

Chapter 18: Miscellaneous and Supplementary Provisions

INTRODUCTION

18.1 In Chapter 18 of our Consultation Paper we dealt with a number of miscellaneous provisions relating to functions under the TCPA 1990. Broadly, these provisions can be considered under four headings:

- 1) the application of the planning system to certain categories of land, including statutory undertakers, the Crown, and the Church of England;
- 2) mining operations;
- 3) general provisions relating to fees and charges, inquiries and other proceedings, and the application of the Public Health Act; and
- 4) definitions.

18.2 We noted that even though many of these miscellaneous provisions are not encountered often, it is still worth considering whether they are fit for purpose.¹ Indeed, it is particularly important that rarely-used provisions are simple and easy to understand, given that the reader of such provisions may well be encountering them for the first time.

STATUTORY UNDERTAKERS

We provisionally proposed that the Bill should: (1) rationalise as far as possible the bodies or categories of bodies that are to be treated as statutory undertakers for the purpose of some or all of the Code; and (2) provide for each undertaker or category of undertaker what is to be regarded as its “operational land” and who is “the appropriate Minister” (Consultation Question 18-1).

18.3 In our Consultation Paper we noted that there are a number of special provisions in the TCPA 1990 and in the regulations under it, relating to the application of the planning system to certain land owned by statutory undertakers, and to development by them.²

18.4 “Statutory undertakers” are, in general terms, bodies that provide public services such as water, electricity, drainage, railways, canals, and postal services. We noted that

¹ Consultation Paper, para 18.6.

² Consultation Paper, para 18.7 to 18.27.

the definition of “statutory undertaker” in the TCPA 1990 is very broad,³ although certain bodies are only included for certain purposes. The TCP General Permitted Development Order 1995 (GDPO)⁴ provides a further definition, very similar to that in the Act; unfortunately, however, the two definitions are not consistent in all respects.⁵

- 18.5 Many of the relevant provisions, in either the GPDO or the TCPA 1990 itself, relate to what statutory undertakers may do on their operational land. Section 263 of the CPA 1990 defines “operational land” as land which is used by a statutory undertaker for the purposes of carrying on their undertaking, and which an interest is held for that purpose, but it excludes land that is comparable to generally.⁶
- 18.6 We also noted the fact that, while planning applications for development by statutory undertakers are generally dealt with by planning authorities in the normal way, under section 266 of the TCPA 1990 the Secretary of State or the appropriate Minister may issue a direction to the effect that they will deal with certain matters jointly. Section 265 defines the term “appropriate minister” in respect of various categories of statutory undertaker. In general, it refers to the minister responsible for the field of activity to which the undertaking relates.⁷
- 18.7 We suspected that the law in this area is confusing, particularly as it will be unfamiliar to many. We therefore recommended that there should be – as far as possible – a single, rationalised definition of “statutory undertaker” in the Bill, which would also apply to regulations made under the Bill. We also recommended that for each undertaker or category of undertaker the Bill should provide what is regarded as “operational land” and who the “appropriate Minister” is.
- 18.8 Of the 33 consultees responded to this question, 24 were in agreement, including the Planning Inspectorate (PINS), the Planning and Environmental Bar Association (PEBA), a number of authorities and Natural Resources Wales (itself a statutory undertaker). Nine consultees were equivocal, but none disagreed.
- 18.9 Several consultees accepted the need for consolidation and clarification in this area. The Law Society agreed that “the code should use a single and consistent definition of a statutory undertaker”. Rhondda Cynon Taf CBC noted that “the law relating to statutory undertakers can be confusing” and that “a lot of time can be spent gaining

³ TCPA 1990, s 262, amended by Utilities Act 2000, Transport Act 2000, 2001 SI 1149, and 2013 SI 755.

⁴ TCP (General Permitted Development) Order, art 1(2), amended by Utilities Act 2000, s 76, Postal Services Act 2011 (Consequential Modifications and Amendments) Order 2011 (SI 2085), Sch 1, and Natural Resources Body for Wales (Functions) Order 2013 (SI No 755), Sch 4.

⁵ Consultation Paper, paras 18.12, 18.13.

⁶ TCPA 1990, s 264(3) – (6) provides a list of additional criteria for operational land, one or more of which must apply. The criteria include the following: the land was held by the undertaker before 6 December 1968, and used then as operational land; the land is the subject of a special development order or a local development order; the land was transferred to the undertaker from another undertaker under any of the reorganisation / privatisation legislation specified in section 264(4), and was held as operational land immediately before that transfer.

⁷ TCPA 1990, s 265(1)(a). The Secretary of State is the appropriate Minister in relation to development on operational land in Wales by suppliers of hydraulic power, universal postal service providers, gas transporters, Electricity Act licence holders and operators of reserved trust ports and cross-harbour ports.

an understanding of the provisions and how they apply.” Pembrokeshire Coast National Park Authority, National Parks Wales, and Carmarthenshire CC all noted that there was currently confusion over whether National Parks was a statutory undertaker.

18.10 In particular, there was widespread support for clarifying the “appropriate Minister.” SP Energy Networks, a statutory undertaker in north Wales, stated that “clarity on the appropriate minister is very welcomed”. The Canal & River Trust, a statutory undertaker in respect of inland navigation, welcomed further provision regarding who the “appropriate minister” was; as did Arqiva, a statutory undertaker in respect of electronic communications.

18.11 Equivocal responses tended to reflect a concern that clarifying the law in this area may have unintended consequences, including the possible exclusion of existing statutory undertakers from the definition, and result in a too restricted the definition of operational land. National Grid thought our proposal “makes sense in principle” but said that that consultation on draft revisions will be important to avoid unintended consequences. The Canal & River Trust noted that:

Whilst we are not against “rationalising” the list of bodies for the purposes of the Code, it is essential that the Trust and other statutory navigation authorities remain covered in any list or definition... Equally, whilst we are not against further clarity as to the definition of “operational land” (which should include any land directly or indirectly used for the purpose of carrying out a statutory undertaking), it is essential that this does not cut down extent of the definition of “operational land” in the TCPA.

18.12 It was not our intention to exclude any existing statutory undertakers from the definition, or to narrow the current definition of operational land. We accept National Grid’s point that further consultation may be necessary to guard against unintended consequences.

18.13 The Law Society highlighted the fact that statutory undertakers, the appropriate Ministers and perhaps even the definition of operational land are susceptible to political change, and recommended to amend the relevant definitions by order. We agree that the mutability of public service delivery in the UK necessitates definitions that are easily amended. We therefore modify our proposal such that the legislation should be simplified as far as possible, and in addition that a single list of statutory undertakers should be provided in guidance (presumably the *Development Management Manual*), with in each case an identification of the appropriate Minister and its operational land. In appropriate cases, such a list would no doubt provide that a particular body is a statutory undertaker only for certain purposes.

18.14 Such a list would initially include all the bodies that are currently statutory undertakers under either primary or secondary legislation relating to planning (notably the TCPA 1990 and the GPDO).

Recommendation 18-1.

We recommend that

- (1) the provisions of the Bill applying it to statutory undertakers should be simplified as far as possible, to clarify the identity of those bodies that are statutory undertakers for any or all of the purposes of the Bill and any regulations made under it;**
- (2) that a single list of such bodies should be included in Welsh Government guidance, including in relation to each such undertaker:**
 - the purpose for which the body is to be a statutory undertaker;**
 - the appropriate Minister; and**
 - its operational land.**

We provisionally proposed that, when the GPDO is next updated, consideration should be given to separating provisions relating to development by statutory undertakers, the Crown, mineral operators, and other similar bodies from those relating to development generally (Consultation Question 18-2).

- 18.15 In our Consultation Paper, we noted that the provisions of the GPDO 1995 dealing with statutory undertakers take up a considerable amount of the overall document, but are rarely encountered by most users of it.⁸ We suggested that it might be helpful if the provisions relating to development by statutory undertakers, the Crown, mineral operators, and other similar bodies were placed in a separate section of the document to those relating to development generally.⁹
- 18.16 Of 33 consultees who responded to this question, 15 agreed, two were equivocal and 16 disagreed.
- 18.17 Those who agreed included PEBA, the Royal Town Planning Institute (“RTPI”), the Institution of Civil Engineers Wales, PINS and a number of planning authorities – generally without further comment.
- 18.18 Most consultees who disagreed did so on the basis that they preferred a single document. Caerphilly and POSW South East Wales noted that “the existing system appears to work well and could be left alone without any disbenefit.” National Grid argued that

⁸ Consultation Paper, para 18.29.

⁹ See TCP (GPDO 1995, Sched 2, Parts 12, 13 (local authorities and highway authorities); Parts 14 to 18 (statutory undertakers); Part 20 (Coal Authority); Part 24 (electronic communications code operators); and Parts 34 to 38 (the Crown).

the document is largely a technical tool for professionals with significant experience of using multiple Parts of the Order. The current structure does not seem to present this user group with any significant challenges.

- 18.19 Arqiva said that they did not see any particular need for this proposal, as “someone only interested in householder development can simply look at that part”.
- 18.20 Our provisional proposal was that “consideration should be given” to restructuring the GPDO in the way we indicated. We note the response to that suggestion; an alternative approach might be preferable, such as separating out permitted development rights relating to dwellings (currently in Part 1 of Schedule 2 to the GPDO) into a separate order – on the same basis that “householder applications” are now subject to different, and simpler, procedural requirements. But that is a matter that can be revisited when the GPDO is next revised.

Recommendation 18-2.

We recommend that, when the GPDO is next revised, consideration should be given to separating it into two orders, one dealing with permitted development rights relating to dwellings and one covering other cases.

We provisionally proposed that section 283 of the TCPA 1990 (relating to the display of advertisements on the operational land of statutory undertakers) should not be restated in the Code (Consultation Question 18-3).

- 18.21 Section 283 of the TCPA 1990 provides that sections 266 to 270 and 279(1), (5) and (6) – all of which apply to the grant of planning permission – do not apply to the display of advertisements on the operational land of statutory undertakers. We noted that such displays require consent under the Advertisements Regulations, and are then deemed to be granted planning permission automatically.¹⁰ We therefore provisionally considered that section 283 is otiose, and need not be restated in the Code.
- 18.22 All 24 consultees who responded to this question agreed with our provisional proposal with no additional comments.

Recommendation 18-3.

We recommend that section 283 of the TCPA 1990 (relating to the display of advertisements on the operational land of statutory undertakers) should not be restated in the Code.

We provisionally proposed that section 316A of the TCPA 1990 (which enables regulations to be made relating to planning permission for development by local

¹⁰ By virtue of section 222: Consultation Paper, para 18.33.

authorities that are statutory undertakers and the display of advertisements on their operational land) should not be restated in the Bill (Consultation Question 18-4).

- 18.23 We suggested in our Consultation Paper that section 316A of the TCPA 1990, relating to statutory undertakers that are planning authorities, was otiose as no regulations have ever been made under it.¹¹ We provisionally proposed that it should not be restated in the Code.
- 18.24 Of 22 consultees responded to this question, 21 agreed. The Law Society and Huw Williams (Geldards LLP) were “not aware of any local authority statutory undertakings in Wales” and agreed that “the provision not be restated”. The RTPI and Rhondda Cynon Taf CBC expressed similar sentiments.
- 18.25 The Institution of Civil Engineers Wales disagreed on the basis that the provision could be useful in the future:

There has been discussion in South Wales for some time on the subject of providing a metro for transportation purposes. This metro may include a street tramway or light railway system within Cardiff, which may be operated by or on behalf of either the local authority or the Welsh ministers. These regulations may become necessary in this eventuality and they should be retained therefore.

- 18.26 We suspect that if such a project were to come to fruition it would be against the background of a private Act or a development consent order under the Planning Act 2008, either of which could make provision equivalent to section 283 – no doubt subject to appropriate amendments. Alternatively, the regulations envisaged in Recommendation 18-1 above could be amended to include local authorities that are operators of enterprises similar to those run by existing statutory undertakers.

Recommendation 18-4.

We recommend that section 316A of the TCPA 1990 (which enables regulations to be made relating to planning permission for development by local authorities that are statutory undertakers and the display of advertisements on their operational land) should not be restated in the Bill.

MINERALS

- 18.27 The Mineral Products Association, the leading trade body in the sector representing all the major mineral operators, took exception to our proposed treatment of the place of mineral operations within the planning system. It drew particular attention to the features of mineral working that we describe in paragraph 18.58 of the Consultation Paper, and emphasised the importance of minerals to society. We accept that mineral development can indeed deliver many benefits, as can other kinds of

¹¹ Consultation Paper, para 18.34. We did note, however, that the power may be relevant if in future a local authority decides to operate a light railway or tramway.

development. In the Paper we were seeking to identify those features of mineral operations that were distinct from development in general.

- 18.28 We also note the Association's concern that the process of mineral planning has been somewhat marginalised by successive Governments, such that a more fundamental policy-driven review of the current system might well be called for. But, as is recognised by the Association, our terms of reference focus on technical reforms, and do not extend to wider policy issues.

We provisionally proposed that the new Bill should generally use – in place of the term “winning and working of minerals” – the term “mining operations”, defined so as to include: (1) the winning and working of minerals in, on or under land, whether by surface or underground working; (2) the removal of material of any description from a mineral-working deposit, a deposit of pulverised fuel ash or other furnace ash or clinker or a deposit of iron, steel or metallic slag; and (3) the extraction of minerals from a disused railway embankment (Consultation Question 18-5).

- 18.29 In the Consultation Paper, we noted the definitions of “minerals” and “the winning and working of minerals” in section 336 of the TCPA 1990 and the definitions of “mining operations” in section 55 and in the GPDO. We observed that the definitions overlapped to a significant extent. We therefore suggested that they be rationalised, and that the term “winning and working of minerals” be replaced by “mining operations”, defined to include both the winning and working of minerals in, on or under land, whether by surface or underground working, and also the various operations mentioned in section 55(4).¹²
- 18.30 Of the 30 consultees who responded to this question, 27 were in agreement with the suggested definitions.
- 18.31 Cardiff Council was concerned that this might mean that the requirements for periodic review of minerals permissions (in the Planning and Compensation Act 1991) would also apply to mineral working deposits and disused railway embankments. The current definition of “old mining permissions”¹³ refers to permission for development consisting of the winning and working of minerals or involving the deposit of mineral waste, and would probably not include the permissions referred to by Cardiff Council. But the new definition of “mining operations” we are proposing would not apply to the interpretation of the 1991 Act, and therefore neither would the requirement for periodic review.
- 18.32 The Mineral Products Association, the main trade body for the minerals industry, suggested that the new definition should capture the full scope of a minerals development from start to finish, including beneficiation and other activities that may take place on a site. We note that each of the existing definitions in the Act, and our proposed definition to be included in the Bill, are inclusive ones – there is no exhaustive definition anywhere in the legislation of any of the terms relating to mineral

¹² Consultation Paper, paras 18.50 to 18.57.

¹³ Planning and Compensation Act 1991, s 22, which applies to the interpretation of Sch 2 to that Act and Sch 13 to the Environment Act (see Consultation Paper, paras 18.62 to 18.67).

extraction.¹⁴ We consider that the entire process referred to by the Association is within the concept of “mining operations”, just as a hotel includes all of the ancillary activities taking part within the hospitality industry, and not just the rooms in which guests sleep.¹⁵

- 18.33 The Association refers to case law clarifying the meaning of some of the existing definitions. That does not present a problem, since the definition proposed would incorporate all the same elements as the existing definition, so that the case law would still apply.
- 18.34 It also suggests that it might be helpful to include clarification of the terms “mineral resource” and “mineral reserve”. We consider that might be helpful in guidance, but is not required in legislation, since neither term occurs either in the TCPA 1990 or in the GPDO.

Recommendation 18-5.

We recommend that the new Bill should generally use – in place of the term “winning and working of minerals” – the term “mining operations”, defined so as to include:

- (1) the winning and working of minerals in, on or under land, whether by surface or underground working;**
- (2) the removal of material of any description from:**
 - a mineral-working deposit;**
 - a deposit of pulverised fuel ash or other furnace ash or clinker; or**
 - a deposit of iron, steel or metallic slag; and**
- (3) the extraction of minerals from a disused railway embankment.**

We provisionally considered that Schedule 2 to the Planning and Compensation Act 1991 (minerals permissions granted prior to 1 July 1948) and Schedule 13 to the Environment Act 1995 (minerals permissions granted from 1 July 1948 to 22 February 1982) no longer serve any useful purpose, and should not be restated in the Planning Code (Consultation Question 18-6).

- 18.35 Schedule 2 to the 1991 Act and Schedule 13 to the 1995 Act both imposed requirements in relation to the compiling of registers, to be carried out by dates that are now in the distant past. Those registers continue to be of relevance. Active sites included in the register are now subject to the requirement for periodic review, under

¹⁴ Consultation Paper, para 18.50 to 18.57.

¹⁵ *Emma Hotels v Secretary of State* (1981) 41 P&CR 255 (CA).

Schedule 14 to the 1995 Act (see below); and dormant sites could, at least in theory, be re-activated at some point in the future.¹⁶

- 18.36 We thus suggested that those two Schedules should not be restated in the new Planning Code, but should simply be updated by the making of appropriate consequential amendments to refer to the Code.
- 18.37 Of the 28 responses to this question, 15 were in agreement. The other 13 drew attention to the continuing relevance of the registers under the two Acts. We agree, but were not suggesting that Schedule 2 to the 1991 Act and Schedule 13 to the Environment Act 1995 should be repealed, merely that they should lie on the statute book as they are, rather than being incorporated in the Bill.
- 18.38 It would be possible to restate the two schedules, together with section 22 of the 1991 Act and section 96 of the 1995 Act that introduce them, in the new Bill. That was the approach adopted when the planning law in Scotland was consolidated in 1997, where the corresponding provisions emerged as Schedules 8 to 10 of the Town and Country Planning (Scotland) Act 1997.
- 18.39 Which approach is preferable is a matter of drafting; from the perspective of a user of the Bill it may be clearer if they are not included. We have adjusted the recommendation to make it clear that we are not suggesting the repeal of the two Schedules without restatement.

Recommendation 18-6.

We recommend that Schedule 2 to the Planning and Compensation Act 1991 (minerals permissions granted prior to 1 July 1948) and Schedule 13 to the Environment Act 1995 (minerals permissions granted from 1 July 1948 to 22 February 1982) need not be restated in the Bill, but should remain as they are.

We provisionally proposed that the Bill should include: (1) the provisions currently in Schedule 14 to the Environment Act 1995 (periodic review of minerals permissions); and (2) those currently in Schedule 9 to the TCPA 1990 (discontinuance of minerals permissions) (Consultation Question 18-7).

- 18.40 We noted in our Consultation Paper that Schedule 14 to the Environment Act 1995 introduced a new system requiring a review of minerals permissions in Wales every 15 years, to ensure that the conditions attached to them remain up-to-date and in line with current environmental standards. We provisionally proposed that the Schedule should be restated in the Bill, possibly placed with the provisions relating to the discontinuance of mineral working and the prohibition of its resumption found in Schedule 9 TCPA 1990.¹⁷

¹⁶ Consultation Paper, paras 18.62 to 18.67.

¹⁷ Consultation Paper, paras 18.68 to 18.69.

- 18.41 Of 29 consultees who responded to this question, 28 agreed and one disagreed. Those agreeing made few further comments.
- 18.42 The Mineral Products Association disagreed with the proposal on the basis that the 15-year review period should not be mandatory, and that a review should only be carried out “where necessary”, that is, where it is clearly established that the conditions pertaining to a development are outdated and therefore need to be the subject of a formal mineral review”. The Association noted that the legislation in England was changed to reflect this approach, by the Growth and Infrastructure Act 2013.
- 18.43 This is a reasonable suggestion, but we think it lies outside the scope of technical reform. Furthermore, any substantive change to a planning authority’s environmental obligations must be considered in the context of the Well-being of Future Generations (Wales) Act 2015, which several consultees identified as being relevant to this Consultation Question.
- 18.44 Cardiff Council agreed in principle but suggested that in relation to orders requiring discontinuance of mineral working:
- It would be helpful to provide a clearer definition of what is meant by the term “substantial extent” in paragraph 3(2) of Schedule 9 of the TCPA 1990 [which provides that an authority may assume that mineral working has permanently ceased only when no operations have occurred, to any substantial extent, for at least two years]. A clearer definition of this term would enable planning authorities to bring forward more orders forward for approval by Welsh Ministers.
- 18.45 We agree that the meaning of this term should be made clearer, but consider that this would be more appropriately included in guidance. There appears to be no guidance currently in force in Wales (or in England for that matter) on the meaning of “substantial extent”, but we note that *Minerals Planning Guidance*¹⁸ provided some assistance on this point, in relation to dormant sites under the Environment Act 1995:

“Substantial extent” is not defined in the statute and, in the absence of case law, the words have their common or everyday meaning. It will therefore be a matter of fact and degree in each case as to whether development has taken place to a substantial extent in the relevant period... “Substantial” clearly means more than token or cosmetic working to keep a permission active and there will need to be evidence of production (or depositing of mineral waste) over a reasonable period of time within the relevant period. Where part of the reserves of the quarry is physically detached from the main operation, if the detached part has planning permission and the main quarry is active, it should not be necessary for there to have been substantial extraction from

¹⁸ Department for Communities and Local Government, *No 14, Environment Act 1995: review of mineral planning permissions* (repealed in 2014).

the detached part for it to be included within the whole operation as an active site.¹⁹

- 18.46 We recommend that the Welsh Government should consider providing guidance on the meaning of “substantial extent” in paragraphs 3(2), 5(3), 10(4) and 10(8) of Schedule 9 to the TCPA 1990.

Recommendation 18-7.

We recommend that the Bill should include:

- (4) the provisions currently in Schedule 14 to the Environment Act 1995 (periodic review of minerals permissions); and**
- (5) those currently in Schedule 9 to the TCPA 1990 (discontinuance of minerals permissions).**

In relation to the discontinuance of minerals permissions, the Welsh Government should consider providing guidance on the meaning of “substantial extent” in Schedule 9 to the TCPA 1990.

We provisionally proposed that the provisions of the TCPA 1990 in the form in which they apply as modified by the TCP (Minerals) Regulations 1995 (so as to apply to minerals development) should be included in the Bill itself rather than in secondary legislation (Consultation Question 18-8).

- 18.47 In our Consultation Paper we noted that section 315 of the TCPA 1990 empowers the Welsh Ministers to prescribe adaptations and modifications of the sections of the Act listed in Schedule 16 in the context of minerals development.²⁰
- 18.48 We noted that the regulations currently in force are the TCP (Minerals) Regulations 1995,²¹ which are not easy to understand, and have not been substantively amended since their first appearance.²² We therefore provisionally proposed that the modifications prescribed in the TCP (Minerals) Regulations should be included in the Bill itself.
- 18.49 30 consultees responded to this question; 29 agreed, including PEBA, the Law Society, PINS and the RTPI. One consultee was equivocal.
- 18.50 The Mineral Products Association stated that “a more open review of the approach to minerals consents may be warranted” but nevertheless agreed that the special compensation provisions relating to the revocation of minerals permissions (under

¹⁹ UK Government, *Minerals Planning Guidance 14: Environment Act 1995 - review of mineral planning permissions* (1995), para 24.

²⁰ Consultation Paper, para 18.70.

²¹ SI No 2863.

²² Consultation Paper, para 18.73.

section 107 of the TCPA 1990, as modified by the Minerals Regulations) should be included in the Bill itself.

Recommendation 18-8.

We recommend that the provisions of the TCPA 1990 in the form in which they apply as modified by the TCP (Minerals) Regulations 1995 (in relation to minerals development) should be included in the Bill itself rather than in secondary legislation.

FINANCIAL PROVISIONS

We provisionally proposed that the Bill should include a power for the Welsh Ministers to provide for a scale of fees for the performance by them or by planning authorities of any of their functions under the Code, by publication rather than prescription, provided that it also includes a restriction equivalent to section 303(10) of the TCPA 1990, ensuring that the income from the fees so charged does not exceed the cost of performing the relevant function (Consultation Question 18-9).

- 18.51 In our Consultation Paper, we noted the Welsh Ministers now have powers to make regulations to enable planning authorities to charge fees for the performance of any of their functions under the TCPA 1990.²³ The suggestion had been made to us that it would be more convenient if the levels of fees could be amended simply by being published on a website, rather than by being prescribed in a statutory instrument.
- 18.52 We noted that the existing power to prescribe fees is subject to section 303(10), which requires that the income accruing to planning authorities and to the Welsh Ministers from the fees so charged must not exceed the cost of performing the function in question. Provided that such a limitation were to be retained, we provisionally considered that it would be reasonable for new fees to be published rather than prescribed.
- 18.53 Of the 36 responses to this proposal, 27 were in agreement, with a further four broadly in agreement but subject to a strong emphasis on the need for any proposed new scale of fees to be the subject of consultation. As Huw Williams pointed out, such consultation would probably occur anyway, but a provision in the Bill to that effect would be beneficial. He also suggested that all fees received by an authority should be ring-fenced, and used for the benefit of the service concerned. We see the attraction of this proposal, but question its practicality.

²³ TCPA 1990, s 303, as substituted by Planning Act 2008, s 199. See Consultation Paper, paras 18.74 – 18.79.

Recommendation 18-9.

We recommend that the Bill should include

- (1) a power for the Welsh Ministers to provide for a scale of fees for the performance by them or by planning authorities of any of their functions under the Code, by publication rather than prescription;**
- (2) a provision equivalent to section 303(10) of the TCPA 1990 (income from the fees so charged not to exceed the cost of performing the relevant function) and**
- (3) a provision requiring any proposed scale of fees to be appropriately publicised before being formally published.**

INQUIRIES, HEARINGS AND OTHER PROCEEDINGS

We provisionally proposed that there should be a single provision in the Bill providing for the determination by the Upper Tribunal of disputes as to compensation under provisions in the Bill relating to revocation, modification and discontinuance of planning permission, temporary stop notices, stop notices, damage caused by entry for enforcement purposes, tree preservation, highways, and statutory undertakers, under the provisions in the Land Compensation Act 1961 (Consultation Question 18-10).

- 18.54 In our Consultation Paper we noted that several provisions of the TCPA 1990 related to compensation, including sections 117 and 118 (revocation, modification and discontinuance); section 171H (temporary stop notices); section 186 (stop notices); section 191 (damage caused by entry for enforcement purposes); section 203 (tree preservation); section 250 (highways); and section 282 (statutory undertakers).²⁴ We noted that each of those provisions directly or indirectly applies section 4 of the Land Compensation Act 1961, and suggested that it would be more straightforward for the Bill to include a single provision to the effect that any question as to disputed compensation under any of these provisions is to be determined by the Upper Tribunal under section 4 of the 1961 Act.
- 18.55 None of the 29 consultees who responded to this proposal disagreed. The Law Society said “we agree that a single provision providing recourse to the Lands Chamber is appropriate, provides consistency and simplifies the Code”. The Canal & River Trust thought that “this would make the issue of who has responsibility for determining compensation disputes clear to all”.

²⁴ Consultation Paper, para 18.80.

Recommendation 18-10.

We recommend that there should be a single provision in the Bill providing for the determination by the Upper Tribunal of disputes as to compensation under provisions in the Bill relating to revocation, modification and discontinuance of planning permission, temporary stop notices, stop notices, damage caused by entry for enforcement purposes, tree preservation, highways, and statutory undertakers, under the Land Compensation Act 1961.

We provisionally proposed that the Code should include a power to require expert evidence at inquiries and other proceedings (including appeals decided on the basis of written representations) to be accompanied by a statement of truth in accordance with the requirements of the Civil Procedure Rules in force for the time being (Consultation Question 18-11).

18.56 Practice Direction 35 of the Civil Procedure Rules sets out that expert reports “must be verified by a statement of truth in the following form –

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.²⁵

18.57 In our Consultation Paper, we referred to the directions in professional guidance manuals, which suggested that a similar statement be used to endorse expert evidence used for planning inquiries, hearings and other planning proceedings.²⁶ We also proposed that the requirement be made a statutory requirement, rather than remaining a rule of good practice.²⁷

18.58 33 consultees responded to this proposal; 23 agreed. The Law Society noted that this “is frequently done already on an informal basis and in accordance with advice from professional bodies”. The RTPI also suggested that the proposal would “increase confidence in professional evidence”.

18.59 Nine consultees expressed mixed views. PINS – which has particular experience of conduct at inquiries – highlighted three main concerns with the proposal, namely

- 1) the difficulties in defining an “expert”;

²⁵ CPR, Practice Direction, para 3.3.

²⁶ Consultation Paper, paras 18.86 to 18.87.

²⁷ Consultation Paper, para 18.88.

- 2) the consequences of failing to include a statement of truth, in the light of PINS' inability to turn away evidence;²⁸ and
 - 3) the difficulties in ensuring that expert evidence is considered to carry more weight than evidence submitted without the attached statement of truth.
- 18.60 We agree with the concerns being expressed. The inclusion of a statement of truth by a professional person giving evidence at a planning inquiry is a relatively recent development, and should undoubtedly be encouraged. Indeed, arguably, it is the confidence of witnesses in their own expertise, sufficient to justify the inclusion of a statement along the lines indicated above, that makes them stand out as experts, rather than vice versa. Experience suggests that there are a number of witnesses at planning inquiries whose expertise is uncertain, and whose evidence may as a result be of limited value; but that must be a matter of judgment for the inspector.
- 18.61 Further, particular problems may arise in relation to appeals determined on the basis of written representations, where there is no opportunity for the supposed expertise of a witness to be challenged.
- 18.62 We therefore agree that the production of a statement of truth by all witnesses (with the omission of the word "professional" where appropriate) should be encouraged, but not made a statutory requirement.

Recommendation 18-11.

We recommend that guidance relating to planning inquiries and appeals should strongly encourage the inclusion of a suitably worded statement of truth in any witness statement (including in relation to appeals decided on the basis of written representations).

We provisionally proposed that the power to make orders as to the costs of parties to proceedings, currently in section 322C(6) of the TCPA 1990, should be amplified to make explicit that such an order is only to be made where a party to an appeal has behaved unreasonably and the unreasonable behaviour has led other parties to incur unnecessary or wasted expense (Consultation Question 18-12).

- 18.63 In our Consultation Paper, we noted that in respect of inquiries and other proceedings, section 322C(6) gives the Welsh Ministers the power to make orders as to the costs of the parties, and as to the party by whom they are to be paid. We noted that despite the general terms in which this provision is expressed, longstanding practice has made it clear that an award of costs is only made where one party has behaved unreasonably, leading to another party incurring unnecessary or wasted expense.²⁹

²⁸ Note that any interested party may make representations.

²⁹ Consultation Paper, para 18.90. See also Welsh Government, *Development Management Manual* (May 2017), Section 12 Annex: *Awards of Costs* (replacing Welsh Office Circular 23/93 *Awards of Costs incurred in Planning and Other (Including Compulsory Purchase Order) Proceedings*).

- 18.64 We provisionally proposed that this principle should be enshrined in the Bill.
- 18.65 Twenty-nine consultees responded to this question, including the RTPI, PINS, and PEBA. All agreed with our proposal.
- 18.66 The Mineral Products Association suggested that:
- It would be beneficial to identify which circumstances could be considered “unreasonable” and this should include decisions made against officer recommendation. This would ensure spurious or political decisions are eliminated. Whilst we recognise the planning process is democratic, applicants for controversial development will routinely avoid periods leading up to local elections.
- 18.67 The refusal of permission and the imposition of conditions – including where the officers have recommended otherwise – will always be accompanied by a statement of reasons. And we have noted that the Supreme Court has recently confirmed that an authority granting permission against officers’ recommendation should also include such a statement.³⁰ Those requirements should concentrate the minds of authorities, and mitigate the problems feared by the Association.
- 18.68 Friends of the Earth Cymru argued that it should be made clear in the legislation that rule 6 parties – that is parties (such as amenity groups) other than the appellant and the planning authority, sometimes granted special status by the Inspectorate – will not be exposed to costs. We note that, in practice, rule 6 parties are only very rarely required to pay the costs of other parties. However, in certain circumstances it may be appropriate for them to be exposed to a potential liability to pay such costs, and a blanket immunity from costs awards might allow some rule 6 parties to abuse their status. We therefore do not agree that such an immunity should be included in the Bill.

Recommendation 18-12.

We recommend that the power to make orders as to the costs of parties to proceedings, currently in section 322C(6) of the TCPA 1990, should be restated in an amended form so as to make it explicit that such an order is only to be made where:

- (1) a party to an appeal has behaved unreasonably; and**
- (2) that unreasonable behaviour has led other parties to incur unnecessary or wasted expense.**

³⁰ *R (CPRE Kent) v Dover DC* [2018] 1 WLR 108, SC, per Lord Carnwath; see **paras 8.225, 8.226**.

APPLICATION OF PROVISIONS IN THE PUBLIC HEALTH ACT 1936

We provisionally proposed that the Planning Code should incorporate provisions equivalent to those currently in section 276, 289 and 294 of the Public Health Act 1936, to be applicable to the carrying out by the authority of works required by discontinuance notices, enforcement notices, tree replacement notices, and unsightly land notices (Consultation Question 18-13).

- 18.69 In our Consultation Paper we noted that various provisions of the TCPA 1990 referred to the Public Health Act 1936.³¹ Most of the 1936 Act has been repealed, but some provisions are still in force. Section 276 contains the powers of a local authority to sell materials removed in executing works, section 289 contains the power to require the occupier of any premises not to prevent the works being carried out, and section 294 limits the liability of landlords and agents in respect of expenses recoverable. We suggested that these provisions – between them amounting to no more than five subsections – should be incorporated into the Planning Bill, to avoid the need for reference to the 1936 Act.
- 18.70 Of the 28 consultees who responded to this question, 27 agreed and one was equivocal. POSW and several planning authorities described the incorporation of these provisions as “long overdue”. Rhondda Cynon Taf CBC expressed strong support, noting that “by placing these provisions in the Bill it makes it clear and saves the time and expense reviewing other legislation to establish what the powers are applied by reference”.
- 18.71 The Mineral Products Association argued that the powers of a planning authority to sell materials removed in executing works should be subject to the same level of environmental controls as non-public bodies. We see no reason why this should not be the case in any event.

³¹ Consultation Paper, para 18.93; E.g. TCPA 1990 s 178(3) (execution and costs of works required by enforcement notice), s 209(3) (works required by a tree replacement notice) and s 219 (works required by an unsightly land notice under section 215).

Recommendation 18-13.

We recommend that the Planning Bill should incorporate provisions equivalent to those currently in:

- (1) section 276 of the Public Health Act 1936 (power of a planning authority to sell materials removed in executing works);**
- (2) section 289 of that Act (power to require the occupier of any premises not to prevent works being carried out); and**
- (3) section 294 of that Act (limit on the liability of landlords and agents in respect of expenses recoverable),**

to be applicable to the carrying out by the authority of works required by discontinuance notices, enforcement notices, tree replacement notices, and unsightly land notices.

INTERPRETATION

Are there any terms used in the TCPA 1990 that need to be defined (or defined more clearly), other than those explicitly referred to in other consultation questions? (Consultation Question 18-14)

- 18.72 In addition to the proposed definitions set out above, we invited suggestions from consultees as to other words or phrases that they considered might usefully be defined within the Bill.³² Of the 25 consultees responded, 13 declined to make any suggestions; the other 12 between them suggested 15 items.
- 18.73 Arup highlighted the need for “clear and concise definitions of terms in order to restrict ambiguity and promote consistent interpretation and (by extension) decision making between authorities”. They also warned against processes which “introduce too many variables and...lead to conflicting interpretation and applications of legislative terms”. And they made a number of suggestions as to terms that could perhaps usefully be defined. We agree with this sentiment, but it is not always possible or appropriate to define terms in statutes, as we have shown in relation to Consultation Question 18-16 (definition of “curtilage”).
- 18.74 While we are grateful for the submissions we received from consultees, we do not consider it appropriate vehicle to provide definitions of the terms suggested. We therefore make no recommendation in response to this question. But for completeness we set out below our response to each of the suggestions made.

Buildings, plant and machinery

- 18.75 Several consultees suggested that “building” should be defined – particularly to exclude structures, such as lamp posts and certain categories of plant and

³² Consultation Paper, paras 18.98 to 18.105.

machinery. The TCPA 1990 currently provides that “building” includes a structure or erection.³³ That seems to us to be sensible, as any attempt to include some structures but to exclude others would be fraught with complications.

- 18.76 “Plant” is defined in the GPDO as anything in the nature of plant; and “machinery” is defined similarly.³⁴ Neither term is defined in the TCPA 1990. Arup seek a more precise definition, but we consider that the nature of plant and machinery is such that it would be impossible to provide a definition which is capable of providing sufficient certainty and encompass future changes in technology.
- 18.77 Arup also suggest clarifications of various terms in the GPDO – notably “ground level”, in relation to underground structures, “renewing of services”, and “enclosures”. We consider that these may be appropriate points to consider when the GPDO itself is next replaced.

Highways

- 18.78 Three consultees suggested including a definition of “highway”. Arup suggested that for the purposes of the GPDO, it may be appropriate to exclude certain types of highway, so as to enable statutory undertakers to construct fences higher than 1m next to footways. And the Institute of Civil Engineers suggested that it would be helpful to clarify the extent of a highway, and in particular whether it includes the grass verge.
- 18.79 The TCPA 1990 states that it has the same meaning as in the Highways Act 1980; but that Act in turn merely provides that “highway” means the whole or part of a highway, other than a ferry or waterway.³⁵ However there is an extensive and complex body of case law, going back to the nineteenth century, as to what actually is a highway – and whether, for example, it includes open land to either side.³⁶ By virtue of the existing statutory definition, all that case law is automatically incorporated. We consider that it would not be helpful to attempt to provide any more precision.

Other terms with technical meaning

- 18.80 The Health and Safety Executive observes that there are several references in planning legislation to a person having “control of land”. Section 72(1)(a) of the TCPA 1990 refers to “land under the control of the applicant...”, section 179(4) refers to “a person who has control of or an interest in the land ...”; and section 187A(2)(b) refers to “any person having control of the land”. Paragraph (w) of Sch.4 to the DMPWO 2012 refers to “the person who is in control of the land on which any existing establishment in question is located”. And the Planning (Hazardous Substances) Regulations 2015 contains several references to “the person in control of the land to which the (application/direction/consent/claim form/notice) relates”.

³³ TCPA 1990, s 336.

³⁴ GPDO 1995, art 1(2).

³⁵ Highways Act 1980, s 328.

³⁶ The relevant law on the characteristics of a highway is summarised in the first 21 pages of *Highway Law*, by Stephen Sauvain, QC, fourth edn, 2009.

- 18.81 “Control” of land clearly means something less than ownership; and the Courts have stressed in a number of cases that the ascertainment of who has “control” of land sufficient to come within any of these statutory provisions must be a matter of fact and degree.³⁷ Once again, we consider that it would be difficult to make more precise a statutory term that has acquired a settled, if not entirely precise, meaning over many years.
- 18.82 The same applies to terms such as “implementation of permission” and “commencement of development”. Each has been the subject of case law, laying down general principles, and we do not consider that it would be possible to provide a statutory formula that would, inevitably, fall to be applied in a wide variety of factual situations.

Words in normal use

- 18.83 Two planning authorities requested definitions of “adjacent” and “abutting”. We consider that these are ordinary English words, and do need a formal definition. We freely accept that it may be difficult to determine their precise meaning in certain situations – such as where a number of property boundaries are in close proximity. But we do not consider that a statutory definition would help – it might indeed make the interpretation of those words more difficult in more straightforward situations.
- 18.84 Andrew Ferguson observes that the term “ancillary” is often used in planning jargon (and is used in the Consultation Paper), and incorrectly used interchangeably with the term “incidental”. He suggests that it might be worthwhile considering carefully which term is appropriate in each case, or defining what both mean.
- 18.85 We agree that the two words are used on many occasions in both the primary and secondary legislation. Each is an ordinary English word; “ancillary” means “subservient, subordinate (to)”; and “incidental” means “occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part; casual.” We suspect that in some cases the legislation may use one where it should use the other, and care will be taken in drafting the Code to ensure correct usage.
- 18.86 We do not consider that definitions would help for any of the terms suggested above, and therefore do not recommend that a definition be provided for them within the Code.

Recommendation 18-14.

We do not recommend that the Bill should provide any further definitions of terms, other than those recommended below.

We provisionally proposed that: (1) the provisions of the English language version of the Bill equivalent to sections 55, 171, 183, 196A and 214B and Schedule 3 of the TCPA 1990 should be framed by reference to a “dwelling”, rather than a “dwellinghouse”; and

³⁷ See for example *George Wimpey Ltd v New Forest DC* (1979) 250 EG 249.

(2) the interpretation section of the Bill should include a definition of the term “dwelling”, to the effect that it includes a house and a flat (Consultation Question 18-15).

- 18.87 In our Consultation Paper we noted that the term “dwellinghouse” is used in a number of places in planning legislation, despite a lack of clarity over its meaning.³⁸ In particular, in some pieces of secondary legislation it is defined to include a flat; in others it is defined to exclude a flat; and in the TCPA 1990 itself (at least in relation to Wales) it is not defined at all.
- 18.88 We provisionally proposed that the term “dwellinghouse” should be replaced with the more widely understood term “dwelling.” We suggested that it would not be appropriate to define the term “dwelling” other than to clarify that it includes a house and a flat.³⁹
- 18.89 Of the 33 consultees responding to this question, 32 agreed with our proposal and one was equivocal. The RTPI and Alan Archer said that our proposal “put forward a very persuasive case for the rationalisation of the differing definitions.” PEBA thought that “the proposed definition of “dwelling” is a sensible standardisation of the meaning of these terms”. Rhondda Cynon Taf CBC told us that “the clarification that a dwelling includes both a house and a flat is welcomed”.
- 18.90 Cardiff Council questioned whether there might be an unintended consequence whereby a flat may gain some permitted development rights.⁴⁰ We agree that this is a possible consequence; but consider that it would be possible, when amending or consolidating the relevant provisions relating to permitted development, to introduce specific exclusions in relation to flats where appropriate.

Recommendation 18-15.

We recommend that:

- (1) the provisions of the English language version of the Bill equivalent to sections 55, 171, 183, 196A and 214B and Schedule 3 of the TCPA 1990 should be framed by reference to a “dwelling”, rather than a “dwellinghouse”; and**
- (2) the interpretation section of the Bill should include a definition of the term “dwelling”, to the effect that it includes a house and a flat.**

³⁸ Consultation Paper, paras 18.106 to 18.127.

³⁹ See Building Regulations 2010, reg 2.

⁴⁰ Permitted development rights under the General Permitted Development Order 1995, Sched 2, Part 1 and Part 24 currently only apply to “dwellinghouses”.

DEFINITION OF “CURTILAGE”

We provisionally considered that the Bill should include a provision to the effect that the curtilage of a building is the land closely associated with it, and that the question of whether a structure is within the “curtilage” of a building is to be determined with regard to: (1) the physical ‘layout’ of the building, the structure, and the surrounding buildings and land; (2) the ownership, past and present, of the building and the structure; and (3) their use and function, past and present (Consultation Question 18-16).

- 18.91 The term “curtilage” refers to the land associated with a building. It is referred to over 1,500 times in a wide variety pieces of primary and secondary legislation, and in the planning context it appears in the context of the definition of a listed building, and the extent of certain permitted development rights.
- 18.92 We noted in our Consultation Paper that the term is not defined in the statute, resulting in a lack of transparency and confusion for practitioners and users of the planning system.⁴¹ We discussed the complexity of defining a term that is used in so many contexts, but suggested that it might be helpful to incorporate into a non-exclusive definition the factors identified by the Court of Appeal in *Attorney-General v Calderdale*⁴² as those to be taken into account when determining whether or not one structure or object is within the curtilage of another.⁴³
- 18.93 Amongst the 31 consultees responding to this proposal, there was a wide range of views. PINS agreed with the approach proposed, and drew attention to the recent decision in *Burford v Secretary of State and Test Valley BC*, which affirmed the criteria laid down in *Calderdale* in a non-listed building case.⁴⁴ PEBA found our suggested approach to be a sensible clarification of an elusive concept. The Central Association of Agricultural Valuers agreed, noting that it was important that the definition “look at principles only and that each case continue to be determined individually”. Rhondda Cynon Taf CBC also suggested that “prescribing the factors that should be considered when making a determination as to the curtilage of a building will assist both the layperson and planning practitioner”.
- 18.94 Four consultees agreed in principle that it would be desirable to clarify the meaning of “curtilage” if possible, but expressed doubts about whether the suggested definition would in fact achieve that result. The RTPI questioned whether the *Calderdale* factors were “capable of being applied to the many different instances where the definition of the curtilage comes into play”, arguing that reference to physical layout, ownership, use and function “appears rather narrow”. Neath Port Talbot CBC suggested that the three criteria are helpful, but other issues should not be precluded. We agree.
- 18.95 Several consultees focussed solely on the relevance of the word “curtilage” to the definition of a listed building. We accept that this is one aspect of the matter, but the

⁴¹ Consultation Paper, paras 18.134 to 18.138.

⁴² (1983) 46 P. & C.R. 399, at p. 407. The three deciding factors are set out in Consultation Question 18-16.

⁴³ Consultation Paper, paras 18.139 to 18.142.

⁴⁴ [2017] EWHC 1493 (Admin).

definition of “listed building”, currently in section 1(5) of the Listed Buildings Act and referring to the curtilage of the building in the list, would remain in place whether or not the term “curtilage” was itself defined. We also note that a number of consultees suggested that, in that context, it would be helpful if the original listing of a building were to define the curtilage at that date. We agree that that would be helpful, and could be done on a non-statutory basis.⁴⁵ But it does not answer the need for a wider definition of “curtilage”.

- 18.96 The CLA disagreed strongly with our proposed definition, suggesting that the criteria laid down in *Calderdale* are “black or white”, and not “factors” to be weighed in the balance. Unfortunately, that is not always the case. In relation to questions of ownership, for example, patterns of ownership may vary over the years, with different parts of a plot of land owned by different family members. Thus, precision is sometimes impossible.
- 18.97 Allan Archer suggested that the key question is not whether one structure is within the curtilage of another, but rather the extent of the curtilage of a building – for example, for the purposes of determining permitted development rights (for example, to erect a greenhouse within the curtilage of a country house). Even in that context, however, it is necessary to focus on the question of whether the location of the proposed structure is within the curtilage of the house – to determine in abstract terms the overall extent of the boundary of the curtilage may be difficult if not impossible.
- 18.98 It is of course easy to say that such a definition should be in guidance, or should be left to users to discover for themselves. And we freely admit that the suggested definition of “curtilage” cannot be determinative. However, as we have noted, the word “curtilage” appears in various places in planning legislation. Unlike most technical terms used in the legislation, it is likely to be not merely unfamiliar to most users, but completely incomprehensible. We therefore consider that it should have a definition in the Bill (which would also apply to secondary legislation made under it). Our suggestion aims to provide a broad indication of what the word means, followed by a summary of the most important principles derived from case law.
- 18.99 Finally, Andrew Ferguson suggested that it might be helpful to clarify that “domestic curtilage” is not a use of land, as is commonly suggested. We are aware of the misconception to which Mr Ferguson refers but we consider that case law is clear that the use of open land in the curtilage of a building is the same as the use of the building itself. We do not immediately see how a legal principle of this kind could be readily be incorporated as a statutory provision.

⁴⁵ As is the practice with scheduled monuments: see *R v Bovis Construction Ltd* [1994] Crim LR 938, CA; also *R v Jackson*, 5 May 1994, Lawtel AC 0001096

Recommendation 18-16.

We recommend that the Bill should include a provision to the effect that the curtilage of a building is the land closely associated with it, and that in determining whether a structure is within the “curtilage” of a building, the factors to be considered include:

- (1) the physical ‘layout’ of the building, the structure, and the surrounding buildings and land;**
- (2) the ownership, past and present, of the building and the structure; and**
- (3) their use and function, past and present.**

DEFINITION OF “AGRICULTURE” AND RELATED TERMS

We provisionally proposed that the interpretation section of the Bill should contain definitions of the following terms: (1) “agriculture” and “agricultural”, along the lines of the definition currently in section 336 of the TCPA 1990, with the addition of a reference to farming in line with those currently in section 147 and 171; and (2) “agricultural land” and “agricultural unit”, broadly in line with the definition in Part 6 of Schedule 2 to the GPDO; and we provisionally proposed that no further definitions of those terms be provided in relation to purchase notices and blight notices (Consultation Question 18-17).

18.100 In our Consultation Paper we noted that the terms “agriculture”⁴⁶ and “agricultural”⁴⁷ are defined in section 336 of the TCPA 1990:

“agriculture” includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and “agricultural” shall be construed accordingly.⁴⁸

18.101 “Agricultural” is also defined in section 147 of the TCPA 1990 for the purposes of sections 145, 146 and 147 (purchase notices), and in section 171, for the purposes of Chapter 2 of Part 6 (blight notices). In both cases, the provision in the TCPA 1990 imports the definition of “agricultural” in section 109 of the Agriculture Act 1947, which is in precisely the same terms as the definition in section 336 of the TCPA 1990. Further definitions of “agricultural land” are provided in section 147, again by reference to the 1947 Act; and the terms “agricultural unit”, “agricultural tenant” and

⁴⁶ Used in TCPA 1990, ss 55, 147 and 315, Schs 5 and 9.

⁴⁷ Used (other than in terms such as “agricultural unit”) in TCPA 1990, s 171.

⁴⁸ Consultation Paper, paras 18.146 to 18.158.

“agricultural holding” are also defined in the Act, in some cases by reference to other statutes.

18.102 We suggested bringing together the various definitions of “agriculture” and related terms into the same place, and that the definitions used should be broadly the same as in existing legislation. Those definitions would also apply for the purpose of interpreting the GPDO.

18.103 Of the 27 consultees responding to this question, all but one agreed.

18.104 Three planning authorities questioned whether the definition should explicitly include or exclude the grazing of horses. The “use of land as grazing land” is already expressly included; if the suggestion is that such use should be excluded, so as to come within planning control, that would seem to be a policy change beyond the scope of the present exercise. The Central Association of Agricultural Valuers queried whether it should include the management of land for ecological benefit. The existing definition is inclusive, rather than exclusive; such activities might be included, depending on the facts of each case.

18.105 Keith Bush QC disagreed with our proposal on the basis that:

“agriculture” is a common term which should be interpreted on the basis of common sense, and on the basis of the courts’ previous decisions.

18.106 We consider that, given that “agriculture” is already (at least partially) defined in statute, it would not be helpful to depart from this and offer no definition at all. Our suggestion was merely to tidy up the plethora of existing interpretations.

Recommendation 18-17.

We recommend that the interpretation section of the Bill should contain definitions of the following terms:

- (1) “agriculture” and “agricultural”, along the lines of the definition currently in section 336 of the TCPA 1990, with the addition of a reference to farming in line with those currently in section 147 and 171; and**
- (2) “agricultural land” and “agricultural unit”, broadly in line with the definition in Part 6 of Schedule 2 to the GPDO;**

and we recommend that no further definitions of those terms should be provided in relation to purchase notices and blight notices.

MISCELLANEOUS PROVISIONS

We provisionally proposed that the following provisions, which appear to be obsolete or redundant, should not be included in the Planning Code: section 314 of the TCPA 1990 (apportionment of expenses by county councils); section 335 of the TCPA 1990

(relationship between planning legislation and other legislation in force in 1947); and Schedule 16 to the TCPA 1990 (provisions of the Act applied or modified by various other provisions in the Act) (Consultation Question 18-18).

18.107 In our Consultation Paper we highlighted three provisions that appeared to be obsolete:

- 8) Section 314 TCPA 1990, which enables a county council to direct that certain expenses incurred by it may be treated as having been incurred in respect of only part of its area, so that they can be appropriately reflected in council tax demands on different parts of the county;
- 9) Section 335 TCPA 1990, which relates to the relationship between the modern scheme of planning control and legislation in force at or about the time of the passing of the TCPA 1947; and
- 10) Parts 1 and 2 of Schedule 16 to the TCPA 1990, relating to sections 314 (county council expenses) and section 315 of the Act (minerals); Part 3 relating to section 315 and section 318 (ecclesiastical property); and Part 6 relating to section 318.

18.108 We suggested that these provisions need not be restated in the Bill.

18.109 All of the 24 consultees who responded to this question agreed in principle with our provisional proposal.

18.110 However, Allan Archer helpfully pointed out a potential issue regarding the suggested repeals in Schedule 16. In our Consultation Paper we proposed the restatement of the provisions relating to property of the Church of England in section 318 of the TCPA 1990, as they were applicable in some border parishes.⁴⁹ Section 318 has two references to Schedule 16. The first reference, to Part 6 of Schedule 16, applies only if the property in question is situated “elsewhere than in Wales”,⁵⁰ and is therefore inapplicable. However, the second reference, to Part 3 of Schedule 16, has no such restriction.⁵¹ It would seem, therefore, that Part 3 of Schedule would need to be retained in some form, and we recommend accordingly.

⁴⁹ Consultation Paper, paras 18.48 – 18.49.

⁵⁰ TCPA 1990, s 318(2)(a).

⁵¹ TCPA 1990, s 318(4), relating to sums payable in relation to ecclesiastical property.

Recommendation 18-18.

We recommend that the following provisions, which appear to be obsolete or redundant, should not be included in the Bill:

- (1) section 314 of the TCPA 1990 (apportionment of expenses by county councils);
- (2) section 335 of the TCPA 1990 (relationship between planning legislation and other legislation in force in 1947); and
- (3) Schedule 16 to the TCPA 1990 (provisions of the Act applied or modified by various other provisions in the Act), other than Part 3, which should be retained in relation to the provision restating section 318 of the TCPA 1990.