and that the decision should be communicated as soon as possible to those who received the original notice and via a notice on the land itself.
- 12.126 None of the 28 responding consultees disagreed. The RTPI described our proposal as "a common sense approach."
- 12.127 Several consultees noted that the requirement under section 184(7) of the TCPA 1990, to publicise the withdrawal of a stop notice via a site notice, only takes effect if a site notice was used to publicise the original stop notice. This was not clear in the wording of our provisional proposal, and we have amended our final recommendation accordingly.

⁶⁴ Consultation Paper, para 12.121.

Recommendation 12-19.

We recommend that:

- (1) where a planning authority decides to withdraw a stop notice, the notice should cease to have effect immediately; and**
- (2) such a decision should be publicised as soon as possible after it has been made:**
 - by the notification of all those who were notified of the original notice, and**
 - where the original notice was publicised by a site notice, by the display of another such notice, at the same location.**

We provisionally considered that where a stop notice is served by the Welsh Ministers under section 185, and subsequently quashed, any compensation arising under section 186 should be payable by them and not by the planning authority (Consultation Question 12- 20).

12.128 In our Consultation Paper we highlighted the fact that if the Welsh Ministers issue a stop notice, it is the planning authority that is liable to pay any compensation that may be payable under section 186 of the TCPA 1990.⁶⁵

12.129 We provisionally proposed that in the rare cases where this does happen, it would be more appropriate for the Welsh Ministers to be liable for compensation than the local planning authority.

12.130 All of the 29 consultees who responded to this question agreed, in several cases strongly – Huw Williams “completely” and Blaenau Gwent CBC “wholeheartedly”. Allan Archer said that our proposal “seems only fair and logical.”

12.131 However, on giving the matter further consideration, we note that compensation is only payable where:

- 1) the enforcement notice linked to the stop notice is quashed or varied on grounds other than planning permission being granted (that is, the legal grounds relating to the need for permission for the development, or the service of the notice); or
- 2) the enforcement notice is withdrawn by the planning authority on such grounds; or
- 3) the stop notice itself is withdrawn.

⁶⁵ TCPA 1990, Sch 1, para 16; Consultation Paper, para 12.124.

- 12.132 We recognise that, where an enforcement notice has been served by a planning authority and a stop notice by the Welsh Ministers, the liability to pay compensation would arise only in the event of the authority's enforcement notice being quashed or varied, which would be the responsibility of the authority; or where the authority itself withdraws its own notice. In such cases, it seems reasonable that the authority should pay compensation.
- 12.133 However, where the Welsh Ministers themselves issue an enforcement notice, under section 182 of the TCPA 1990, and then issue a stop notice under section 185, it seems more appropriate that the Welsh Ministers should meet any liability for compensation that may arise. We have adjusted our recommendation accordingly.

Recommendation 12-20.

We recommend that where an enforcement notice is served by the Welsh Ministers under the provision restating section 182 of the TCPA 1990, and a stop notice is served by them under the provision restating section 185, and the stop notice is subsequently quashed, any liability to compensation arising under section 186 should be payable by them and not by the planning authority.

CONSEQUENCES OF ENFORCEMENT ACTION

We provisionally proposed that the offences under section 179(2) (breach of an enforcement notice) and section 179(5) (subsequent resumption of prohibited activity) should each be framed so as to provide that a person commits an offence if: (1) the person is in breach of an enforcement notice; (2) the notice was at the time of the breach contained in the relevant register; and (3) the person had been served with a copy of the notice (Consultation Question 12-21).

- 12.134 We noted in our Consultation Paper that non-compliance with an enforcement notice that has come into effect is an offence under section 179(2) of the TCPA 1990.⁶⁶ Section 179(7) states that where a person is charged with an offence under section 179 and has not been served with a copy of the enforcement notice, and the notice is not contained in the enforcement register, it is a defence for that person to show that he or she was not aware of the existence of the notice.
- 12.135 We argued that it was onerous for the defendant to prove that the notice was not contained in the relevant register at the date of the offence and that he or she had not been served with a copy of it. We provisionally proposed that the prosecution should prove, to the criminal standard of proof, that the defendant was in breach of an enforcement notice, and that the notice was at the time of the breach contained in the relevant register, and that the person had been served with a copy of the notice.
- 12.136 Of 28 consultees who responded to this question, 25 agreed and three disagreed. The RTPI said that "this appears to be a logical approach."

⁶⁶ Consultation Paper, para 12.125.

12.137 Those who disagreed provided detailed and useful comments. PINS stated the following:

No, PINS disagrees with this proposal. Under present provisions it is a defence for a person to show that he or she was not aware of the existence of a notice if that person has not been served with a copy of the notice and the notice is not in the register. This latter requirement ensures that those who become involved in the site after the notice has been served are bound by its requirements (and should consult the register). The suggested change appears to alter the existing 2 options to requiring that both steps (serving on the person and register entry) are necessary.

It would seem undesirable that: 1) a person served with a notice could plead ignorance of it on the basis that the register is not up-to-date; and 2) a person who becomes involved in the site after the notice has been properly served can use the defence that he/she was not served with a copy.

12.138 Torfaen CBC stated the following:

It may be equally as difficult for a LPA to prove that a notice was contained in the relevant register at the time of the breach because there is not a requirement to record the date when a notice is added to the register. Although, in reality, most LPAs are likely to add any new notices to the enforcement register within a couple of days of being issued / served, if the authority was asked to confirm exactly when a notice was added to the register then this may be difficult.

Furthermore, it is questionable whether it is actually beneficial to include reference to the register in respect of the above offences. No-one ever asks to see the enforcement register and there are probably very few people that know that one exists! Would it not be easier and fairer for the above offences to be proved with reference to points (1) and (3) only and to amend Section 179(7) accordingly?

For those transgressors that weren't originally served with a copy of the enforcement notice (e.g. because they have only recently bought the land to which the notice relates), there could be a requirement for the LPA to prove that they subsequently supplied the transgressor with a copy of the notice and therefore made them aware of its existence.

Finally, in terms of point (3), reference is made to the person being "served" with a copy of the notice. However, this term may be confusing as a person who is "served" with a copy of an enforcement notice is usually regarded as the original recipient of the notice. It may therefore be beneficial to distinguish between those people that were originally "served" with a copy of a notice, and those people who subsequently had an interest in the land and were "supplied / provided with" a copy of the notice.

12.139 Bridgend CBC stated the following:

No - (2) and (3) should not have to be satisfied. If the notice was properly registered at the time of the breach then whoever breaches it should be criminally liable. Otherwise, the LPA will have to show service on each individual person as well as the registration of the notice. All of the onus of establishing service will fall on the LPA. This reform will make prosecutions in Wales for breach of an enforcement notice much harder for the LPA and is likely to make evasion much easier.

We should either stick with the current section 179 or at the very least say that the offence will be made out if the notice had been properly registered.

12.140 We are persuaded by the point, raised by both PINS and Bridgend CBC, that the defence would be too favourable to defendants if there was a requirement on planning authorities to prove both service *and* entry on the register. As Torfaen CBC explained, it can be difficult for a planning authority to establish when an enforcement notice has been placed on the register. It would seem inappropriate for a defendant to avoid prosecution on the basis of the planning authority being unable to prove when the notice was placed on the register, if the planning authority can prove that the defendant was served with a copy of the enforcement notice before the breach in question. We have therefore amended our provisional proposal accordingly.

12.141 Torfaen CBC also noted that there may be defendants who know about an enforcement notice but are not served with a copy of it, such as subsequent occupiers of the land. We are persuaded that if a planning authority can prove beyond reasonable doubt that a defendant was aware of an enforcement notice, this should be sufficient to impose criminal liability notwithstanding the lack of service of a copy of the notice.

12.142 Following the above suggestions, we recommend that the burden of proof (to the criminal standard) should be on the planning authority, but we now recommend that the authority should only have to prove awareness of the notice *or* an entry on the enforcement register at the time of the alleged breach.

12.143 We note the comment by Torfaen CBC that the enforcement register is rarely consulted. However, prospective purchasers or their professional advisers are likely to be aware of it – or of the local land charges register.

12.144 A further problem, brought to our attention in relation to **Consultation Question 15-16**, also applies to this proposal – namely that the requirement to show that the notice was in the relevant register “at the time of the breach” could cause problems if the works were to be carried out outside office hours (for example, at the weekend).⁶⁷ The resulting evidential difficulty could be slightly alleviated by introducing, into the relevant regulations, alongside the requirement to include the enforcement notice in the register, a further requirement to record the date on which it was first thus included.

⁶⁷ See para 15.113.

Recommendation 12-21.

We recommend that:

- (1) the offences under section 179(2) (breach of an enforcement notice) and section 179(5) (subsequent resumption of prohibited activity) should each be reframed so as to provide that a person commits an offence if the person is in breach of an enforcement notice, and**
 - the notice was at the time of the breach contained in the relevant register; or**
 - the person was aware of the notice, through service of a copy or otherwise.**
- (2) the relevant regulations should include, alongside the requirement to include an enforcement notice in the register, a further requirement to record the date on which it was first included.**
- (3) Welsh Government guidance should advise users of the planning system to consult the enforcement register before undertaking activities on land that may be subject to planning control, and provide clear directions on how to do this.**

We provisionally proposed that section 172A of the TCPA (assurances as to non-prosecution for breach of an enforcement notice) should be amended so as to enable an authority: (1) to give such an assurance simply by “giving notice” to the relevant person, rather than necessarily doing so by a letter; and (2) to give in response to a request from to a person (B), who acquires an interest in land following the issue of an enforcement notice relating to the land, an assurance explaining that, once the enforcement notice had been issued, the authority was required to serve a copy of it on a person (A) from whom person B had acquired the interest in the land (Consultation Question 12-22).

12.145 Section 172A of the TCPA 1990 was introduced by section 125 of the Localism Act 2011. Unlike most of the other provisions of the 2011 Act relating to enforcement, it applies in Wales as well as in England.

12.146 First, it enables a planning authority to give assurance to a person on whom a copy of an enforcement notice has been served that the person will not be at risk of prosecution for non-compliance. Section 172A thus states that:

When, or at any time after, an enforcement notice is served on a person, the local planning authority may give the person a letter –

explaining that, once the enforcement notice had been issued, the authority was required to serve the notice on the person.

- 12.147 This presumably deals with the position where, for example, a notice has to be served by the authority on a freeholder of land (A) in circumstances where that owner has nothing to do with the breach of control being committed by an occupier (B). But it does not deal with the position where a copy of the enforcement notice is served on A, who subsequently transfers the land to B. There is no duty on the authority to serve a further copy of the notice on B, who will simply become aware of it in through the conveyancing process. But it should be open to an authority to give B an assurance in the same terms as it gave, or might have given, to A – particularly if B was seeking such assurance. In our Consultation Paper we noted that, where land is transferred, there is no power for the authority to give such an assurance to the new owner.
- 12.148 Secondly, section 127A as drafted requires the assurance to be in the form of a letter, rather than simply by an authority “giving notice”, which could include doing so by email. We provisionally proposed that both of these anomalies be rectified.
- 12.149 Of 32 consultees who responded to this question, 28 agreed, 3 disagreed and one response was unclear.
- 12.150 No-one commented on the first point above. However, several consultees expressed the concern that under our proposal, “notice” could include verbal assurances. And Sirius Planning noted that:
- We disagree with the proposal to issue notice by other means than letter. Email addresses are regularly changed, or emails often lost into ‘junk’ folders; we consider that any communications should be supplemented by hard copy letter.
- 12.151 We agree that oral notice would not be desirable. But we consider that email would be appropriate where the recipient has indicated that it would be – the onus is on the person seeking the assurance to ensure that an email has indeed been received, and then to retain it (either by printing a hard copy or otherwise).
- 12.152 Our proposal simply referred to the giving of notice. Section 329 of the TCPA 1990 provides an elaborate definition of what that involves in different situations, including sending or delivering a written notice and (in certain circumstances only) sending it by electronic means – but not simply giving oral notice, either by telephone or face-to-face. We have amended our final recommendation to make this clearer.

Recommendation 12-22.

We recommend that section 172A of the TCPA 1990 (assurances as to non-prosecution for breach of an enforcement notice) should be amended so as to enable an authority:

- (1) to give such an assurance simply by giving written notice, as defined in section 329 of the TCPA 1990, to the relevant person rather than necessarily doing so by a hardcopy letter; and**

- (2) to give in response to a request from to a person (B), who acquires an interest in land following the issue of an enforcement notice relating to the land, an assurance explaining that, once the enforcement notice had been issued, the authority was required to serve a copy of it on a person (A) from whom B had acquired the interest in the land.

We provisionally proposed that section 180(1) of the TCPA 1990 (relating to the effect on an enforcement notice of a subsequent grant of planning permission) should be amended so as to refer: (1) to the grant of planning permission generally, rather than just to permission for development already carried out; and (2) to the grant of planning permission following the issue of an enforcement notice, rather than following the service of a copy of the notice (Consultation Question 12-23).

- 12.153 Where, after the service of a copy of an enforcement notice or a breach of condition notice, planning permission is subsequently granted for “development carried out before the grant of that permission”, the notice is of no effect in respect of that development.⁶⁸ The intention is clearly that, in effect, a grant of planning permission supersedes any earlier enforcement notice that is inconsistent with it.
- 12.154 We noted in our Consultation Paper that, at present, this applies only where the development for which permission is granted has already been carried out. However, if permission is granted prospectively for other development that in some way overlaps with or relates to the unauthorised development that is the subject of the enforcement notice, the same principle should apply. We therefore provisionally proposed that section 180(1) of the TCPA 1990 should be amended accordingly.
- 12.155 We also recommended amending section 180(1) so that it refers to the issuing of a notice rather than service of a copy of it. This would also apply to a breach of condition notice.
- 12.156 None of the 29 responding consultees disagreed with our provisional proposal.
- 12.157 Allan Archer queried why the reference in section 180(1) to “development carried out” is not correct, as enforcement action would not be taken in respect of development which has not yet been carried out”.
- 12.158 We agree that the existing wording of section 180(1) would normally not be problematic in practice. However, an enforcement notice remains “in effect” indefinitely, until it is quashed or ceases to have effect, and it seems wrong in principle that it should remain in effect to the extent that permission is granted for development that overlaps with the unauthorised development. But that might not apply where permission is granted for such overlapping development, but where that permission is never implemented. We have amended our recommendation accordingly.

⁶⁸ Consultation Paper, para 12.134; TCPA 1990, s 180(1).

Recommendation 12-23.

We recommend that section 180(1) of the TCPA 1990 (relating to the effect on an enforcement notice of a subsequent grant of planning permission) should be restated in an amended form so as to refer:

- (1) to the grant of planning permission following the issue of an enforcement notice or a breach of condition notice, rather than following the service of a copy of the notice; and**
- (2) to the grant of planning permission generally for development already carried out; and**
- (3) to the grant of planning permission for other development, once that permission has been implemented.**

CRIMINAL PENALTIES

We provisionally proposed that offences of supplying false information in response to a request from a planning authority, currently under sections 65(6), 171D(5), 194(1) and 330(5) of the TCPA 1990, should all be triable either summarily (in the magistrates' court) or on indictment (in the Crown Court), and the maximum penalty in each case should be in either case a fine of any amount (Consultation Question 12-24).

12.159 In various places the TCPA 1990 provides that it is a criminal offence to supply false information.⁶⁹ In our Consultation Paper we noted that there were inconsistencies in that some offences could attract a prison sentence whereas others only attracted an unlimited fine. For example, supplying false information to procure a certificate of lawful development, which is an offence under section 194(1), attracts on summary conviction a fine (of any amount), and on conviction on indictment (in the Crown Court) a fine and/or imprisonment for up to two years. By contrast, supplying a false certificate as to the ownership of land in connection with an application for planning permission, an offence under section 65(6), attracts only a fine on summary conviction.

12.160 We provisionally proposed that for the sake of consistency, the maximum penalty attracted by all of the offences related to the supply of false information to a planning authority should be an unlimited fine, without the option of imprisonment.

12.161 27 consultees responded to this question. None disagreed with our provisional proposal.

⁶⁹ Consultation Paper, paras 12.141 – 12.146.

- 12.162 Our provisional proposal suggested that offences which are currently indictable should continue to be so, despite the reduced maximum sentence. The Law Society and Huw Williams commented that

We are unsure about this proposal. If the sentence both summarily and on indictment is an unlimited fine what is the purpose of proceeding by indictment? The availability of imprisonment, albeit only in the most serious cases provided a justification for retaining prosecution on an indictment.

- 12.163 In March 2015 the £5,000 cap on maximum fines in the magistrates' court was lifted, so that magistrates can now impose unlimited fines.⁷⁰ However, it may still be preferable to proceed by way of indictment if a case is particularly complex, or if the prosecution is linked with prosecution for other offences. Further, if the existing offences were made "summary only", there would also be some consequences for prosecution time limits.⁷¹

Recommendation 12-24.

We recommend that offences of supplying false information in response to a request from a planning authority, currently under sections 65(6), 171D(5), 194(1) and 330(5) of the TCPA 1990, should – in the case of offences committed on or after the date of the enactment of the Bill – all be triable either summarily (in the magistrates' court) or on indictment (in the Crown Court), and that the maximum penalty in each case should be in either case a fine of any amount.

We provisionally proposed that the offences of: reinstating or restoring buildings or works following compliance with an enforcement notice (under section 181(5) of the TCPA 1990); and failing to comply with a breach of condition notice (under section 187A(9) of the TCPA 1990) should be triable either summarily or on indictment, and punishable in either case by a fine of any amount, to bring them into line with the penalties for other breaches of planning enforcement notices (Consultation Question 12-25).

- 12.164 While the carrying out of unauthorised development is not a criminal offence, failing to comply with enforcement action is.⁷² In our Consultation Paper, we noted that in most cases the offence in question may be tried summarily or on indictment, and

⁷⁰ Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 85, which came into force on 12 March 2015: SI 2015/504, art 2.

⁷¹ Summary only offences are subject to a stricter prosecution time limit than offences which are also indictable: Magistrates' Courts Act 1980, s 127(1). It is notable that under section 65(9) TCPA 1990, the summary only offence contained in section 65(6) is not subject to the stricter time limit. This can be contrasted with the summary only offence in section 171D(5). Oddly, the "either way" offence in s 194(1) is subject to a provision with the same wording in s 194(3), despite either way offences not being subject to the stricter time limit: Magistrates' Courts Act 1980, s 127(2)(a). See also *Blackstone's Criminal Practice* (2017) D21.18.

⁷² Consultation Paper, para 12.147.

punishable in either case by a fine of any amount.⁷³ However, there are two exceptions, each of which is a summary-only offence:

- 8) reinstating or restoring buildings or works following compliance with an enforcement notice, which attracts on conviction a maximum penalty of an unlimited fine (an offence under section 181(5) of the TCPA 1990).
- 9) failing to comply with a breach of condition notice, which attracts on conviction a maximum penalty of a fine of up to Level 4 in England, and up to Level 3 in Wales (an offence under section 187A(9)).

12.165 We provisionally proposed that that each of these two offences should be triable either way, and punishable in either case by a fine of any amount, to bring them into line with the penalties for other breaches of planning enforcement notices under the TCPA 1990.

12.166 30 consultees responded to this question. None disagreed with our provisional proposal. PINS described our provisional proposal as a “reasonable suggestion.” Carmarthenshire CC welcomed the proposal. Rhondda Cynon Taf CBC agreed that “the penalties for none compliance should be brought in line with other notices”. NAPE, PEBA and Lawyers in Local Government supported the proposal without comment. The Law Society and Huw Williams agreed, but reiterated their comment as to the previous recommendation – to which we would repeat our observations in response.⁷⁴

12.167 There were two equivocal responses. The CLA noted that “consistency is important” but that it was “not in a position to know whether what is proposed is the right option.” The Central Association of Agricultural Valuers noted that “in principle we believe that fines should be proportionate to the damage so that the level of any fine imposed should be justified.” In practice, the sentence imposed in each case will be a matter for the court, and may vary from a heavy fine, in the case of a flagrant breach by a wealthy defendant, to an absolute discharge.

Recommendation 12-25.

We recommend that the offences of

- (1) reinstating or restoring buildings or works following compliance with an enforcement notice (under the provision restating section 181(5) of the TCPA 1990); and**
- (2) failing to comply with a breach of condition notice (under the provision restating section 187A(9))**

should, in the case of offences committed on or after the date of the enactment of the Bill, both be triable either summarily or on indictment, and punishable in either

⁷³ Consultation Paper, para 12.149.

⁷⁴ See **paras 12.162 and 12.163** above.

case by a fine of any amount, to bring them into line with the penalties for other breaches of planning enforcement notices under the TCPA 1990.

HISTORIC BREACHES OF PLANNING CONTROL

We provisionally proposed that sections 57(7), 302 of and Schedules 4 and 15 to the TCPA 1990, relating to pre-1948 breaches of planning control, should not be restated in the Code (Consultation Question 12-26).

12.168 In our Consultation Paper we highlighted two apparently redundant provisions in the TCPA 1990, relating to historic breaches of planning control, and recommended that they should not be restated in the Code:

- 1) Section 57(7) and Schedule 4, regarding the resumption of historic temporary uses of land prior to December 1968.
- 2) Section 302 of and Schedule 15, regarding the taking of enforcement action against unauthorised development on Crown land that took place during the Second World War.

12.169 All 29 responding consultees agreed.

Recommendation 12-26.

We recommend that sections 57(7), 302 of and Schedules 4 and 15 to the TCPA 1990, relating to historic breaches of planning control, should not be restated in the Code.

OTHER POINTS

12.170 PEBA suggested that we consider incorporating into the Bill the principle established by the House of Lords in *R v Wicks*⁷⁵ – that it is a defence to prosecution for breach of an enforcement notice that there is a defect on the face of the notice rendering it a nullity. However, we take the principle established in *Wicks* to be that challenges to the validity of an enforcement notice – even on the basis that it is so defective as to be a nullity – should almost always be dealt with by way of an application for judicial review rather than in the criminal courts (in the context of a prosecution for non-compliance under section 179 of the TCPA 1990). Further, we doubt that the exceptions to that principle could easily form the subject of a statutory provision.

12.171 We have therefore not included a recommendation in response to this suggestion.

⁷⁵ [1998] AC 92.